(49)

No. 04-108
Title: Susette Kelo, et al., Petitioners
v.
City of New London, Connecticut, et al.
Docketed: July 22, 2004
Lower Ct: Supreme Court of Connecticut
Case Nos.: (SC 16742)
Decision Date: March 9, 2004
Rehearing Denied: April 20, 2004
Questions Presented

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Jul 19 2004 | Petition for a writ of certiorari filed. (Response due August 23, 2004) |
| Jul 19 2004 | Appendix of Susette Kelo, et al. filed. |
| Aug 18 2004 | Brief of respondents City of New London, Connecticut, et al. in opposition filed. |
| Aug 19 2004 | Brief amici curiae of James M. Buchanan, Gordon Tullock, and Pacific Legal Foundation filed. |
| Aug 23 2004 | Brief amici curiae of Property Rights Foundation of America, Inc.,et al. filed. |
| Aug 30 2004 | Reply of petitioners Susette Kelso, et al. filed. (Distributed) |
| Sep 1 2004 | DISTRIBUTED for Conference of September 27, 2004. |
| Sep 28 2004 | Petition GRANTED. |
| Oct 1 2004 | Consent to the filing of amicus briefs in support of either side received from counsel for the petitioners |
| Oct 7 2004 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondent. |
| Oct 19 2004 | Extension of time within which to file petitioners' brief on the merits to and including December 3, 2004. |
| Nov 10 2004 | Brief amicus curiae of Rutherford Institute filed. |
| Nov 30 2004 | Brief amici curiae of America's Future Inc., et al. filed. |
| Dec 1 2004 | Brief amici curiae of The American Farm Bureau Federation, et al. filed. |
| Dec 2 2004 | Brief amici curiae of Robert Nigel, et al. filed. |
| Dec 2 2004 | Brief amici curiae of Mountain States Legal Foundation, et al. filed. |
| Dec 2 2004 | Brief amicus curiae of Cato Institute filed. |
| Dec 2 2004 | Brief amicus curiae of K. Hovnanian Companies LLC in support of respondents filed. |
| Dec 3 2004 | Brief amicus curiae of Property Rights Foundation of America, Inc. filed. |
| Dec 3 2004 | Joint appendix filed. ( Jt. Appendix in 3 volumes.) |
| Dec 3 2004 | Brief of petitioners Susette Kelso, et al. filed. |
| Dec 3 2004 | Brief amici curiae of National Association of Home Builders, et al. filed. |
| Dec 3 2004 | Brief amicus curiae of New London R.R. Co., Inc. filed. |
| Dec 3 2004 | Brief amicus curiae of Tidewater Libertarian Party filed. |
| Dec 3 2004 | Brief amici curiae of National Association for Advancement of Colored People, et al. filed. |
| Dec 3 2004 | Brief amicus curiae of King Ranch Inc. filed. |
| Dec 3 2004 | Brief amici curiae of Goldwater Institute, et al. filed. |

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| Dec 3 2004 | Brief amicus curiae of John Norquist, President of Congress for New Urbanism filed. |
| Dec 3 2004 | Brief amicus curiae of Jane Jacobs filed. |
| Dec 3 2004 | Brief amici curiae of Mary Bugryn Dudko, et al. filed. |
| Dec 3 2004 | Brief amicus curiae of Develop Don't Destroy (Brooklyn), et al. filed. |
| Dec 3 2004 | Brief amicus curiae of Reason Foundation filed. |
| Dec 3 2004 | Brief amici curiae of Better Government Association, et al. filed. |
| Dec 3 2004 | Brief amici curiae of Cascade Policy Institute, et al. filed. |
| Dec 3 2004 | Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. |
| Dec 3 2004 | Brief amici curiae of Laura B. Kohr and Leon P. Haller filed. |
| Dec 3 2004 | Brief amici curiae of New London Landmarks, Inc., et al. filed. |
| Dec 3 2004 | Brief amicus curiae of Becket Fund for Religious Liberty filed. |
| Dec 3 2004 | Brief amici curiae of Professor David L. Callies, et al. filed. |
| Dec 7 2004 | Letter from amici Pacific Legal Foundation seeking permission to lodge copies of a Nevada Supreme Court decision. |
| Dec 10 2004 | Extension of time within which to file respondents' brief on the merits to and including January 21, 2005. |
| Dec 15 2004 | SET FOR ARGUMENT ON Tuesday, February 22, 2005 |
| Dec 15 2004 | CIRCULATED.. |
| Jan 14 2005 | Record received from Supreme Court of Connecticut. 5 boxes, 15 posterboards, Large maps and 1 sealed envelope) |
| Jan 18 2005 | Motion of Connecticut for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Jan 19 2005 | Brief amicus curiae of New York State Urban Development Corporation filed. (Distributed) |
| Jan 21 2005 | Brief amicus curiae of Massachusetts Chapter of National Association of Industrial and Office Properties filed. (Distributed) |
| Jan 21 2005 | Brief amici curiae of Brooklyn United for Innovative Local Development (BUILD), et al. filed. (Distributed) |
| Jan 21 2005 | Brief amici curiae of Connecticut Conference of Municipalities, et al. filed. (Distributed) |
| Jan 21 2005 | Brief amici curiae of American Planning Association, et al. filed. (Distributed) |
| Jan 21 2005 | Brief amicus curiae of Connecticut filed. (Distributed) |
| Jan 21 2005 | Brief amici curiae of National League of Cities, et al. filed. (Distributed) |
| Jan 21 2005 | Brief amicus curiae of California Redevelopment Association filed. (Distributed) |
| Jan 21 2005 | Brief amicus curiae of Mayor and City Council of Baltimore filed. (Distributed) |
| Jan 21 2005 | Brief amici curiae of Law Professors Robert H. Freilich, et al. filed. (Distributed) |
| Jan 21 2005 | Brief amicus curiae of City of New York filed. (Distributed) |
| Jan 21 2005 | Brief of respondents City of New London, Connecticut, et al. filed. (Distributed) |
| Jan 21 2005 | Petitioners opposition to motion of Connecticut for leave to participate in oral argument as amicus curiae and for divided argument. |
| Jan 21 2005 | Brief amicus curiae of Vermont. et al. filed. (Distributed). |
| Jan 27 2005 | Objection of Respondents to motion of Amicus Curiae State of Connecticut for leave to participate in oral argument and for divided argument |
| Feb 11 2005 | Reply of petitioners Susette Kelso, et al. filed. (Distributed) |

Docket for 04-108

| | |
|---|---|
| Feb 18 2005 | Motion of Connecticut for leave to participate in oral argument as amicus curiae and for divided argument DENIED. |
| Feb 22 2005 | Argued. For petitioners: Scott G. Bullock, Washington, D.C. For respondents: Wesley W. Horton, Hartford, Conn. |

S. Court, U.S.
- E D

No. 1 04 108 JUL 1 9 2004

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In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

**PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 190**

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

## PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Susette Kelo; Thelma Brelesky; Pasquale Cristofaro; Wilhelmina and Charles Dery; James and Laura Guretsky; Pataya Construction Limited Partnership; and William Von Winkle.

Respondents, who were defendants below, are the City of New London, Connecticut; and the New London Development Corporation.



## RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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## OPINIONS BELOW

The decision of the Supreme Court of Connecticut of which review is sought is reported at *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) and republished in the Appendix at App. 1-190. The decision of the Superior Court of Connecticut, Judicial District of New London, is unreported and reproduced in the Appendix at App. 191-424.

## JURISDICTION

The decision and judgment of the Supreme Court of Connecticut was entered on March 9, 2004. The motion for reconsideration filed by the Petitioners was denied on April 20, 2004. (App. 427). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution. App. 428. The statute involved is Connecticut General Statutes, Chapter 132, §§ 8-186 *et seq.*, "Municipal Development Projects," reproduced in the Appendix at App. 429-453.

## STATEMENT

Petitioner Wilhelmina Dery was born in her house in the Fort Trumbull neighborhood of New London, Connecticut in 1918. She lives there now, as she has for her entire

life, along with her husband of over fifty years and the rest of her family. She and her neighbors, the other Petitioners in this case, stand to lose their homes through eminent domain to make way for private business development. Mrs. Dery's city government and a private development corporation hope that the new development projects will create more tax revenue and jobs than the homes that currently occupy this peninsula of land along the Thames River. Petitioners have poured their labor and love into their homes. They are places where they have lived for years, have raised their families, and have grown old. Petitioners do not want money or damages. They merely seek to stop the use of eminent domain to take away their most sacred and important of possessions: their homes.

The Fort Trumbull neighborhood originally consisted of approximately 115 land parcels with a mixture of homes and small businesses. App. 4. On January 18, 2000, respondent City of New London ("the City") adopted the Fort Trumbull Municipal Development Plan ("development plan") as prepared by respondent New London Development Corporation ("NLDC"), a private, nonprofit development corporation. App. 8. The development plan covers approximately ninety acres and is divided into seven "parcels" of land slated for different development projects. App. 5-6. The instant case concerns homes located on two parcels of the plan area: four properties owned by three Petitioners are situated on Parcel 3, which is currently slated for development as private office space and parking,[1] while eleven homes owned by four Petitioners

[1] The parcel was also originally slated for a health club, but that use has been moved to Parcel 1.



are situated on Parcel 4A, which is designated in the development plan as "Park Support." *Id.*

The NLDC will own the land located in the development area but lease it to private developers. App. 6. At the time of the trial, the NLDC was negotiating with Corcoran Jennison, a private developer, to enter into a ninety-nine year lease for development projects in parcels 1, 2, and 3 of the area. App. 6-7. Under the terms of the lease, Corcoran Jennison would pay the NLDC the rent of $1 per year. App. 7. Corcoran Jennison would then develop the land and select tenants for the projects. *Id.*

When it adopted the development plan, the City delegated to the NLDC the power of eminent domain to acquire properties within the Fort Trumbull development area. App. 8. In October 2000, the NLDC voted to use eminent domain to acquire the remaining properties in the Fort Trumbull area from owners who would not sell voluntarily, including homes owned by Petitioners. *Id.* Starting in November 2000, the NLDC began to file the condemnation actions against Petitioners that gave rise to the present case. *Id.* The NLDC brought all condemnation actions in this case not under Connecticut's urban renewal law (C.G.S. Chapter 130, §§ 8-124, *et seq.*), which permits the use of eminent domain to clear slums or blighted areas, but rather under C.G.S. Chapter 132, §§ 8-186, *et seq.*, which governs Municipal Development Projects.

Under Connecticut law, property owners in the context of an eminent domain action can only challenge the amount of compensation offered, not the right of the government to take property. So, wishing to keep their homes, Petitioners brought the instant action on December 20, 2000 seeking

declaratory and injunctive relief, and other relief under C.G.S. Chapter 916 and 42 U.S.C. § 1983. App. 8. Petitioners alleged that Respondents' exercise of eminent domain violated the U.S. and Connecticut Constitutions, C.G.S. Chapter 132, and the New London City Charter.

Following a seven-day bench trial in 2001, the New London Superior Court issued a 249-page Memorandum of Decision (App. 191-424), which granted permanent injunctive relief and dismissed the eminent domain actions against the Petitioners who live on Parcel 4A of the development area while upholding the takings of the properties of the Petitioners on Parcel 3. App. 9, 424. With regard to Parcel 4A, the trial court ruled that Respondents had not demonstrated necessity for the condemnations and that the condemnations lacked assurances of future public use, because the Respondents had not identified the future use. App. 343-350. The trial court ruled in favor of the Respondents on the remaining claims. Although the trial court ruled against the Parcel 3 property owners, it granted an injunction, allowing the owners to remain in their homes while the case was resolved in the appellate courts. App. 412-424.

An appeal by the Petitioners and a cross-appeal by the Respondents to the Connecticut Appellate Court followed. The Supreme Court of Connecticut transferred the appeal and cross-appeal to itself pursuant to C.G.S. § 51-199. App. 2 n.3. On March 9, 2004, a four-justice majority of the Connecticut Supreme Court affirmed in part and reversed in part, holding that none of the challenged condemnations violated the U.S. or Connecticut constitutions or C.G.S. Chapter 132. App. 3. Three of the justices concurred in part with the majority but dissented on the "majority's



conclusions . . . pertaining to private economic development as a public use under the Connecticut and federal constitutions and the taking of [Petitioners'] properties on parcels 3 and 4A." App. 135-36.

The majority opinion in this case held that the public use clauses of the U.S. and state constitutions authorize the use of eminent domain for economic development that will supposedly increase tax revenue and improve the local economy. App. 25-79. The standard adopted by the majority focused on the intent and motives of the government in determining whether the condemnation satisfied the public use requirement of the U.S. Constitution. App. 28, 39, 42. In contrast, the dissenting opinion, while agreeing that economic development was validly declared a public purpose under Connecticut law, went on to establish a test that evaluated whether the primary intent of the economic development plan was to benefit public interests; whether a specific economic development will, in fact, result in public benefit; and whether the condemnation is reasonably necessary to implement the plan. App. 134-190. The dissenting justices found that the condemnations of Petitioners' homes failed that test.

The Connecticut Supreme Court denied Petitioners' motion for rehearing on April 20, 2004. App. 427. On the same day, the Court stayed its judgment pending resolution of the instant petition for certiorari or, if applicable, a decision on the merits. App. 425-426.

Petitioners do not seek review by this Court of the other issues decided by the Connecticut Supreme Court but rather petition for review of the primary issue in this case: the limits under the public use requirement of the

U.S. Constitution when government takes land for private economic development.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF NATIONAL IMPORTANCE CONCERNING THE LIMITS ON EMINENT DOMAIN AUTHORITY FOR PRIVATE ECONOMIC DEVELOPMENT UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

This is not a case that concerns the use of eminent domain for a traditional public use such as a road or public building; nor does it concern the use of eminent domain for the purpose of urban renewal/blight removal such as the condemnations upheld in *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny. Rather, this case presents a vital constitutional question that this Court has never before addressed: whether the public use clause of the Fifth Amendment to the U.S. Constitution authorizes the exercise of eminent domain to help a government increase its tax revenue and to create jobs.

The use of eminent domain for the creation of tax revenue and jobs is the broadest expansion of eminent domain authority yet realized. Urban renewal condemnations are limited to slums and blighted areas. But economic development condemnations can occur in any area, as long as the city can conceive of a possibly more profitable use of the property that might therefore produce more tax dollars. Any home can be condemned because few if any homes generate as much tax revenue or as many jobs as an office building; any small or medium-sized business



can be condemned because the land will always produce more taxes as a larger business.

The Connecticut Supreme Court ruled that this Court's decisions in *Berman* and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), supported the expansion of eminent domain authority to include takings for private economic development projects. Petitioners are homeowners who ask this Court to grant this petition to determine the constitutional limits on the use of eminent domain for private development.

The dissenting justices in this case captured precisely the expansion of eminent domain countenanced by the majority and the significance of this constitutional question facing the courts:

> '[A]s an incident to its sovereignty, the Government has the authority to take private property for a public purpose.' At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as for a public building. As the population grew and the collective needs of our society changed, however, the takings power was construed more broadly. Government authorities condemned private properties not just for a "public use," but also to achieve a "public benefit" such as the elimination of urban blight. Today, an even more expansive interpretation of public use in certain jurisdictions permits the taking of property for private economic development. To many, this represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be used to favor purely private interests. This case therefore

> presents the court with a rare and timely opportunity to address a constitutional issue of great significance, that is, whether there are limits to the government's authority to take private property by eminent domain when the public purpose is private economic development, and, if so, how those limits should be defined and enforced.

*Kelo*, 843 A.2d at 574-75 (citations omitted) (App. 134-35). Likewise, this case presents this Court with a unique and timely opportunity to examine this federal constitutional issue of great significance: the limits to eminent domain authority in the area of private economic development.

The use of eminent domain for private development projects is not only an issue in Connecticut. It is a growing, nationwide controversy. A recent study documented that between 1998 and 2002 alone, there were over 10,000 filed or threatened condemnations that involved private-to-private transfers of property in 41 states. Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining The Abuse Of Eminent Domain* (2003) (available at http://www.ij.org/publications/castle/).[2] News reports throughout the country also document rampant takings of homes and businesses for use by other private parties, including developers and big-box retail stores. *See, e.g.*, Cauchon, *Pushing the Limits of 'Public Use,'* USA Today, April 1, 2004; George, *Testing the Boundary Lines of Eminent Domain*, The New York Times, March 31, 2004; Cass, *Government Seizure of Homes Targeted*, The Boston

[2] The study only documented cases available from public sources. Because many private condemnations go unreported in public sources, the actual number of private-to-private eminent domain cases is most likely much higher than the confirmed numbers of the study.



Globe, May 12, 2003; Starkman, *Tracking the Abuse of Eminent Domain*, The Wall Street Journal, May 7, 2003; Carnahan, *Domain Game*, Forbes, December 9, 2002; Humphries, *The Uninvited Bulldozer*, Christian Science Monitor, April 26, 2001. These condemnations, to paraphrase the words of the dissenting justices in this case, unquestionably blur the line between public purpose and private benefit and raise the specter that eminent domain authority is now being used to favor purely private interests. Moreover, as set forth below in this petition, these controversies have sparked numerous, often conflicting, court decisions.

The scope of this national phenomenon – and the litigation and controversy it engenders – demonstrates the importance of and the urgent need for this Court to address the limits of eminent domain authority under the U.S. Constitution. Eminent domain is one of the most awesome powers a government has at its disposal. As early as 1795, this Court described eminent domain as "the despotic power." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 312 (1795). Eminent domain uproots families from their homes and businesspeople from their stores. With eminent domain, the government can force an elderly couple in their eighties, like two of the Petitioners in this case, to move from their home of over 50 years. The dangers inherent in such an extreme power led the drafters of the U.S. Constitution to place limits on its use, including the requirement that takings be for "public use." Given the vast expansion of eminent domain authority to include the taking of homes and businesses so that the land can be transferred to private interests for economic development, it is imperative that this Court determine the limits on government's eminent domain authority so that the public use requirement does not become a nullity. The homes of Petitioners

and the homes and businesses of property owners throughout the country hang in the balance.

## II. STATES HAVE ADOPTED CONFLICTING AND INCONSISTENT STANDARDS FOR DETERMINING WHETHER CONDEMNATIONS FOR PRIVATE DEVELOPMENT MEET THE CONSTITUTION'S PUBLIC USE REQUIREMENT.

As the Connecticut Supreme Court recognized, the states are sharply divided on the question of whether eminent domain for economic development alone, rather than for the elimination of blight, constitutes a public use. *See Kelo*, 843 A.2d 532 (App. 50). Among the states that have considered the issue, no one legal test predominates. Indeed, nearly every state has devised its own test. Some state decisions explicitly cite to the U.S. Constitution or federal cases.[3] Some interpret only the state constitution,[4]

[3] *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 459 (7th Cir. 2002); *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987); *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 480 (Del. 1958); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 (Fla. 1975); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 7 (Ill. 2002); *Prince George's County v. Collington Crossroads, Inc.* 339 A.2d 278, 287 (Md. 1975); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 455, 459 (Mich. 1981); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995); *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 369, 374 (N.D. 1996).

[4] *City of Little Rock v. Raines*, 411 S.W.2d 486, 491 (Ark. 1967); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979); *Opinion of the Justices*, 131 A.2d 904, 907 (Me. 1957); *Opinion of the Justices*, 250 N.E.2d 547, 553 (Mass. 1969); *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 855 (S.C. 2003); *Petition of Seattle*, 638 P.2d 549, 554 (Wash. 1981).



and some cite to neither,[5] leaving the reader and future litigants to guess. This chaos is not, however, an example of healthy state experimentation. Instead, it shows courts seeking understanding of any continued vitality to the federal public use restriction. With the passage of the Fourteenth Amendment, the United States extended a baseline of protection of individuals' rights throughout the country. On the question of public use, however, that baseline is absent. Some courts, like Illinois and Michigan, give some content to the federal public use requirement. Others, like Maryland and Connecticut, find that it imposes no test or substantive protection. The division in state court rulings, and the profusion of legal tests among the state courts, demonstrate that the lower courts desperately need guidance from this Court.

### A. State Supreme Courts Are Almost Evenly Split On The Issue Of Whether Property May Be Taken For Business Development Alone.

Seven states, now including Connecticut, definitely allow condemnations for private business development alone. Eight definitely forbid the use of eminent domain to transfer property to private parties when the purpose is not the elimination of slums or blight. Another three have indicated they probably will find such condemnations unconstitutional. More states will confront this difficult legal question in the coming months and years.

[5] *General Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873 (Kan. 2003); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980); *Appeal of City of Keene*, 693 A.2d 412 (N.H. 1997); *In the Matter of Port of New York Auth.*, 219 N.E.2d 797 (N.Y. 1966); *Cannata v. City of New York*, 11 N.Y.2d 210 (N.Y. 1962).

### 1. States that Say Yes

In addition to Connecticut, Kansas, Maryland, Michigan, Minnesota, New York, and North Dakota all have held that simply increasing tax revenue and creating jobs are public purposes and that eminent domain for the purpose of private development is constitutional. *See General Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873, 882-83 (Kan. 2003) (condemnation for industrial use and Target distribution center); *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 283-88 (Md. 1975) (condemnation for industrial park); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458-60 (Mich. 1981) (condemnation for General Motors plant); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 390 (Minn. 1980) (condemnation for hotel, retail, and office space); *Cannata v. City of New York*, 11 N.Y.2d 210, 214-15 (N.Y. 1962) (condemnation for industrial park);[6] *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 369 (N.D. 1996) (condemnation for supermarket).

[6] The New York Court of Appeals has not directly ruled on whether economic development itself is a public use, although that conclusion is implicit in *Cannata, supra*, and *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 190 N.E.2d 402, 404-06 (N.Y.), *app. dismissed*, 375 U.S. 78 (1963) (condemnation for commercial development in conjunction with port development met public purpose requirement). The area in *Cannata* was not a "slum," but it was still "substandard," *Cannata*, 11 N.Y.2d at 215, which distinguishes it from a pure economic development condemnation in which the condition of the area is irrelevant. The *Courtesy Sandwich Shop* condemnations took place pursuant to the state's authority over ports, which is a more traditional public use. Thus, neither directly rule on the constitutionality of economic development as a valid purpose for condemnation. The Appellate Division, however, has ruled explicitly that private business development is a public use. *See Vitucci v. New York City School Construction Authority*, 735 N.Y.S.2d 560 (App. Div. 2001) (expansion of area employer was public use because it would contribute to local economy).



### 2. States that Say No

Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington all hold that condemnation for the purpose of increased taxes and jobs, rather than the elimination of slums or blight, is not a public use. *See City of Little Rock v. Raines*, 411 S.W.2d 486, 494-95 (Ark. 1967) (condemnation of agricultural property in order to sell or lease it to private industries not public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455-59 (Fla. 1975) (condemnation for shopping mall not public purpose); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (condemnation for racetrack expansion not public use, even though it would contribute to economic growth in region);[7] *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5-8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Opinion of the Justices*, 131 A.2d 904, 906-07 (Me. 1957) (act permitting condemnation for industrial development unconstitutional); *City of Bozeman v. Vaniman*, 898 P.2d

[7] The Connecticut Supreme Court believed that the *SWIDA* decision did not reflect a categorical rejection of condemnations for economic development but instead represented "the outer boundary" of the use of eminent domain for primarily private purposes. *Kelo*, 843 A.2d at 536 (App. 57-58). Petitioners cannot agree. While the Illinois Supreme Court certainly found that the agency's primary purpose was to assist a private party in its land acquisition, the court also squarely rejected the notion that economic development itself was a public use. The court explained that all businesses create economic benefit to the region and that this public benefit was necessarily "incidental." In light of the *SWIDA* court's explanation of its holding, the Connecticut court's attempted marginalization of the case is not tenable. *See SWIDA*, 768 N.E.2d at 22-23 (Freeman, J., dissenting) (interpreting *SWIDA* majority opinion as precluding condemnations for economic development alone).

1208, 1214 (Mont. 1995) (chamber of commerce could not occupy 40% of visitors center to be built on land taken by eminent domain); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856-57 (S.C. 2003) (condemnation for business development not for public use); *Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight).

#### 3. States that Say Probably Not

Delaware, New Hampshire, and Massachusetts all have indicated that they are unlikely to uphold condemnations for private development in the absence of blight. *See Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 484-85 (Del. 1958) (although upholding a condemnation to eliminate a slum area, the court expressed "the very gravest doubt" as to whether the state could condemn in future cases based on the fact that the property was "not used in the most efficient or economical manner"); *Merrill v. City of Manchester*, 499 A.2d 216, 217-19 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); *Opinion of the Justices*, 250 N.E.2d 547, 558 (Mass. 1969) (declaring proposed stadium act invalid because resulting economic benefits to area did not establish public use).

### B. The States Have Been Unable To Develop A Consistent Legal Standard For Evaluating Whether Condemnations Are For A Public Use.

State courts are obviously struggling with how to apply the public use requirement in situations where the condemned property will be transferred to a private party



and the purpose is economic development. All courts agree, in general, that if the primary purpose is public and the private benefits incidental, then the condemnation passes constitutional muster. All agree that, conversely, if the primary purpose is private and the public benefits incidental, then the condemnation is unconstitutional. When property is condemned for the elimination of slums or blight, courts find that the elimination of blight is the primary purpose and benefits to private parties are incidental. However, when the purpose is simply to increase taxes and jobs by condemning for private business, further analysis is required. Unfortunately, it seems there is little agreement on what that further analysis should be. Among states that agree that economic development can be a public use, some apply minimal scrutiny and some use heightened scrutiny. Among the states that find economic development is not a public use, there are several competing tests.

#### 1. Some states review official statements of primary purpose with extreme deference.

In this case, the Connecticut Supreme Court adopted a standard that finds a condemnation lacks public purpose only if the *intention* of the governing body is to benefit a private party. 843 A.2d at 541 (condemnation constitutional unless "the taking was primarily intended to benefit a private party"). Thus, if the condemnor was motivated by the goal of public benefit, the condemnation is for public use. *See, e.g., Kelo*, 843 A.2d at 537-39 (App. 60-63) (explaining that city and NLDC met all Pfizer's requirements, but their *motivation* was public). Other states use a similar standard.[8]

[8] *See Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 287-88 (Md. 1975) (condemnation constitutional because no

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### 2. Some states apply heightened scrutiny to determine whether the public purpose is primary or incidental.

In its well-known decision in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court, perhaps concerned about the breadth and impact of its ruling, attempted to limit it by creating a heightened scrutiny standard:

> Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.

304 N.W.2d at 459-60. Delaware and, probably, North Dakota also have adopted heightened scrutiny.[9]

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intent to benefit single private party); *City of Minneapolis v. Wurtele*, 219 N.W.2d 386, 390 (Minn. 1980) ("a public body's decision that a project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); *see also General Bldg. Contractors, L.L.C. v. Tolbert*, 66 P.3d at 883 (finding that since economic development is a public purpose, the condemnation was constitutional); *In the Matter of Port of New York Auth.*, 219 N.E.2d 797, 797-99 (majority opinion), 799-800 (Van Voorhis, J., dissenting) (criticizing majority for denying owners the opportunity to make a factual showing at trial that particular condemnation lacked primary public purpose).

[9] *See Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987); *Wilmington Parking Auth.*, 521 A.2d at 232 (primary purpose determined by looking at objective "consequences and effects" of the taking); *see also City of Jamestown v. Leevers*, 552 N.W.2d 365, 372-74 (N.D. 1996) (despite finding of public use in general, remanding for determination of primary purpose of condemnation and citing *Poletown's* heightened scrutiny standard).



Although both the instant case and *Poletown* cite *Berman v. Parker*, the Connecticut Supreme Court explicitly rejected heightened scrutiny and Michigan's requirement that the claimed benefits of the project be both "clear" and "significant," 304 N.W.2d at 459-60. *See Kelo*, 843 A.2d at 529 n.39 (App. 45 n.39) (declining to adopt *Poletown* test), 544 n.62 (App. 73 n.62) (rejecting dissent's position that future public benefits must be reasonably certain).

The dissent in this case also proposed a type of heightened scrutiny, using a four-step test in which the court evaluates: (1) whether the statutory scheme is facially constitutional; (2) whether "the primary intent of the particular economic development plan is to benefit ... public [] interests;" (3) whether "the specific economic development contemplated by the plan will, in fact, result in public benefit;" and (4) whether the condemnation is reasonably necessary to implement the plan. 843 A.2d at 587-92 (App. 159-70). The dissent's test differs from the majority's in that it requires courts to evaluate not just motivation but also the real public benefit the project will produce.

### 3. Some states hold that economic benefits are dependent on private ones and therefore incidental.

Other states have focused even less on subjective motivation or the extent of possible public benefit and instead asked whether the public benefit results from the taking itself or whether it is an indirect or derivative benefit. These courts have concluded that eminent domain to eradicate slums or blight is a primary public purpose, because the benefit occurs as a direct consequence of removing the offending conditions. *See Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476 (Del. 1958) ("once the

slum is cleared and the primary purpose of the act accomplished the Authority must do something with the land"); *Baycol*, 315 So.2d at 457 (clearing slum is primary purpose that is identical whether the later construction is private or public); *cf. Kelo*, 843 A.2d at 578-79 (dissent) (explaining that in blight condemnations, the public purpose is accomplished immediately).

On the other hand, where the public benefit occurs only as an indirect or derivative effect of the private development, then a number of states find the public benefit is "incidental" and insufficient to sustain a finding of public use.[10] Florida and Washington use a similar method, but instead of asking if the benefit is direct or indirect, they use a "but-for" test that asks if the public benefit would exist absent private benefit. If so, then the public purpose is primary, and any other private benefits will not defeat the condemnation. However, if the public use would not exist but for the private one, then the private purpose is primary and the public use incidental.[11]

[10] *See, e.g., City of Little Rock v. Raines*, at 494 (distinguishing condemnations to eliminate blight where the transfer to private parties occurs "after the public purpose was accomplished" and condemnations for economic development where the purpose is the transfer to the private business); *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 10-11 (Ill. 2002) (describing economic benefit as "trickle-down" effect); *see also City of Owensboro v. McCormick*, 581 S.W.2d 3, 6-7 (Ky. 1979) ("Every legitimate business ... indirectly benefits the public"); *Opinion of the Justices*, 131 A.2d 904, 907-08 (Me. 1957) (fact that project may be beneficial "in a broad sense" does not mean there is any direct public use); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856, 857 (S.C. 2003) (property may not be taken "on vague grounds of public benefit to spring from a more profitable use").

[11] *See Baycol*, 315 So.2d at 456 ("the tail cannot wag the dog"); *Petition of Seattle*, 638 P.2d at 556-57 (private retail was "essential" to the project, not "incidental" to the public uses, so private use was

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The related approaches used by Arkansas, Florida, Illinois, Kentucky, Maine, South Carolina, and Washington are thus completely different than Connecticut's decision in this case, because the Connecticut Supreme Court does not distinguish between direct and immediate public benefit (as in removal of slums harmful to the public) and indirect and attenuated public benefits (as in condemnations for transfer to private businesses that will perhaps make a profit and then will perhaps provide increased tax revenue and jobs). According to Connecticut, as long as the city has come up with a chain of causation that could eventually lead to some public benefits in the form of tax revenues and jobs, then that is the primary purpose. According to the other states, when public benefits occur only indirectly and are dependent upon the realization of private benefit, then the public benefit is incidental and the condemnation therefore lacking in public use.

### 4. Some states weigh the net public and private benefits to determine the primary purpose.

While Arkansas, Delaware, Florida, Illinois, Kentucky, Maine, South Carolina, and Washington all use some kind of analysis of the direct or indirect nature of the public benefits, New Hampshire, Massachusetts and, to some extent, Montana engage in a weighing of the public and private benefits and costs, with perhaps some consideration

primary purpose); *see also Daniels v. Area Plan Commission*, 306 F.3d 445, 464-65 & n.19 (7th Cir. 2002) ("the [condemnation] only benefits the public if [the private developer] benefits first, and even then if the commercial development is completed and successful").

of whether they are direct or indirect.[12] Net benefit is measured by weighing "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." *Merrill*, 499 A.2d at 217. Connecticut declined to weigh the costs of a condemnation project. *See Kelo*, 843 A.2d at 541 (App. 67-68 n.58).

In short, a homeowner moving across the country will find widely varying interpretations of her constitutional rights. In Connecticut, the Constitution allows her home to be taken for private development almost automatically. In Illinois, the Constitution forbids taking her home unless she lives in a blighted area. And in New Hampshire, she'll just have to wait and see what the courts say. Moreover, if she challenges the condemnation, the court in Connecticut will ask whether the government intended primarily to benefit private parties, while in many other states, the courts will engage in a more searching review of the objective consequences and benefits of the condemnation.

The Takings Clause, and indeed the entire U.S. Constitution, provides the baseline of the rights of U.S. citizens. Although states may provide more protection, they may not provide less. *See, e.g., Harper v. VA Dep't of*

[12] *See Appeal of City of Keene*, 693 A.2d 412, 416 (N.H. 1997) (court must determine if there is "a public purpose for the taking and that, on balance, a probable net benefit to the public [will result] if [the] taking occurs for the intended purpose."); *Opinion of the Justices*, 250 N.E.2d 547, 558-60 (Mass. 1969) (stadium could potentially be a public purpose but statute was not written to assure sufficient public benefits or "equitable use," as opposed to private benefits); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that private benefit of 40% of building was not incidental).



*Taxation*, 509 U.S. 86, 102 (1993), *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). It is clear from the conflicting authorities and profusion of legal tests that state courts do not know what that baseline constitutional protection might be. The states urgently need guidance from this Court and clarification of the constitutional public use requirement as they face the increasingly common practice of condemnations for private development alone.

## III. UNLIKE OTHER RECENT PETITIONS FOR CERTIORARI ON PUBLIC USE, THIS ONE PRESENTS A CLEAR LEGAL DISPUTE ABOUT THE CONSTITUTIONAL LIMITS ON CONDEMNATIONS FOR PRIVATE DEVELOPMENT ALONE.

This is not the first time in recent years that this Court has seen a petition for writ of certiorari to review a proposed condemnation for private development. However, most of the other cases involved condemnations pursuant to blight determinations and thus have not presented this Court with an opportunity to address eminent domain for the sole purpose of economic development. This case presents the issue with a fully-developed record and legal decisions and is not muddied by procedural difficulties that could frustrate review.

The legal issue could not be more clearly presented to this Court: What, if any, limits does the U.S. Constitution's public use requirement place on government's ability to use eminent domain for the purpose of generating tax revenue and increasing employment? The Connecticut Supreme Court's decision engages in a lengthy analysis of the public use requirement and the standard of subjective motivation that it adopts. There is also a lengthy dissent,

again addressing the public use of economic development condemnations and setting forth a detailed proposed legal standard for evaluating such condemnations. Moreover, both the majority and dissenting opinions directly address the application of the U.S. Constitution's Takings Clause, *Berman v. Parker,* and *Hawaii Hous. Auth. v. Midkiff* to the case. *Kelo*, 843 A.2d at 525-30 (App. 37-42), 578-80 (App. 140-46). The dissent in particular explains how this case differs from both *Berman* and *Midkiff* and harmonizes those decisions with its standard of greater scrutiny of municipal decisions regarding particular economic development condemnations. *Id.* at 578-80 (App. 140-46). Moreover, after a seven-day trial and a trial court decision exceeding 200 pages, it is fair to say that the factual record is extraordinarily well-developed.

Most of the other recent cases petitioning for certiorari have challenged a condemnation under the auspices of a blight designation. *See, e.g., City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 6-7 (Nev. 2003), *cert. denied*, case no. 03-972, 2004 U.S. LEXIS 1990 (Mar. 8, 2004); *West 41st St. Realty, L.L.C. v. New York State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 123-24 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003); *Housing & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 666-67 (Minn. Ct. App. 2001), *aff'd by an equally divided court*, 641 N.W.2d 885 (Minn. 2002), *cert. denied*, 537 U.S. 974 (2002). In reviewing such a case, this Court would first need to evaluate if the blight designation was proper and thus whether the case was controlled by *Berman v. Parker*, and then, if it found problems with the blight designation, address the issue of whether the Constitution allows condemnation of non-blighted areas for economic development. The instant case presents none of those extra steps. The *only* issue is whether an area may be condemned not



because that particular area is blighted but because the *city* desires greater tax revenues. Moreover, because the condemnation does not take place under the blight statutes, *Berman v. Parker* does not control.

Other cases have presented additional procedural inconveniences. Some were appeals from state appellate courts and thus lacked definitive state supreme court decision and analysis. *See Bugryn v. City of Bristol*, 774 A.2d 1042 (Conn. App.), *cert. denied*, 534 U.S. 1019 (2001); *Housing & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. App. 2001), *aff'd by an equally divided court*, 641 N.W.2d 885, 891 (Minn. 2002) (affirming by majority that case was not moot but divided on merits), *cert. denied*, 537 U.S. 934 (2002). One case appealed a condemnation in conjunction with an airport and thus involved issues far afield from economic development. *See Piedmont Triad Airport Auth. v. Urbine*, 554 S.E.2d 331 (N.C. 2001), *cert. denied*, 535 U.S. 971 (2002). *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002), which did involve a condemnation purely for economic development and is the closest to this case, found the condemnation unconstitutional under the U.S. Constitution but also on independent grounds under the Illinois Constitution. The instant case offers a uniquely simple and clear legal presentation of the federal constitutional issue in an area usually fraught with thorny factual and procedural issues.

It has been fifty years since this Court addressed the use of eminent domain for private redevelopment in *Berman v. Parker*, 348 U.S. 26 (1954). *Berman*, however, authorized the taking of a severely troubled area. *See Berman*, 348 U.S. at 30 ("64.3% of the dwellings were

beyond repair ... 57.8% of the dwellings had outside toilets, 60.3% had no baths ... 83.8% lacked central heating."); *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953) (district court in *Berman* case found general death rate in area 50% higher, tuberculosis death rate 250% higher, and syphilis death rate more than 600% higher than average for District of Columbia). It is quite different to ask if an area that is not harmful to the public may be condemned because other parts of the city may benefit.

*Midkiff* was twenty years ago, and it addressed the regulation of oligopolies, which, as *Midkiff* pointed out, represents "a classic exercise of a State's police powers." *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984). As explained by the dissent in this case, and evidenced by the decisions in *SWIDA* and other cases, neither *Berman* nor *Midkiff* necessarily controls how courts should evaluate the constitutionality of eminent domain for the sole purpose of economic development. *See Kelo*, 843 A.2d at 593-95 (App. 170-74); *SWIDA*, 768 N.E.2d at 8-9. As the dissent explained, for example, it is possible to accept a legislative finding of public purpose and yet to find that particular condemnations do not in fact sufficiently benefit the public to survive constitutional scrutiny. *See id.*; *cf. SWIDA*, 768 N.E.2d at 26-27 ("the government does not have unlimited power to redefine property rights") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982)). Yet a number of courts, including the court below, have concluded that *Midkiff* dictates that, absent overwhelming evidence of bad faith or official corruption, all uses of eminent domain must be affirmed. *See, e.g., Leevers Supermarkets*, 552 N.W.2d at 371 (property owner "failed to demonstrate bad faith or fraud"); *Wurtele*, 291 N.W.2d at 390 (government's finding that "a project is in the public interest is presumed



correct unless there is a showing of fraud or undue influence"). Other states have been unable to reach a consistent analytical framework for evaluating takings for private parties. The need for that framework – and for guidance from this Court on the application of the federal public use requirement – will only grow as more states face the increasingly common use of eminent domain for private business development alone.

## IV. THE STANDARD ADOPTED BY THE COURT BELOW DRAINS THE PUBLIC USE REQUIREMENT OF THE U.S. CONSTITUTION OF ANY MEANING OR SUBSTANCE.

In upholding the use of eminent domain for private economic development projects, the Connecticut Supreme Court paid lip service to the continued existence of the public use requirement. *Kelo*, 583 A.2d at 543 (App. 71) The standard it adopted, however, nullifies the public use clause of the U.S. Constitution. Any condemnation of private property for a private business passes constitutional muster in Connecticut so long as the government *claims* that the purpose of the condemnation is to improve the city's tax base and to increase employment. As nearly all homes and small businesses generate fewer tax dollars and jobs than a larger business, condemnation of any of them would satisfy the public use requirement of the U.S. Constitution. If all private businesses are "public uses," then it is hard to imagine what could be a private use.

> The majority has created a test that can aptly be described as the "Field of Dreams" test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is

> enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.

*Kelo*, 843 A.2d at 602 (App. 189) (footnote omitted). Only the utterly incompetent could fail to devise a hypothetical chain of events whereby any use of eminent domain could lead to economic growth.[13]

The Connecticut Supreme Court held that economic development, sought through the transfer of property to private parties for their own use, nonetheless constitutes a public use because of the possible economic benefits to the government from such private activities. *Kelo*, 843 A.2d at

[13] To give but one example, the District of Columbia meets the exact same criteria identified by New London and the Connecticut Supreme Court as justifying the use of eminent domain. The District needs more tax revenue, and it has high unemployment in comparison to the greater metropolitan area. *Compare Kelo*, 843 A.2d at 510 (App. 7). DC is a small city with much of its land devoted to tax-free purposes. *Id.* Under the Connecticut court's reasoning, that justifies condemnation anywhere in DC. Georgetown would be no more exempt than anywhere else. Certainly, the city might decide to use eminent domain in an actually blighted neighborhood, but economic development condemnations are not tied to the condition of the area. If developers were more interested in Georgetown than Southwest, the city could condemn there. Georgetown's somewhat upscale shopping could be replaced by truly expensive designer shopping, more like that on Rodeo Drive in Los Angeles. Georgetown's older townhomes could be replaced by office buildings, which would produce both more taxes and more jobs. The District could condemn the buildings on Wisconsin, plus a few blocks on either side, and lease it to a developer for $1 per year. And it would all be for the public purpose of economic development. Would Rodeo Drive actually work in Georgetown? It doesn't matter. *Compare Kelo*, 843 A.2d at 541 n.58 (App. 67 n.58) (court should not consider social costs). Would successful businesses and viable homes be uprooted? Again, it doesn't matter. *Compare Kelo*, 843 A.2d at 560-61 (App. 104-05, 107). The city intends that its $1 lease to the developer will produce economic growth, and that is enough.



528, 531 (App. 42, 48). The standard for public use adopted by the majority opinion focuses overwhelmingly on the intent and motive of the government decision-makers in determining whether condemnations are for "public use," *Id.* at 527-58 (App. 42) (placing "overwhelming emphasis on the legislative purpose and motive behind the taking"). Thus, proof of actual fraud, dishonesty, or illegal *ultra vires* activity might violate "public use," but apparently nothing else would.

In order to be faithful to the first principles of constitutional construction, there must be distinct substance and meaning to the requirement of "public use" as opposed to the general prohibition against government malfeasance. "Public use" must, instead, mean something about the relationship of the condemnation to the use or benefit of the public. As the dissent observed, in slum elimination cases and in *Midkiff*, the benefit to the public was the direct result of the taking itself: the removal of a slum regardless of the ensuing use, or the direct divestiture of oligopolistic private ownership, respectively. *Id.* at 578-80 (App. 141-46). In the case of takings for economic development, however, the taking is just the first link in a long and tenuous chain of causation subject to numerous and uncertain contingencies before the *public* receives any benefit. Allowing constitutional limitations to be satisfied by such attenuated causal chains effectively destroys such limitations. *Cf. United States v. Morrison*, 529 U.S. 598, 615 (2000) (reasoning that follows a "but-for causal chain . . . to every attenuated effect" implicating an enumerated power is "unworkable if we are to maintain the Constitution's enumeration of powers").

Indeed, in the instant case, the Court held that the taking provided a public benefit even though it was being

taken for (1) a private office building that the developer admitted would not be built unless the market changes, 843 A.2d at 559-60 (App. 102-03); 596-98 (App. 177-81) (dissent); and (2) some other, unknown, use, *Id.* at 570-72 (App. 125-28). Under the Connecticut Supreme Court's rule, only an utter failure to even *try* to concoct some possible chain of events would result in the rejection of a proposed condemnation for private ownership and development. But an invented public benefit gloss can be put on virtually any taking of land for economic development, no matter how private in nature, turning the public use requirement then into a matter of whether the municipal body has a "stupid staff." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). As this Court further pointed out in *Lucas*, "the Takings Clause requires courts to do more than insist upon artful [justifications]." *Id.*

The dissent sets forth one legal standard that retains an independent meaning for the public use clause. *See Kelo*, 843 A.2d at 587-92 (App. 159-70). It first asks, consistent with *Berman* and *Midkiff*, if the enabling legislation is facially constitutional. *Id.* at 587-88 (App. 160). Then, the dissent inquires, as does the majority, if the subjective intent was to primarily benefit a private party. *Id.* at 588 (App. 160). The majority ends its analysis there. The dissent, however, adds further analysis of the objective indicia of private and public benefit. It next asks if "the specific economic development contemplated by the plan will, in fact, result in a public benefit." *Id.* (App. 161). This is a purely objective inquiry. Finally, it inquires if the specific condemnation is reasonably necessary. *Id.* at 591 (App. 166). Under the dissent's test, courts should review the first, second, and fourth factors with substantial deference to the government. *Id.* at 587-91 (App. 159-66).



Thus, the main difference between the majority and the dissent is the third part of the dissent's test, which asks for an actual, objective assurance that the particular project will result in the claimed public benefits, without giving deference to the government's determination. Like many other state supreme courts, the dissent concludes that eminent domain for economic development is not like other exercises of eminent domain. The public benefit, if any, occurs far in the future. *Id.* at 578-79 (App. 141-42), 596-600 (App. 177-86) (plan in effect for thirty years). The public benefit is achieved, if at all, only as a result of substantial private benefit, not through any action of government. *Id.* at 579-80 (App. 142-45) (transfer of property to private parties "essential, rather than incidental, to achieving the public purpose"). These features of the use of eminent domain to increase tax revenue create a greater, constitutionally significant, risk that eminent domain will be used for private use and private profit and necessitate the more searching test applied by the dissent.

Granting this petition is appropriate to restore some recognizable meaning to the public use requirement of the U.S. Constitution. The dissent's suggested standard of review is one plausible means of giving the public use requirement substance; other states provide other tests. *See, supra*, Part IIB. Of course, the petition stage is not the time to resolve the issue of the proper standard. But this is certainly the time to accept review of this case in order to resolve the issue and put some meaningful check on abuses of eminent domain authority and to provide guidance to government officials, property owners, and courts in reviewing condemnations for private economic development.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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**SUSETTE KELO ET AL. v.
CITY OF NEW LONDON ET AL.**

**(SC 16742)**

**SUPREME COURT OF CONNECTICUT**

***268 Conn. 1; 843 A.2d 500; 2004 Conn. LEXIS 54***

**December 2, 2002, Argued
March 9, 2004, Officially Released**

**COUNSEL:** Scott G. Bullock, pro hac vice, and Dana Berliner, pro hac vice, with whom, on the brief, were Scott W. Sawyer, William H. Mellor, pro hac vice, and Clark Neily, pro hac vice, for the appellants-appellees (plaintiffs).

Thomas J. Londregan, with whom were Jeffrey T. Londregan and, on the brief, Brian K. Estep, for the appellee-appellant (named defendant).

Edward B. O'Connell, with whom was David P. Condon, for the appellee-appellant (defendant New London Development Corporation).

**JUDGES:** Sullivan, C. J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.[1] In this opinion BORDEN, PALMER and VERTEFEUILLE, Js., concurred. ZARELLA, J., with whom SULLIVAN, C. J., and KATZ, J., join, concurring in part and dissenting in part.

**OPINION BY:** NORCOTT

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[1] This case originally was argued before a panel of this court consisting of Justices Borden, Norcott, Palmer, Vertefeuille and Zarella. Thereafter, the court, pursuant to Practice Book § 70-7(b), sua sponte, ordered that the case be considered. Accordingly, Chief Justice Sullivan and Justice Katz were added to the panel, and they have read the record, briefs and transcript of the oral argument.

**OPINION:**

NORCOTT, J. The principal issue in this appeal is whether the *public use clauses of the federal* and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas. The plaintiffs,[2] owners of certain real property in the city of New London, appeal[3] from the judgment of the trial court denying their request for permanent injunctive relief to prevent the defendants, the city of New London (city), a municipal corporation, and the New London Development Corporation (development corporation), a private nonprofit economic development corporation, from exercising eminent domain authority to condemn the plaintiffs' properties located on parcel 3 of the development corporation's municipal development plan (development plan). The defendants cross appeal[4] from the judgment of the trial court granting the plaintiffs' request for permanent injunctive relief with respect to those properties located on parcel 4A of the development plan.

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[2] The individual plaintiffs are Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Margherita Cristofaro, Wilhelmina Dery, Charles Dery, James Guretsky, Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle.

[3] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-2.

[4] The defendants cross appealed from the judgment of the trial court to the Appellate Court, and we transferred the cross appeal, along with the plaintiffs' appeal; *see* footnote 3 of this opinion; to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-2.



On appeal, the plaintiffs claim that the trial court improperly concluded that: (1) the taking of the plaintiffs' land was authorized under chapter 132 of the General Statutes; (2) economic development constitutes a valid public use under the takings clauses of the state and *federal constitutions*, and that these takings will sufficiently benefit the public and bear reasonable assurances of future public use; (3) the delegation of the eminent domain power to the development corporation was not unconstitutional; (4) the taking of the plaintiffs' land on parcel 3 was reasonably necessary to the development plan; and (5) the development corporation, by allowing a private social club, but not the plaintiffs' properties to remain on parcel 3, did not violate the plaintiffs' federal and state constitutional rights to equal protection of the laws. We affirm the judgment of the trial court with respect to the claims presented in the plaintiffs' appeal.

On their cross appeal, the defendants contend that the trial court improperly concluded that: (1) the condemnation of the plaintiffs' properties on parcel 4A was not reasonably necessary to accomplish the development plan; and (2) the city's general power to widen and alter its roadways did not justify the taking of the plaintiffs' properties on parcel 4A. We reverse the judgment of the trial court with respect to the defendants' cross appeal.

The record reveals the following background facts and procedural history, as aptly set forth in the trial court's comprehensive memorandum of decision. "In 1978, the [development corporation] was established to assist the city in planning economic development. In January, 1998, the state bond commission authorized bonds to support planning activities in the Fort Trumbull area [of the city] and property acquisition to be undertaken by [the development

corporation] in support of the project and other money toward the ultimate creation of a state park at Fort Trumbull. In February, 1998, [Pfizer, Inc. (Pfizer)] announced that it was developing a global research facility on the . . . New London Mills site which is adjacent to the Fort Trumbull area. In April, 1998, the New London city council gave initial approval to prepare a development plan for the Fort Trumbull area and the [development corporation] began holding informal neighborhood meetings regarding the [development plan] process. In May, 1998, the city council authorized [the development corporation] to proceed under chapters 130, 132 and/or 588(*l*) of the [General] Statutes.

"The state bond commission approved more funds for [the development corporation] activity. In June, 1998, the city formally conveyed the New London Mills site to Pfizer. In July, 1998, a consulting team was appointed for the state *Environmental Protection Act* process and to prepare the [development plan]. Six alternative plans for the project area were considered as part of the required environmental impact evaluation."

The development plan area is approximately ninety acres in size and is located on the Thames River in New London, adjacent to the proposed Fort Trumbull State Park, and the Pfizer global research facility, which opened in June, 2001. *See* Appendix to this opinion. It presently includes residential and commercial areas, and is comprised of approximately 115 land parcels. The development plan area also includes the presently closed United States Naval Undersea Warfare Center, which is thirty-two acres, and also the regional water pollution control facility.



In its preface to the development plan, the development corporation stated that its goals were to create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

The development plan itself is divided into seven parcels of land. Parcel 1 will include a waterfront hotel and conference center, along with marinas for both transient tourist boaters, and commercial fishing vessels. Parcel 1 also will include a public walkway along the waterfront. Parcel 2 will provide for approximately eighty new residences, organized into an urban neighborhood and linked by public walkway to the remainder of the development plan, including the Fort Trumbull State Park. Space will be reserved at the southern end of parcel 2 for the United States Coast Guard Museum (museum), which will be moved to the development plan area from the nearby United States Coast Guard Academy.

Parcel 3 is projected to have at least 90,000 square feet of high technology research and development office space and parking.[6] This office space would be located close to other research and development facilities, including those

[6] A major health club complex available to hotel guests and other city residents initially had been planned for parcel 3. It subsequently was relocated to parcel 1 as part of the hotel and conference center complex because, according to Admiral David Goebel, the development corporation's chief operating officer, the development corporation and its consultants had concluded that there was "no stand-alone economic viability for such a health club." The health club constructed pursuant to the development plan, however, will remain open to the public.

of Pfizer. The location of parcel 3 allows for direct vehicular access to the development therein, obviating the need for that traffic to pass through the rest of the development area. Parcel 3 also will retain the existing Italian Dramatic Club, a private social organization with its own building. Four properties owned by three of the plaintiffs are located on parcel 3.

Parcel 4 is subdivided into two smaller parcels, 4A and 4B. Parcel 4A is designated for "park support"; it will provide parking or retail services for the adjacent state park. Parcel 4B will include a marina, which will be a renovation of an existing marina and include slips for both recreational boating and commercial fishing operations. The walkway will be continued through these parcels. Eleven properties owned by four of the plaintiffs are located on parcel 4A.

Parcel 5 also is subdivided into three separate parcels, which cumulatively will include 140,000 square feet of office space, parking and retail space. Parcel 6 will be developed for a variety of water-dependent commercial uses. Parcel 7 is small and will be used for additional office or research and development use.

According to Admiral David Goebel, chief operating officer of the development corporation, the development corporation will own the land located within the development area. The development corporation will enter into ground leases of various parcels to private developers; those leases will require the developer to comply with the terms of the development plan. At the time of trial, the development corporation was negotiating with Corcoran Jennison, a developer, with the intention of entering into a ninety-nine year ground lease of parcels 1, 2 and 3 with



the developer. Under the lease, Corcoran Jennison will pay the development corporation rent of $1 per year. Corcoran Jennison will actually develop the parcels, a process that includes marketing for and locating tenants.

The development corporation estimated that the development plan, which is a composite of the most beneficial features of six alternate development plans that it had considered,[6] would have a significant socioeconomic impact on the New London region. The development plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes. These gains would occur in a city that, with the exception of the new Pfizer facility adjacent to the development plan area that now employs approximately 2000 people, recently has experienced serious employment declines, particularly with the loss of approximately 1900 government sector positions, and the closure of the United States Naval Undersea Warfare Center in 1996, which transferred more than 1000 positions to Newport, Rhode

[6] The alternate plans considered by the development corporation included: (1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements.

Island.[7] Indeed, the state office of policy and management has designated the city a " 'distressed municipality.' "

The development corporation board approved the development plan in early 2000; the city council also approved it shortly thereafter.[8] When it approved the development plan in January, 2000, the city council also had authorized the development corporation to acquire properties within the development area. Thereafter, in October, 2000, the development corporation voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell them. In November, 2000, the development corporation filed the condemnation proceedings that gave rise to the actions presently on appeal. Thereafter, in December, 2000, the plaintiffs brought the present action challenging the condemnations.

The trial court noted in its memorandum of decision that "each of the plaintiffs testified and said they wished to remain in their homes for a variety of personal reasons. Two of the people referred to the fact that their families have lived in their homes for decades. They all testified that they loved their homes and the Fort Trumbull area.

[7] The New London region has benefited economically by the opening and the expansion of casinos, specifically Foxwoods and Mohegan Sun. We note, however, that the city itself has not been a major beneficiary of this economic growth.

[8] As required by statute; *see* General Statutes § 8-191; the state department of economic and community development, the state department of environmental protection, the state office of policy and management, and the Southeastern Connecticut Council of Governments, also approved the development plan. Hereafter, all references in this opinion to the department are to the department of economic and community development.



Several have put a lot of work into their property and all of them appeared . . . to be sincerely attached to their homes. One owner, [Susette] Kelo, loved the view her house afforded her and the fact that it was close to the water. All testified that they were not opposed to new development in the Fort Trumbull area. Also, two of the plaintiffs own their property as business investments – the rental of apartments. These two people have put much time, money and effort into renovating their properties, one has owned his property for seventeen years, the other for about eight years."

After a seven day bench trial, the court granted permanent injunctive relief to, and dismissed the pending eminent domain actions against, the four plaintiffs who live on parcel 4A of the development plan. The court, however, upheld the takings of the parcel 3 properties.[9] This appeal and cross appeal followed. Additional facts and procedural history will be set forth in greater detail as necessary for the resolution of this appeal.

## I

## WHETHER CHAPTER 132 OF THE GENERAL STATUTES APPLIES TO NONVACANT LANDS AND, THEREFORE, AUTHORIZED THE TAKING OF THE PLAINTIFFS' LAND

The plaintiffs' first claim is that the trial court improperly determined that the development corporation has the authority to condemn the plaintiffs' property under

[9] The trial court did, however, grant a temporary injunction to the parcel 3 property owners, pending the resolution of this case on appeal.

chapter 132 of the General Statutes.[10] The plaintiffs contend that chapter 132; General Statutes § 8-186 *et seq.*; applies only to "unified land and water areas" and "vacated commercial plants," and that their homes fit neither of those categories, because under the language and legislative history of chapter 132, the statutory term "unified land and water areas" refers only to undeveloped land. The defendants claim, in response, that, in the context of the statutory language of the entire chapter, the term "unified land and water areas" includes developed land, and moreover, to conclude otherwise would frustrate the declared legislative purpose of restoring the state's economic health. We agree with the defendants.

We begin our analysis by reviewing the conclusions of the trial court on this issue. The trial court noted that it was undisputed that the development corporation attempted to exercise its eminent domain powers pursuant to only chapter 132 of the General Statutes, and stated that it would construe the eminent domain statutes strictly against the condemning authority. The trial court rejected the plaintiffs' arguments that chapter 132 applies only to: (1) multimunicipality districts; and (2) undeveloped land other than vacated commercial plants. The court conducted a thorough analysis of the chapter's language and legislative history, and concluded that references throughout the chapter to "structures" and "demolition," as well as the requirement in General Statutes § 8-189(f)

[10] We first address the plaintiffs' statutory claims because "ordinarily, constitutional issues are not considered unless absolutely necessary to the decision of a case." (Internal quotation marks omitted.) *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 230, 662 A.2d 1179 (1995).



that a plan exist for relocating project area occupants, indicated that the chapter applies to developed land as well as vacant land. In so concluding, the court rejected the plaintiffs' argument that the subsequent addition of "vacated commercial plants" to the chapter was necessary because, otherwise, the statute would apply only to vacant land.[11]

We first set forth the applicable standard of review, and the process by which we interpret statutes. "Statutory construction is a question of law and therefore our review is plenary." (Internal quotation marks omitted.) *Grondin v. Curi*, 262 Conn. 637, 649, 817 A.2d 61 (2003). "The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter."[12]

[11] The trial court also rejected the plaintiffs' contention that chapter 132 of the General Statutes applies only to multimunicipality economic development projects on contiguous land areas. We need not address this conclusion in any detail because the plaintiffs have not challenged it on appeal.

[12] With regard to this purposive approach to statutory interpretation, our legislature recently has enacted Public Acts 2003, No. 03-154, § 1 (P.A. 03-154), which provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and

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(Internal quotation marks omitted.) *Commissioner of Social Services v. Smith*, 265 Conn. 723, 734, 830 A.2d 228 (2003).

We begin our analysis of this claim by reviewing the language of the relevant sections of chapter 132 of the General Statutes. The chapter begins with General Statutes § 8-186,[13] which is the legislative declaration of policy recognizing that the state's "economic welfare" is dependent on the "growth of industry and business. . . ." Section 8-186 provides, inter alia, that "permitting and assisting municipalities *to acquire and improve unified land and water areas* and to acquire and improve or demolish

unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." This case does not implicate P.A. 03-154. We note that, in the present case, the relevant statutory text and the relationship of that text to other statutes is not "plain and unambiguous. . . ." P.A. 03-154. Accordingly, our analysis is not circumscribed to an examination of text alone, but rather properly may consider the various other sources helpful in the ascertainment of statutory meaning.

[13] General Statutes § 8-186 provides: "It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."



vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."[14] (Emphasis added.) General Statutes § 8-187[15] is the chapter's

[14] Chapter 132 of the General Statutes originally had referred only to "unified land areas." Public Acts 1967, No. 760, § 1. The legislature amended it to include the present term "unified land and water areas" in 1975. Public Acts 1975, No. 75-480, § 1.

[15] General Statutes § 8-187 provides: "As used in this chapter, (1) 'municipality' means a town, city, consolidated town and city or consolidated town and borough; (2) 'legislative body' means (A) the board of selectmen in a town that does not have a charter, special act or home rule ordinance relating to its government or (B) the council, board of aldermen, representative town meeting, board of selectmen or other elected legislative body described in a charter, special act or home rule ordinance relating to government in a city, consolidated town and city, consolidated town and borough or a town having a charter, special act, consolidation ordinance or home rule ordinance relating to its government; (3) 'development agency' means the agency designated by a municipality under section 8-188 through which the municipality may exercise the powers granted under this chapter; *(4) 'development project' means a project conducted by a municipality for the assembly, improvement and disposition of land or buildings or both to be used principally for industrial or business purposes and includes vacated commercial plants; (5) 'vacated commercial plants' means buildings formerly used principally for business or industrial purposes of which more than fifty per cent of the usable floor space is, or which it is anticipated, within eighteen months, shall be, unused or substantially underutilized; (6) 'project area' means the area within which the development project is located;* (7) 'commissioner' means the Commissioner of Economic and Community Development; (8) 'planning commission' means the planning and zoning commission designated pursuant to section 8-4a or the planning commission created pursuant to section 8-19; *(9) 'real property' means land, subterranean or subsurface rights, structures, any and all easements, air rights and franchises and every estate, right or interest therein*; and (10) 'business purpose' includes, but is not limited to, any commercial, financial or retail enterprise and includes any

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definitions section, providing most significantly that "'real property' means land, subterranean or subsurface rights, *structures*, any and all easements, air rights and franchises and every estate, right or interest therein. . . ." (Emphasis added.) General Statutes § 8-187(9). General Statutes § 8-189[16] describes the requirements that the

enterprise which promotes tourism and any property that produces income." (Emphasis added.)

[16] General Statutes § 8-189 provides: "The development agency may initiate a development project by preparing a project plan therefor in accordance with regulations of the commissioner. The project plan shall include: (a) A legal description of the land within the project area; (b) a description of the present condition and uses of such land or building; (c) a description of the types and locations of land uses or building uses proposed for the project area; (d) a description of the types and locations of present and proposed streets, sidewalks and sanitary, utility and other facilities and the types and locations of other proposed site improvements; (e) statements of the present and proposed zoning classification and subdivision status of the project area and the areas adjacent to the project area; (f) *a plan for relocating project-area occupants*; (g) a financing plan; (h) an administrative plan; (i) a marketability and proposed land-use study or building use study if required by the commissioner; (j) appraisal reports and title searches; (k) a statement of the number of jobs which the development agency anticipates would be created by the project and the number and types of existing housing units in the municipality in which the project would be located, and in contiguous municipalities, which would be available to employees filling such jobs; and (*l*) findings that the land and buildings within the project area will be used principally for industrial or business purposes; that the plan is in accordance with the plan of development for the municipality adopted by its planning commission and the plan of development of the regional planning agency, if any, for the region within which the municipality is located; that the plan is not inimical to any state-wide planning program objectives of the state or state agencies as coordinated by the Secretary of the Office of Policy and Management; that the project will contribute to the economic welfare of the municipality and the state; and that to carry out and administer the project, public action under this chapter is required. Any plan which has been prepared by a redevelopment agency under chapter 130 may be submitted by the development agency to the

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development agency must follow in preparing the mandatory project plan, which include providing "a plan for relocating project-area occupants. . . ." General Statutes § 8-189(f). General Statutes § 8-193[17] permits the development agency to acquire real property within the project area, including through the exercise of the eminent

legislative body and to the commissioner in lieu of a plan initiated and prepared in accordance with this section, provided all other requirements of this chapter for obtaining the approval of the commissioner of the project plan are satisfied." (Emphasis added.)

[17] General Statutes § 8-193 provides: "(a) After approval of the development plan as provided in this chapter, the development agency may proceed by purchase, lease, exchange or gift with the acquisition or rental of real property within the project area and real property and interests therein for rights-of-way and other easements to and from the project area. *The development agency may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area and real property and interests therein for rights-of-way and other easements to and from the project area, in the same manner that a redevelopment agency may acquire real property under sections 8-128 to 8-133, inclusive, as if said sections specifically applied to development agencies.* The development agency may, with the approval of the legislative body and, of the commissioner if any grants were made by the state under section 8-190 or 8-195 for such development project, and in the name of such municipality, transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property in the project area to any person, in accordance with the project plan and such disposition plans as may have been determined by the commissioner.

"(b) *A development agency shall have all the powers necessary or convenient to undertake and carry out development plans and development projects, including the power to clear, demolish, repair, rehabilitate, operate, or insure real property while it is in its possession*, to make site improvements essential to the preparation of land for its use in accordance with the development plan, to install, construct or reconstruct streets, utilities and other improvements necessary for carrying out the objectives of the development project, and, in distressed municipalities, as defined in section 32-9p, to lend funds to businesses and industries in a manner approved by the commissioner." (Emphasis added.)

domain power as authorized by the city council. General Statutes § 8-198[18] provides for the promulgation of regulations to carry out the provisions of chapter 132. Finally, General Statutes § 8-199[19] provides that all actions taken by the development agency are taken in the name of the municipality.

The statutory term whose meaning is in dispute is "unified land and water areas"; General Statutes § 8-186; a phrase that is not defined expressly in any section of chapter 132 of the General Statutes. Thus, in construing the term, we look to its commonly approved usage, an inquiry that often is enhanced by the examination of dictionary definitions. *See*, e.g., *Hasselt v. Lufthansa German Airlines*, 262 Conn. 416, 425, 815 A.2d 94 (2003) (utilizing Merriam-Webster's Collegiate Dictionary definition to construe statutory term "including"); *see* also General Statutes § 1-1(a). Merriam-Webster's Third New International Dictionary defines "unified" as the adjective form of "unify," which means "make into a coherent group or whole. . . ." Accordingly, we conclude that, as used in § 8-186 of chapter 132, a "unified land and water [area]" is one that exists because of the combination of separate land parcels into a unitary development scheme,[20] a definition

[18] General Statutes § 8-198 provides: "The commissioner is authorized to make and enforce reasonable regulations to carry out the provisions of this chapter."

[19] General Statutes § 8-199 provides: "Any development agency shall exercise its powers in the name of the municipality, and all bonds issued pursuant to this chapter shall be issued in the name of the municipality and title to land taken or acquired pursuant to a development plan shall be solely in the name of the municipality."

[20] This definition is not inconsistent with the legislative history of Public Acts 1967, No. 760, which reveals that the act was intended to enable and encourage industrial development in districts that are

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that undisputedly fits the Fort Trumbull development plan in the present case. This definition, however, does not resolve the issue of whether a unified land and water area under chapter 132 is limited to vacant land. Accordingly, we must continue our analysis by examining the term in the context of both the language of the chapter as a whole, and the legislative history.

We conclude that the term "unified land and water areas" in § 8-186 is not limited to vacant land. The language and legislative history of chapter 132 of the General Statutes in its entirety are replete with references that compel this conclusion. For example, § 8-187(9), the chapter's definition of "'real property,'" includes "structures" expressly within its ambit. *See* footnote 15 of this opinion. Moreover, the legislative history indicates that § 8-187(9) was enacted as Public Acts 1980, No. 80-18, to clarify the meanings of the terms "land" and "real property" as used in chapter 132, and to make them consistent with the definitions provided in chapter 130 of the General Statutes, the urban renewal statutes.[21] *See* 23 H.R. Proc., Pt. 2, 1980 Sess., p. 453, remarks of Representative Joseph J. Farricielli ("This bill would attempt to remove confusing language defining land and the real property in Chapter

comprised of more than one municipality. Representative William S. Mayer, sponsor of the legislation, stated: "This particular bill will be of interest to towns interested in industrial development not only within their own confines but within multi-town districts. A section of this particular act provides that towns can get together to develop industrial land on contiguous borders." 12 H.R. Proc., Pt. 10, 1967 Sess., pp. 4917-18.

[21] Indeed, § 8-187(9) is identical to the definition of "'real property'" found in chapter 130 of the General Statutes, the urban renewal chapter. *See* General Statutes § 8-125(f).

132 as compared to Chapter 130 of the General Statutes. It would clarify the meaning of real property as applied to state assisted municipal industrial development rights."); *see* also 23 S. Proc., Pt. 3, 1980 Sess., pp. 660-61, remarks of Senator Sanford Cloud, Jr. (same). Even more significantly, § 8-193(a), which provides authorization for the acquisition of real property by eminent domain; *see* footnote 17 of this opinion; does not include or exclude any *specific type* of real property, leaving us only to conclude that the power applies to "'real property,'" as broadly defined in § 8-187(9).

Another probative definition is that of "'development project,'" which is defined as "a project conducted by a municipality for the *assembly, improvement and disposition of land or buildings or both* to be used principally for industrial or business purposes and *includes* vacated commercial plants. . . ." (Emphasis added.) General Statutes § 8-187(4). This definition is significant because the use of the word "includes" in the phrase "includes vacated commercial plants" indicates firmly that vacated commercial plants are not the only structures contemplated by the legislature as potentially present in a development area. *See Hasselt v. Lufthansa German Airlines, supra*, 262 Conn. 424-25 (Court construed General Statutes § 31-307a[c], which "imposes liability on the [second injury] fund to reimburse employers for adjustments, including lump-sum payments. . . . Construing the word including according to its ordinary usage, however, must mean that the fund is required as well to reimburse employers for something other than those retroactive [cost of living adjustments] paid in a lump sum." [Citation omitted; internal quotation marks omitted.]).



Moreover, § 8-189, which describes the requirements that the development agency must follow in preparing the required project plan, requires the agency to provide "a plan for relocating project-area occupants. . . ." General Statutes § 8-189(f); *see* footnote 16 of this opinion. This is a requirement that, by definition, contradicts the plaintiffs' argument that "unified land and water areas" is limited to vacant land; it is axiomatic that vacant land has no occupants to relocate.

Furthermore, the commissioner's regulations, promulgated pursuant to § 8-198, support the conclusion that "unified land and water areas" under chapter 132 of the General Statutes include occupied, and indeed, residential, land. Section 8-198-10 of the Regulations of Connecticut State Agencies,[22] the regulation providing for the

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[22] Section 8-198-10 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) The amount of funds available to a municipality for development grants is based on a percentage of the net project cost. The net project cost is the total project cost less the estimated income from the project. Eligible project costs include:

"(1) real estate acquisition and disposition financing for a period;

"(2) site clearance;

"(3) site development;

"(4) planning and engineering;

"(5) administration of the project;

"(6) interest costs for temporary and definitive financing for a period not to exceed five years on a principal amount not to exceed the required matching local share; and

"(7) *relocation.*

"The purchase of vehicles and interim and final audits are not eligible costs. Interim audits are required every two years through the duration of the development project.

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determination of funding for development grants, provides that "the amount of funds available to a municipality for development grants is based on a percentage of the net project cost. The net project cost is the total project cost less the estimated income from the project." Regs., Conn. State Agencies § 8-198-10(a). We note that one factor that may be calculated into project cost is relocation expenses; Regs., Conn. State Agencies § 8-198-10(a)(7); and that another factor that may be calculated into project income is income gained from "the temporary use of land, residences or businesses prior to their dispositions. . . ." Regs., Conn. State Agencies § 8-198-10(b)(2). These regulations are particularly probative in light of the well established proposition that "unless [administrative regulations] are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." (Internal quotation marks omitted.) *Andersen Consulting, LLP v. Gavin*, 255 Conn. 498, 520 n.15, 767 A.2d 692 (2001). We particularly are persuaded by the fact that the

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"(b) The project income includes monies or the value of goods and services received from:

"(1) the sale or lease of land;

"(2) *the temporary use of land, residences or businesses prior to their dispositions*;

"(3) the sale or lease of sand, gravel, or other earthen materials;

"(4) the sale or lease of buildings, machinery, equipment or other materials of value, occupying land areas within the project area;

"(5) other state grants;

"(6) federal capital grants approved for a non-distressed municipality; and

"(7) Interest income realized from the investment of project monies. . . ." (Emphasis added.)



commissioner responsible for the implementation of chapter 132 has implemented regulations pursuant to that chapter that consider expressly residences, and their relocation, as factors for calculating the funding of development grants. Cf. *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 138, 778 A.2d 7 (2001) ("it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement" [internal quotation marks omitted]).

The plaintiffs claim that the text and legislative history of chapter 132 of the General Statutes indicate that unified land and water areas do not include land already developed with business and residences. Specifically, they contend that a construction of "unified land and water areas" that includes developed or occupied land renders the subsequent addition of "vacated commercial plants" superfluous. They also contend that the legislative genealogy and history indicates that the legislature did not intend the term "unified land and water areas" to include occupied land because references within the chapter pertinent to occupied land, such as those of demolition and rehabilitation, were added only after the vacated commercial plant provision was enacted in 1972. Finally, the plaintiffs contend that construing "unified land and water areas" to include occupied land would be excessively broad in light of the strict construction given to eminent domain statutes. We disagree with these contentions, and address each in turn.

We first conclude that construing "unified land and water areas" as including occupied land does not render the "vacated commercial plants" provision of § 8-186 superfluous. Indeed, the legislative history indicates that,

in enacting chapter 132 of the General Statutes, the legislature envisioned two *different* types of economic development plans, one aimed at developing unified land areas, or combinations of multiple parcels of land, and the other intended to revitalize underutilized commercial buildings. In introducing the bill that was enacted as Public Acts 1972, No. 87, which added the "vacant commercial plant" language to chapter 132, Senator Lawrence J. DeNardis stated that "this Bill will allow municipalities through their development agencies, to acquire [improve] and rehabilitate vacant commercial plants. At present, municipalities can acquire and improve unified land areas as it is worded in the present Statutes. They also have the power to clear, repair, operate and insure real property. This Bill would add the additional power of rehabilitation to the list and furthermore, *it would add vacated commercial plants to the areas that can be dealt with or the matters that could be dealt with*. . . . The intent of this Bill is to improve the economic climate of the State by furthering industry and thereby creating jobs." (Emphasis added.) 15 S. Proc., Pt. 2, 1972 Sess., p. 785.[23] Put differently, chapter 132 does not require that a vacated commercial plant be located within a unified land and water area; they merely present two different opportunities for economic development. Accordingly, we conclude that a construction of the term "unified land and water areas" in

[23] *See* also 15 H.R. Proc., Pt. 4, 1972 Sess., p. 1439, remarks of Representative Victor Tudan ("This Bill will allow municipalities through development agencies to acquire, improve and rehabilitate vacated commercial properties. *At present municipalities can acquire and improve unified land areas only.* They also have the power to clear, repair, operate and insure real property. This Bill adds rehabilitate to this list." [Emphasis added.]).



§ 8-186 that includes developed or occupied land does not render the 1972 addition of "vacated commercial plants" superfluous.

We also reject the plaintiffs' contention that the legislative genealogy of § 8-186 indicates that the legislature did not intend "unified land and water areas" to include occupied land because references within chapter 132 of the General Statutes pertinent to occupied land, such as those to demolition and rehabilitation, were added only after the vacated commercial plant provision was enacted in 1972. Our reading of the legislative history, and particularly the original 1967 Public Act, contradicts the plaintiffs' construction of the chapter. The plaintiffs note correctly that "rehabilitate" was not added to the development agency's powers under § 8-193(b) until 1972; *see* Public Acts 1972, No. 87, § 3; and that the power to "demolish" vacated commercial plants was not added until 1974; *see* Public Acts 1974, No. 74-184, § 6(b);[24] both of which occurred after vacated commercial plants were added to the scope of the chapter. Our reading, however, of the original 1967 Public Act, which only provided for the development of unified land and water areas, reveals that the legislature contemplated unified land and water areas as including occupied land. Indeed, § 8-189(f), which requires the development agency to submit "a plan for relocating project-area occupants," was included in the 1967 act.[25] *See* Public Acts 1967, No. 760, § 4(f).

[24] Public Act 74-184, § 1, also amended § 8-186, to declare expressly that it is a public use and purpose "*to acquire and improve or demolish* vacated commercial plants for industrial or business purposes. . . ." (Emphasis added.)

[25] Accordingly, we disagree with the plaintiffs' contention that the requirement of a relocation plan refers to the chapter's definition of

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Accordingly, we disagree with the plaintiffs' contention that the legislative history of § 8-186 necessarily indicates that the legislature intended "unified land and water areas" to be limited to vacant land.

We next address the plaintiffs' contention that construing "unified land and water areas" to include occupied land would be excessively broad in light of the strict construction applied to eminent domain statutes. We are mindful of the well established proposition that "the authority to condemn [is to] be strictly construed in favor of the owner of the property taken and against the condemnor. . . ." *State v. McCook*, 109 Conn. 621, 630, 147 A. 126 (1929). We also note, however, that "the statute . . . should be enforced in such a way as to effectuate the purpose for which it was enacted." (Internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 601-602, 790 A.2d 1178 (2002). We conclude that construing the ambiguous term "unified land and water areas" in § 8-186 as including occupied land is not impermissibly broad; indeed, the language of other provisions in chapter 132 of the General Statutes compels this conclusion, and our review of the legislative history reveals nothing to contradict it. Moreover, a construction limiting the application of the unified land and water areas provisions of chapter 132 to vacant land would undercut severely the chapter's declared purpose of promoting economic development, particularly as the

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vacated commercial plant, which contemplates partial occupation. *See* General Statutes § 8-187(5) ("'vacated commercial plants' means buildings formerly used principally for business or industrial purposes of which more than fifty per cent of the usable floor space is, or which it is anticipated, within eighteen months, shall be, unused or substantially underutilized").



state's stock of vacant land diminishes. This construction largely would limit the applicability of chapter 132 in urban and suburban areas to vacated commercial plants standing alone; the presence of a structure in the project area that does not meet the definition of vacated commercial plant would disrupt the entire economic development plan because it would need to be built around. This would make the parcels unattractive for investment by developers, and would, therefore, thwart the declared purpose of chapter 132. *See* General Statutes § 8-186. Accordingly, we conclude that the trial court properly construed the term "unified land and water areas" in § 8-186 of chapter 132 as not excluding developed or occupied land.

## II

## WHETHER ECONOMIC DEVELOPMENT IS A PUBLIC USE UNDER THE STATE AND FEDERAL CONSTITUTIONS

We next address the principal issue in this appeal, which is the plaintiffs' claim that the trial court improperly concluded that the use of eminent domain for economic development does not violate the public use clauses of the state and federal constitutions. Specifically, the plaintiffs contend that: (1) economic development as contemplated in chapter 132 of the General Statutes is not a public use under the state and federal constitutions; (2) even if economic development is a public use, the condemnations in the present case do not promote sufficient public benefit to pass constitutional muster; and (3) the condemnation of parcels 3 and 4A lack a reasonable assurance of future public use because private parties retain control over the parcels' use. We address each contention in turn.

A

Whether Economic Development Is a Public Use under the State and Federal Constitutions

The plaintiffs' first contention is that the trial court improperly concluded that economic development under chapter 132 of the General Statutes, namely, the development plan in the present case, is a public purpose that satisfies the public use clauses of article first, § 11, of the Connecticut constitution,[26] and the fifth amendment to the United States constitution.[27] Specifically, they claim that the condemnation of property for economic development by private parties is inconsistent with this court's prior public use decisions because: (1) the new owner will not provide a public service or utility; and (2) the condemnation will not remove blight conditions that are, in and of themselves, harmful to the public. In response, the defendants contend that by concluding that economic development is by itself a public use justifying the exercise of the eminent domain power, the trial court properly deferred to state and municipal legislative determinations. We conclude that economic development projects created and implemented pursuant to chapter 132 that have the public economic benefits of creating new jobs, increasing tax and other

[26] Article first, § 11, of the constitution of Connecticut provides: "The property of no person shall be taken for public use, without just compensation therefor."

[27] The fifth amendment to the United States constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.) The fifth amendment's public use clause has been made applicable to the states through the fourteenth amendment to the United States constitution. *See*, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).



revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.[28]

We begin by setting forth the applicable statutory framework. The legislative determination at issue in the present case is provided by § 8-186, which provides that as a matter of legislative finding and declaration, "*that the economic welfare of the state depends upon the continued growth of industry and business within the state*; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; *that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and*

[28] We note that, in *Bugryn v. Bristol*, 63 Conn. App. 98, 103-104, 774 A.2d 1042, cert. denied, 256 Conn. 927, 776 A.2d 1143, cert. denied, 534 U.S. 1019, 122 S.Ct. 544, 151 L. Ed. 2d 422 (2001), the Appellate Court rejected a factual challenge to the trial court's finding that the plaintiffs' land was not condemned for the purpose of benefiting and retaining a private manufacturer. The Appellate Court's decision in *Bugryn*, however, is of limited value in resolving the particular issue in the present case, because the parties in that case did not dispute the proposition that the development of an industrial park is a public use. *Id.*, 104. The court in that case did note that, even if the industrial park plan did benefit the manufacturer, the public use of industrial park development was not disputed, and "where the public use which justifies the taking of the area in the first instance exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to private persons." (Internal quotation marks omitted.) *Id.*; *Broadriver, Inc. v. Stamford*, 158 Conn. 522, 533-34, 265 A.2d 75 (1969), cert. denied, 398 U.S. 938, 90 S. Ct. 1841, 26 L. Ed. 2d 270 (1970).

*improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."* (Emphasis added.)

The trial court concluded that this language did not violate the public use clauses of either the state or the *federal constitutions*. In so concluding, the trial court relied on decisions from this court and the United States Supreme Court, but especially *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-40, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984), *Berman v. Parker*, 348 U.S. 26, 31-32, 75 S. Ct. 98, 99 L. Ed. 27 (1954), *Katz v. Brandon*, 156 Conn. 521, 532-34, 245 A.2d 579 (1968), *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 141-43, 104 A.2d 365 (1954), and *Olmstead v. Camp*, 33 Conn. 532, 546 (1866). After reviewing the authorities, the trial court concluded that both this court and the United States Supreme Court consistently have taken a broad, purposive view of the concept of public use, and accordingly have taken a deferential approach to legislative pronouncements of public use. The trial court, however, also emphasized that the public use question is ultimately a judicial inquiry. Ultimately, the trial court concluded that the purpose of chapter 132 of the General Statutes, as expressed in § 8-186; *see* footnote 13 of this opinion; was an appropriate public use that passed muster under both state and federal constitutions, stating that "economic growth and its encouragement, especially in 'distressed municipalities' is a valid public use because it obviously confers a benefit to all members of the public." Accordingly, the trial court concluded that "the language of chapter 132 authorizing the use of eminent domain power



for the purpose of accomplishing economic development in designative project areas [is not] violative of the federal or state eminent domain clauses of their respective constitutions."

We note that the trial court approached the plaintiffs' general claim about whether economic development is a constitutional public use in the context of a facial attack on the provisions of chapter 132 of the General Statutes that authorize the use of eminent domain. Although the plaintiffs do not argue expressly that these statutory provisions are unconstitutional, we will address this particular claim as a facial attack on the constitutionality of chapter 132 inasmuch as it authorizes the use of eminent domain for private economic development. Accordingly, "we proceed from the well recognized jurisprudential principle that the party attacking a validly enacted statute . . . bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and we indulge in every presumption in favor of the statute's constitutionality. . . . The burden of proving unconstitutionality is especially heavy when, as at this juncture, a statute is challenged as being unconstitutional on its face." (Citation omitted; internal quotation marks omitted.) *State v. Ball*, 260 Conn. 275, 280-81, 796 A.2d 542 (2002).

Moreover, in light of the somewhat confusing constitutional posture of their principal and reply briefs,[29] we also

[29] The plaintiffs, in seeking invalidation of the eminent domain provisions of chapter 132 of the General Statutes under the public use clauses of the federal and state constitutions, provide a single, unitary analysis that does *not* assert that the state constitution's public use clause offers them *greater* protection than the federal constitution's public use clause. Their approach is confusing to us because their principal brief otherwise is replete with citations to cases such as *Gohld*

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take the opportunity to clarify the scope of our review of the plaintiffs' constitutional claims in the present case. Inasmuch as the relevant public use language of the state and federal constitutions is virtually identical; *see* footnotes 26 and 27 of this opinion; the plaintiffs have not stated expressly that the Connecticut constitution offers them greater protection, and their claim presents an issue of first impression for this court, we will address simultaneously their federal and state claims. *See Donahue v. Southington*, 259 Conn. 783, 794 n.7, 792 A.2d 76 (2002) ("If a party does not provide an independent analysis asserting the existence of greater protection under the state constitutional provision than its federal counterpart . . . we will not of our own initiative address that question. . . . Accordingly, the federal equal protection standard is considered prevailing for the purposes of our review of both the state and federal equal protection claims in this case." [Internal quotation marks omitted.]).

We now turn to the substance of the plaintiffs' claims. This court long has taken a flexible approach to

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*Realty Co. v. Hartford*, *supra*, 141 Conn. 135, *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill. 2d 225, 240-41, 768 N.E.2d 1, 263 Ill. Dec. 241, cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002), and *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 633-35, 304 N.W.2d 455 (1981), which typically would support the separate *state* constitutional analysis required as a threshold matter for review by well established Connecticut precedent. *See*, e.g., *State v. DeJesus*, 260 Conn. 466, 480 n.11, 797 A.2d 1101 (2002) (separate state analysis required); *State v. Geisler*, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992) (factors governing construction of state constitution enumerated). Moreover, the plaintiffs' principal brief, does not contain a discussion of any relevant *federal* precedent, such as *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 229. We do note, however, that they do cite three significant federal cases in their reply brief.



construction of the Connecticut public use clause. Indeed, our analysis begins in 1866, when this court, in *Olmstead v. Camp*, *supra*, 33 Conn. 532, first addressed the constitutional concept of public use. In *Olmstead*, the owner of a water powered mill used for the grinding of grain petitioned the court, pursuant to the flowage act, for permission to make improvements to the pond and dam that powered his mill. *Id.* These alterations necessarily would have resulted in flooding his neighbor's land, and the neighbor had refused to accept compensation from the mill owner for the privilege of flooding his land.[30] *Id.*, 532-33.

This court concluded that the mill owner should be permitted to flood his neighbor's land. *Id.*, 552. In interpreting Connecticut's public use clause, the court rejected a strict construction that "the term 'public use' means possession, occupation, direct enjoyment, by the public." *Id.*, 546. Instead, it concluded that "such a limitation of the intent of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel. One of the most common meanings of the word 'use' as defined by [Webster's Dictionary], is 'usefulness, utility, advantage, productive of benefit.' *'Public use' may therefore well mean public usefulness*,

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[30] A committee appointed pursuant to the flowage act recommended that the improvement be made, in furtherance of the public use. *Olmstead v. Camp*, *supra*, 33 Conn. 534. With respect to public use, the trial court found that the mill operated generally for the public benefit in a farming community where people relied, but not exclusively, on it and other merchants to furnish food for people and animals. *Id.*, 536. The court also found that the mill owner had no legal obligation to allow the public access to the mill, or to do milling for the public himself. *Id.*, 537. The trial court then reserved for this court the question of whether allowing the improvements to the mill would be a public use. *Id.*

*utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.* Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures and legal authorities."[31] (Emphasis added.) *Id.*

Moreover, the court in *Olmstead* laid the foundation for our deferential approach to legislative declarations of public use, stating that "the question is asked with great pertinence and propriety, what then is the limit of the legislative power under the clause which we have been

[31] Even more tellingly, the court in *Olmstead* stated further: "In none of the cases to which we have referred does the public as an active agent take and hold and occupy the property in actual possession. *The term 'public use' is synonymous with public benefit or advantage.* It is equivalent to the language, so familiar in our statute in relation to highways, 'of common convenience and necessity.'

"If there were any doubt on the subject on first principles, we understand it to be the settled law of the country that the flowing of land for the purposes of mills and manufactories, in view of its effect upon the community, is to be considered as a taking it for public use. It would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state. It is obvious that those sections of the country which afford the greatest facilities for the business of manufacturing and the mechanic arts, must become the workshops and warehouses of other vast regions not possessing these advantages; and must receive in exchange for the results of their industry and skill an abundant return of the rich products of the earth, including the precious metals. *It is of incalculable importance to this state to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition.*" (Emphasis added.) *Olmstead v. Camp, supra*, 33 Conn. 550-51.



considering, and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. *The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.* The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts." (Emphasis added.) *Id.*, 551; accord *New York, N.H. & H.R. Co. v. Offield*, 77 Conn. 417, 421, 59 A. 510 (1904) (in taking for railroad improvements, court held "that the uses to be furthered are public, is a question the decision of which by the legislative department, while not absolutely conclusive upon the judicial department . . . is entitled to very great weight").

This court has continued to afford the public use clause a broad construction, and repeatedly has embraced the purposive formulation first articulated in *Olmstead v. Camp, supra*, 33 Conn. 546.[32] In *Gohld Realty Co. v.*

[32] Prior to the urban renewal cases, we note that this court has construed the phrase "public purpose," in the context of spending public moneys, as synonymous with the term "public use." In *Barnes v. New Haven*, 140 Conn. 8, 12-14, 98 A.2d 523 (1953), a taxpayer challenged the validity of an act creating a parking authority as lacking a public purpose under the emoluments clause, article first, § 1, of the Connecticut constitution. This court upheld the act as having the legitimate public purpose of addressing severe traffic problems, a situation that "calls for an appropriate exercise of the police power of the state operating through the city as one of its municipalities." *Id.*, 14. The court noted that "whether the act does provide for a legitimate public purpose in the constitutional sense involves the question whether it primarily serves, in a reasonable manner, to promote the public welfare. . . . If it does, that an incidental financial benefit may result to certain individuals as distinguished from the public at large does not

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*Hartford*, *supra*, 141 Conn. 139, the owner of commercial real estate challenged the constitutionality of the eminent domain provisions of the redevelopment act, under which land in blighted urban areas could be taken, cleared and sold or leased to redevelopers. The property owner contended that use of eminent domain in this manner violated the public use clause of the state constitution. *Id.*, 141. Utilizing the purposive definition of public use from *Olmstead v. Camp*, *supra*, 33 Conn. 546, this court relied on express legislative findings about the deleterious effects of urban blight, and concluded that "there can be no doubt that the elimination of such substandard, insanitary, deteriorated, slum or blighted areas . . . is for the public welfare. Private property taken for the purpose of eradicating the conditions which obtain in such areas is taken for a public use." *Gohld Realty Co. v. Hartford*, *supra*, 143. Moreover, with respect to the provisions of the act allowing the taken land to be sold or leased to private developers, the court concluded that "if the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums, *that same public use continues after the property is transferred to private persons.* The public purposes for which the land was taken are still being accomplished." (Emphasis added.) *Id.*, 143-44.

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deprive it of its legitimate public purpose." (Citations omitted.) *Id.*, 14-15.

Although *Barnes* is a spending case, and not a taking case, it is significant in our resolution of the present case. Indeed, the court in *Barnes* expressly used the terms "public use" and "public purpose" in an interchangeable manner, a definition that we later adopted in *Katz v. Brandon*, *supra*, 156 Conn. 532-33, a redevelopment taking case.



*Gohld Realty Co.* was followed by *Katz v. Brandon*, *supra*, 156 Conn. 521.[33] In *Katz*, a property owner brought an action to determine the validity of the taking of his home pursuant to a redevelopment plan in Hartford. *Id.*, 523. A manufacturing corporation had a plant with an employee parking lot near the plaintiff's home. *Id.*, 525. The state had condemned this parking lot for the construction of an interstate highway. *Id.* The corporation had offered to build a parking garage in the area, should the city approve a redevelopment plan in the area. *Id.*, 525-26. Subsequently, the redevelopment agency approved a redevelopment plan in the area, which included the plaintiff's land. *Id.*, 525. The city then met with the corporation and other local manufacturers to discuss the redevelopment area, which was found by the city and the agency to be blighted and unsafe. *Id.*, 526-27. The city did not enter into an agreement with the corporation to purchase or lease any of the land; the city was of the opinion that the project was necessary with or without the corporation's participation. *Id.*, 527-28. Subsequently, the city approved the redevelopment project and acquired title to all properties in the area by purchase or eminent domain, including those of the plaintiff. *Id.*, 529-31. The plaintiff brought an action, and contended that the takings were invalid because they were taken for the private purpose of inducing the corporation to remain in Hartford by providing a parking lot for its employees, rather than for a public purpose. *Id.*, 531.

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[33] For the sake of clarity, we note that this court's opinion in *Katz v. Brandon*, *supra*, 156 Conn. 532-34, does not state whether its public use analysis is based specifically on either or both of the federal and state constitutions.

This court, relying on *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 143, rejected the plaintiff's argument, and emphasized that the public use was the clearing of the blighted land. *Katz v. Brandon*, *supra*, 156 Conn. 534. Indeed, the court in *Katz* further broadened our approach to public use, citing *Barnes v. New Haven*, 140 Conn. 8, 15-16, 98 A.2d 523 (1953), a public spending case. *See* footnote 32 of this opinion. Indeed, this court stated in *Katz* that "[*a*] *public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation*. . . . Courts as a rule, instead of attempting judicially to define a public as distinguished from a private purpose, have left each case to be determined on its own peculiar circumstances. Promotion of the public safety and *general welfare* constitutes a recognized public purpose. . . . The modern trend of authority is to expand and liberally construe the meaning of public purpose. *The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy its benefit.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Katz v. Brandon*, *supra*, 532-33;[34] *Barnes v. New Haven*, *supra*, 15. Accordingly, the court in *Katz* rejected the plaintiff's argument

[34] Indeed, this court in *Katz v. Brandon*, *supra*, 156 Conn. 533, noted that "in this day of keen competition to attract industry and business to a state or to a particular locality, public officials are expected to cooperate in helping an industry to locate in their community. They must be at all times alert in providing for future as well as present needs." (Internal quotation marks omitted.)



that the redevelopment plan violated the public use requirement. *Katz v. Brandon*, *supra*, 534.

The United States Supreme Court has afforded similarly broad treatment to the federal public use clause. In *Berman v. Parker*, *supra*, 348 U.S. 28-29, the Supreme Court addressed the constitutionality of the District of Columbia's redevelopment act, in which Congress had declared, as a matter of public policy, the acquisition of property necessary to eliminate blight conditions. The act allowed the redevelopment agency, once it acquired the property, to transfer it to redevelopment companies or individuals to carry out the plan; indeed, private enterprise was preferred over public agencies for execution of the plan. *Id.*, 30. The owner of a department store in the rehabilitation area challenged the taking of his property pursuant to the plan, and contended that it was unconstitutional because: (1) his property was not slum housing; and (2) it would be redeveloped and managed by private, and not public agencies, for private, and not public use. *Id.*, 31.

The Supreme Court concluded that the redevelopment act was a valid exercise of the police power that Congress exercises over the District of Columbia. *Id.*, 34. The court adopted the broad, purposive view of eminent domain, and held that the police power, while generally undefinable, "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. *Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.* In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it

be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs.... *This principle admits of no exception merely because the power of eminent domain is involved.* The role of the judiciary in determining whether that power is being exercised for a public purpose is an *extremely narrow* one." (Citations omitted; emphasis added.) *Id.*, 32.

Moreover, the court stated that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." *Id.*, 33. Accordingly, the court concluded that, because the taking was for the public purpose of clearing blighted areas, the means of redevelopment through private enterprise did not violate the *public use clause*.[35] *Id.* Indeed, the court also adopted a highly deferential approach to agency determination of necessity, allowing the agency to take the building despite the fact that it was, itself, not blighted. *Id.*, 33-34. "If the agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be

[35] The court stated further: "The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose." *Berman v. Parker, supra*, 348 U.S. 33-34.



included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation." *Id.*, 36. Ultimately, the court concluded that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.*

The broad purposive approach to the interpretation of the *federal public use clause* reached its zenith in 1984, with the Supreme Court's decision in *Hawaii Housing Authority v. Midkiff, supra*, 467 U.S. 239-40. In that case, the Hawaii state legislature had attempted to address economic problems created by severely overconcentrated land ownership that remained as a vestige of the feudal land tenure scheme developed by the original Polynesian settlers. *Id.*, 232-33. "The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.*, 232.

In response to this property crisis, the Hawaii legislature had enacted legislation that created a mechanism for the condemnation of residential land tracts by the Hawaii housing authority, with subsequent transfer of the condemned fees simple to existing lessees. *Id.*, 233. The act provided for a hearing process to ensure that the condemnation would further the public purpose of the act. *Id.* Once the housing authority acquired the land and paid compensation to the landowners, it was authorized to sell the land to the tenant residing there,[36] or to sell or lease it

[36] The housing authority also made loans for up to 90 percent of the purchase price available to the existing tenants. *Hawaii Housing Authority v. Midkiff, supra*, 467 U.S. 234.

to other prospective purchasers. *Id.*, 234. The act prohibited the sale or lease of more than one lot to the same person. *Id.* Landowners, whose land had been condemned pursuant to the act after a hearing, brought an action to have the law declared unconstitutional. *Id.*, 235.

The Supreme Court concluded, with "no trouble," that the act was a constitutional exercise of the Hawaii legislature's police powers because "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.*, 241-42. The court relied on *Berman v. Parker*, *supra*, 348 U.S. 31-33, and concluded that "the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 240. Accordingly, the court stated that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.*, 241. As applied, the court concluded that the act was a "comprehensive and rational approach to identifying and correcting market failure."[37] *Id.*, 242.

[37] In taking a broad, purposive approach to public use, the United States Supreme Court further emphasized that "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. . . . The [Land Reform] Act advances its purposes without the State's taking actual possession of the land. *In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 243-44.



Moreover, in *Midkiff*, the Supreme Court reemphasized the *Berman* theme of judicial deference to the legislative public use determination, stating that the courts' role "in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power . . . is . . . extremely narrow. . . ." (Internal quotation marks omitted.) *Id.*, 240. "*In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation.*"[38] (Emphasis added; internal quotation marks omitted.) *Id.*, 241. The court emphasized that this deference applies equally to determinations made by both Congress and the state legislatures, and that "judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, *if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.*" (Citation omitted; emphasis added.) *Id.*, 244.

Our analysis of the foregoing cases reveals that this state's well established approach to judicial review of

[38] The court also noted that whether the act is successful in solving Hawaii's land problems is irrelevant to whether it was passed in furtherance of a valid public purpose. *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 242 ("Of course, this [Land Reform] Act, like any other, may not be successful in achieving its intended goals. But whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." [Emphasis in original; internal quotation marks omitted.]).

legislative public use determinations, first articulated more than 125 years ago in *Olmstead v. Camp*, *supra*, 33 Conn. 546-51, is in harmony with the approach of the federal courts, as enunciated in *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 239-40, and *Berman v. Parker*, *supra*, 348 U.S. 31-32. Both federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial deference to the legislative determination of purpose. Accordingly, with this standard in mind, we turn to the plaintiffs' specific claim, which is that economic development is not, by itself, a public use under either the United States or Connecticut constitutions.

Under this broad and deferential constitutional rubric, we conclude that an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions. Indeed, the courts of several of our sister states, using the same deferential and purposive approach to which we adhere, have arrived at the same conclusion. *See Oakland v. Oakland Raiders*, 32 Cal.3d 60, 69-72, 646 P.2d 835, 183 Cal.Rptr. 673 (1982) (concluding that city was not barred as matter of law from taking professional football franchise by eminent domain in order to keep it from moving to another city; remanding for complete determination of public benefit involved); *Shreveport v. Chanse Gas Corp.*, 794 So.2d 962, 973 (La. App. 2001) (relying on *Berman*, *Midkiff*, and relevant legislative declarations to conclude that "economic development, in the form of a convention center and headquarters hotel, satisfies the public purposes and public



necessity requirement of [state constitution]"), cert. denied, 805 So.2d 209 (La. 2002); *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 191, 339 A.2d 278 (1975) (concluding in condemnation for industrial park that "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses [under state constitution], at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide"); *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 633-35, 304 N.W.2d 455 (1981) (A landmark case relying on legislative and redevelopment agency declarations and upholding, under the state constitution, the taking of private homes for the construction of a major car manufacturing assembly plant. "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.");[39] *Duluth v. State*, 390 N.W.2d 757,

[39] The Michigan Supreme Court's decision in *Poletown Neighborhood Council* is a landmark case in the use of eminent domain. We conclude that it warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit. In that case, General Motors Corporation (General Motors) had informed the city of Detroit that it was going to close its Cadillac plant in three years, at the cost of more than 6000 jobs, and the following "loss of millions of dollars in real estate and income tax revenues." *Poletown Neighborhood Council v. Detroit*, *supra*, 410 Mich. 650-51 (Ryan, J., dissenting). General Motors offered to build a new assembly complex in the city, so long as a site suitable with regard to size and transportation access could be located. *Id.*, 638 (Fitzgerald, J., dissenting). The city proposed a number of sites, of which one, the neighborhood in question, met General Motors' specifications. *Id.*, 637 (Fitzgerald, J., dissenting). The plaintiffs, a neighborhood

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association and various individual residents, brought an action to challenge the project. *Id.*, 628.

The Michigan court concluded, in a per curiam opinion, that the taking of a residential neighborhood, for the purpose of conveying that property to General Motors for construction of an assembly plant, was public use under the state constitution because of the economic benefits of the jobs and tax revenue that would result from the plant's construction. *Id.*, 633-34. The majority opinion noted that the legislature had stated distinctly, in the state Economic Development Corporations Act, the public purposes of revitalizing the state's economy and alleviating unemployment, and also had authorized municipalities to condemn properties for development as industrial or commercial sites, with subsequent transfer to private users. *Id.*, 630-31.

Indeed, the court framed the issue in the case as "whether the proposed condemnation is for the primary benefit of the public or the private user." *Id.*, 632. The majority deferred to the legislature's determination of economic development as a legitimate public purpose. *Id.*, 633. The court stated "when there is . . . public need, the abstract right [of an individual] to make use of his own property in his own way is compelled to yield to the general comfort and protection of community, and to a proper regard to relative rights in others. . . . Eminent domain is an inherent power of the sovereign of the same nature as, albeit more severe than, the power to regulate the use of land through zoning or the prohibition of public nuisances." (Citation omitted; internal quotation marks omitted.) *Id.*, 633-34. The court then noted that the economic benefits to the city of the condemnation are "clear and significant." *Id.*, 634. The court stated: "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental." *Id.*

The majority, however, limited the impact of its holding. The court stated: "Our determination that this project falls within the public purpose, as stated by the legislature, does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. *If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.* . . . Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is

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761-64 (Minn. 1986) (relying on *Midkiff* and deferring to city council legislative determination to conclude that construction of large privately operated paper mill that would alleviate unemployment and contribute to city's economic revitalization was public purpose justifying use of eminent domain under federal and state public use clauses); *Kansas City v. Hon*, 972 S.W.2d 407, 414 (Mo. App. 1998) (airport expansion is public use that will be furthered by subsequent transfer of land to private aviation related corporation); *Vitucci v. New York City School Construction Authority*, 289 App.Div.2d 479, 481, 735 N.Y.S.2d 560 (2001) (condemnee not entitled to right of first refusal when condemnor sold land to private party for "new public purpose; the expansion of the facilities of a major employer and economic force in the area"; "if a

the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant. . . ." (Emphasis added.) *Id.*, 634-35.

There were two dissenting opinions in *Poletown Neighborhood Council*. The dissenting opinions, by Justices Fitzgerald and Ryan, both criticized the degree of deference to the legislative public use determination and distinguished economic development from blight clearance. *Id.*, 639, 643 (Fitzgerald, J., dissenting); *id.*, at 665, 673 (Ryan, J., dissenting). The dissenters also criticized what they deemed to be incidental public benefit, as compared to the direct benefit to General Motors from the new plant. *Id.*, 641 (Fitzgerald, J., dissenting); *id.*, 672 (Ryan, J., dissenting).

*Poletown Neighborhood Council* informs, but does not dictate, our decision in the present case. Specifically, we decline to follow the Michigan court's holding that when "the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Id.*, at 634-35. Indeed, we conclude that the application of a "heightened scrutiny" standard; *id.*, 635; is inconsistent with our well established approach of deference to legislative determinations of public use.

municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain"); *Jamestown v. Leevers*, 552 N.W.2d 365, 369, 374 (N.D. 1996) ("the stimulation of commercial growth and removal of economic stagnation sought by [state urban redevelopment act allowing acquisition of nonblighted urban property 'in furtherance of economic development'] are objectives satisfying the public use and purpose requirement of [federal and state public use clauses]"; reversing and remanding because "trial court made no finding whether the primary object of this development project is for the economic welfare of downtown Jamestown and its residents rather than for the benefit of private interests"); *see* also *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (stating in dicta that "if the city council . . . had by ordinance declared that a shopping center on the plaintiffs' property would serve a public use by, for example, increasing legitimate business traffic in the area and providing jobs for neighborhood residents, the city might have been able to acquire plaintiffs' property through the payment of just compensation, under the power of eminent domain");[40]

[40] We note that the Ninth Circuit Court of Appeals' decision in *Armendariz v. Penman, supra*, 75 F.3d 1320-21, is a significant example of judicial intervention into an alleged governmental *abuse* of property rights by agents of the city's executive branch. In *Armendariz*, city agents had conducted multiple housing code enforcement sweeps in an area of the city with low income housing owned by the plaintiffs. *Id.*, 1313. The plaintiffs alleged that "city officials conducted the sweeps to enable a commercial developer to acquire contiguous property in [the neighborhood] on the cheap, bulldoze the low-income housing units, and replace them with a planned shopping center. According to the plaintiffs, the city effectuated these purposes by 'faking' the existence of serious housing code violations purportedly discovered on the plaintiffs'

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*99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1129-30 (C.D.Cal.2001) (redevelopment agency's admitted use of eminent domain solely to satisfy "private expansion demands" of major anchor retailer violated federal public use clause, even under deferential analysis; court rejected as speculative argument that prevention of "future blight" upon departure of retailer was public use), appeal dismissed and remanded, 60 Fed. Appx. 123 (9th Cir. Cal. 2003).

properties during the sweeps in order to invoke the city building official's emergency powers to evict the plaintiffs' tenants and revoke the plaintiffs' business licenses and certificates of occupancy." *Id.*, 1315.

The Ninth Circuit concluded that the plaintiffs had stated a claim under 42 U.S.C. § 1983, because "if the plaintiffs can prove their allegations, the defendants' actions would constitute a taking of the property. Such a taking, if the allegations are true, would seem not to have been for a 'public use' as the Fifth Amendment requires but rather for the use of another private person, the shopping-center developer." *Id.*, 1321. Significantly, however, the court stated in dicta that "if the city council . . . had by ordinance declared that a shopping center on the plaintiffs' property would serve a public use by, for example, increasing legitimate business traffic in the area and providing jobs for neighborhood residents, the city might have been able to acquire [the] plaintiffs' property through the payment of just compensation, under the power of eminent domain." *Id.*

The court emphasized, however, that "what [the] plaintiffs allege here is an uncompensated taking through a raw misuse of government power. If the allegations are true, the only determination that could possibly have been made that a shopping center on the plaintiffs' land was a 'public use' would have been a secret determination by the defendants as executive-branch officials of the city or as individuals using the cloak of their official positions to effect their private ends. *Thus, the usual extreme deference that courts owe to legislative determinations of public use . . . is not appropriate here.*" (Citations omitted; emphasis added.) *Id.*

This line of cases is wholly consistent with the broad[41] view of the public use clause that Connecticut and the federal courts follow. Accordingly, we find them persuasive, and we conclude that economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution.

The plaintiffs contend that the Connecticut blight and substandard housing clearance cases, such as *Katz v. Brandon*, *supra*, 156 Conn. 533-34, and *Gohld Realty Co.*

[41] The leading treatise on eminent domain states that there are two competing definitions of the term "public use" – a "narrow" definition and a "broad" definition. 2A P. Nichols, Eminent Domain (3d Ed. Rev. 2003, J. Sackman ed.) § 7.02[2] through [7], pp. 7-26 through 7-37. The "broad" definition provides that " 'public use' means 'public advantage.' Any eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and prosperity of the whole community and thus constitutes a valid public use. Under this view of 'public use,' it has been held that the scope of eminent domain is both 'coterminous with the scope of the sovereign's police powers,' as well as its constitutional taxing authority." *Id.*, § 7.02[3], pp. 7-29 through 7-32.

In contrast, under the "narrow" definition, "to make a use public means that the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property taken." *Id.*, § 7.02[2], p. 7-26. The treatise states that the "broad" view of eminent domain generally has gained greater acceptance among the federal and state courts; *id.*, § 7.02[5], pp. 7-35 through 7-36; but that neither definition comprehensively can explain all eminent domain public use holdings; *id.*, §§ 7.02[6] and [7], pp. 7-36 through 7-37; concluding that "further efforts at providing a precise definition of 'public use' are doomed to fail, and many courts have recognized this. . . ." *Id.*, § 7.02[7], p. 7-37.



*v. Hartford*, *supra*, 141 Conn. 143-44, are inapposite because in those cases the private sector economic development was secondary to the primary purpose of the redevelopment act, under which the applicable public use was the removal of harmful urban blight or substandard conditions. The plaintiffs also cite a competing line of sister state cases, notably *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill. 2d 225, 240-41, 263 Ill.Dec. 241, 768 N.E.2d 1, cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002), and urge this court to follow them and conclude that economic development is not, by itself, a public use that justifies the use of eminent domain. We address each of these contentions in turn.

We first address the plaintiffs' contention that the blight and substandard housing clearance cases, namely, *Katz v. Brandon*, *supra*, 156 Conn. 533, and *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 143-44, are inapplicable. Specifically, they contend that, in the present case, the primary legislative purpose is to transfer the property to private entities, which will become the primary beneficiary of the taking; accordingly, any benefit to the public from the taking is merely secondary. Their arguments contrast this scenario with that of the blight cases, wherein this court concluded that the primary purpose of the takings was the clearance of harmful urban conditions, with any benefit to private entities being secondary. *Katz v. Brandon*, *supra*, 534; *Gohld Realty Co. v. Hartford*, *supra*, 143-44. We disagree with the plaintiffs' contentions because we already have determined that municipal economic development can be, in and of itself, a constitutionally valid public use under the well established broad, purposive approach that we take on this issue under both the federal

and state constitutions. Accordingly, we also conclude that private benefit from such economic development is, just as in the blight and substandard housing clearance cases, secondary to the public benefit that results from significant economic growth and revitalized financial stability in a community.

We next address the plaintiffs' analysis of the sister state cases, particularly *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 235-41, that they cite in support of their contention that economic development projects do not, by themselves, constitute public use. We acknowledge that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow[42] view of their public use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes. *See Little Rock v. Raines*, 241 Ark. 1071, 1083-84, 411 S.W.2d 486 (1967) (utilizing narrow definition of public use and noting lack of express legislative eminent domain authorization in concluding that taking for industrial park did not satisfy public use clause); *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451, 456-58 (Fla. 1975) (condemnation of land for construction of parking garage for private shopping mall not public use solely because of economic benefits; describing public benefit from garage construction as "incidental" and insufficient "as a basis for public necessity justifying eminent domain"); *Owensboro v. McCormick*, 581 S.W.2d 3, 5-8 (Ky. 1979) (using narrow view of public

[42] *See* 2A P. Nichols, Eminent Domain (3d Ed. Rev. 2003, J. Sackman ed.) § 7.02[2], pp. 7-26 through 7-29; *see* also footnote 41 of this opinion.



use under state constitution to strike statute granting city or other governmental unit "unconditional right to condemn private property which [was] to be conveyed by the local industrial development authority for private development for industrial or commercial purposes"; "the constitutional provisions involved clearly require that finding of 'public purpose' does not satisfy the requirement of a finding of 'public use'"); *Opinion of the Justices*, 152 Me. 440, 447, 131 A.2d 904 (1957) (advisory opinion following narrow view of state public use clause and concluding that statute authorizing city to use eminent domain for development of industrial park is unconstitutional); *Merrill v. Manchester*, 127 N.H. 234, 237-39, 499 A.2d 216 (1985) (using narrow public use analysis under state constitution and requiring direct public use in light of declared legislative policy of preserving open lands; enjoining taking of plaintiffs' open lands for industrial park construction); *Karesh v. City Council*, 271 S.C. 339, 342-45, 247 S.E.2d 342 (1978) (adhering to narrow view of public use under state constitution, and concluding that city could not condemn land and lease it to developer for parking garage and convention center project; noting that "guarantee that the public will enjoy the use of the facilities, so necessary to the public use concept, is absent"); *In re Seattle*, 96 Wn. 2d 616, 627-29, 638 P.2d 549 (1981) (using narrow view of state public use clause, without deference to legislature, and concluding retail shopping center "contemplated a predominantly private, rather than public, use," noting that "[a] beneficial use is not necessarily a public use").[43]

[43] Indeed, the Washington Supreme Court expressly has stated that the courts of its state "have provided a more restrictive interpretation of

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We address separately, and in greater detail, the Illinois Supreme Court's recent decision in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 237-38, because the plaintiffs rely heavily on that case, and its analysis is distinct from the aforementioned decisions of the other states. In that case, the state legislature had created a regional economic development authority to promote industrial and economic development within a geographic project area. *Id.*, 227-28. Under its enabling statute, the plaintiff had the authority to issue bonds and to exercise eminent domain. *Id.*, 228.

A successful and popular racetrack in the plaintiff's region desired to expand its seating and parking capacities. *Id.*, 229. To increase parking, it wished to acquire a large parcel of land from an adjacent metal recycling center owned by the defendant. *Id.* The defendant refused to discuss the matter, and the racetrack never had offered to purchase the land. *Id.* Instead, the racetrack had asked the plaintiff to use its eminent domain powers to take the land and transfer it to the racetrack, with the racetrack paying all expenses for the taking. *Id.*, 229-30. Thereafter, the county legislative body issued the required approval for the plaintiff's use of its eminent domain powers, concluding that expanded parking would be beneficial for the public safety, and also would increase the region's tax revenues. *Id.*, 230. The plaintiff followed with a similar

public use" than have the federal courts. *Manufactured Housing Communities of Washington v. State*, 142 Wn. 2d 347, 359-60, 13 P.3d 183 (2000) (regulatory taking); *see* also *Hogue v. Port of Seattle*, 54 Wn. 2d 799, 827-29, 341 P.2d 171 (1959) (utilizing narrow definition of state public use clause to strike statute allowing eminent domain for industrial development).



resolution. *Id.* Both the plaintiff and the racetrack continued to negotiate with the defendant for the purchase of the property; the negotiations failed and the plaintiff then filed a condemnation petition, which the trial court granted.[“] *Id.*, 231.

On appeal, the Illinois Supreme Court reversed the determination of the trial court. The Supreme Court cited *Berman v. Parker*, *supra*, 348 U.S. 26, and *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 243-44, and undertook initially a generally broad, purposive police power analysis of the plaintiff's exercise of its eminent domain powers. *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 235-36. The court, however, then qualified these statements by stating that "a distinction still exists" between "public use" and "public purpose." *Id.*, 237. Indeed, the court emphasized that "the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right." (Internal quotation marks omitted.) *Id.*, 238. Moreover, the court stated that while it has "also recognized that economic development is an important public purpose . . . to constitute a public use, something more than a mere benefit to the public must flow from the contemplated

[“] In the condemnation action, the trial court heard testimony about the positive public safety impact that the expanded parking would have on severe highway traffic generated by the racetrack, as well as on the benefits that continued racetrack expansion would bring to the region. *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 232-34. The trial court granted the condemnation petition and ordered compensation paid to the defendant; as soon as title vested in the plaintiff, it conveyed the property to the racetrack. *Id.*, 234.

improvement."[45] (Citations omitted; internal quotation marks omitted.) *Id.*, 239.

Ultimately, the court concluded that the taking violated the *public use clauses* of both federal and state constitutions. *Id.*, 235, 240. The court did "not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose. . . . Members of the public are not the primary intended beneficiaries of this taking. . . . This condemnation clearly was intended to assist [the racetrack] in accomplishing their goals in a swift, economical, and profitable manner." (Citations omitted.) *Id.*, 240. The court stated that "[the plaintiff's] true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use."[46] *Id.* It further

[45] Indeed, the Illinois Supreme Court rejected the plaintiff's contention that it is the purpose of the taking alone that controls, noting that "in its wisdom, the legislature has given [the plaintiff] the authority to use eminent domain power to encourage private enterprise and become involved in commercial projects that may benefit a specific region of this state. While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, the government does not have unlimited power to redefine property rights. . . . The power of eminent domain is to be exercised with restraint, not abandon." (Citation omitted; internal quotation marks omitted.) *Southwestern Illinois Development Authority v. National City Environmental, LLC, supra*, 199 Ill. 2d 242.

[46] The court stated that "it appears [the plaintiff's] true intentions were to act as a default broker of land for [the racetrack's] proposed parking plan." *Southwestern Illinois Development Authority v. National City Environmental, LLC, supra*, 199 Ill. 2d 241. The court also dismissed claims of resulting economic benefits as mere "trickle-down" of the racetrack's revenues, stating that "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow [the racetrack] to avoid the open real estate market and expand its facilities in a more cost-efficient

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noted the plaintiff's responsiveness to the racetrack's demands, as well as the lack of planning studies and consideration of other alternatives, such as construction of a parking garage on the existing racetrack property.[47] *Id.*, 241.

We disagree with the plaintiffs' contention that the *Southwestern Illinois Development Authority* stands for the proposition that economic development is never a constitutionally valid public use. Indeed, despite its use of a more restrictive public use standard than the purely

manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public." *Id.*

[47] The opinion in *Southwestern Illinois Development Authority v. National City Environmental, LLC, supra*, 199 Ill. 2d 254, also included a spirited dissent by Justice Freeman, who stated that "contrary to the holdings of *Hawaii Housing Authority* and *Berman*, the majority gives little deference to the legislature's public use determination. Further, the majority engrafts upon *Hawaii Housing Authority* and *Berman* a requirement that property taken by eminent domain be put into use for the public, a proposition specifically rejected by the Court in *Hawaii Housing Authority*. . . . Today's opinion is not an accurate rendition of the holdings of *Hawaii Housing Authority* and *Berman* and of the principles of law involved in this area." (Citation omitted.)

Justice Freeman also supplied a rendition of the facts that he concluded demonstrated the economic benefits of the racetrack and its proposed expansion; *Id.*, 243-53 (Freeman, J., dissenting); and noted what he considered an extreme lack of deference by the majority to "the legislative findings regarding the need to alleviate certain economic, housing and other conditions in the southwestern part of this state . . . [and] that alleviation of these conditions furthers certain public purposes." *Id.*, 261-62 (Freeman, J., dissenting). Ultimately, Justice Freeman concluded in his dissent that "the majority commits great disservice to the State of Illinois and its citizens in engrafting upon the public use doctrine the requirement that property taken by eminent domain must be accessible to the general public as of right. *This requirement is the death of social legislation in furtherance of economic development and revitalization.*" (Emphasis added.) *Id.*, 268.

purposive formulation followed by this court and the United States Supreme Court; *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 243-44; *Olmstead v. Camp*, *supra*, 33 Conn. 546-51; the Illinois decision strikes us more as an illustration of when a court determines that an economic development plan cannot be said to be for the public's benefit. In our view, the facts of *Southwestern Illinois Development Authority* merely demonstrate the far outer limit of the use of the eminent domain power for economic development. Indeed, that decision did not strike the statute allowing the agency to use eminent domain; it merely assailed the agency's exercise of that power within a particularly egregious set of facts. *See Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 240-41 ("clearly the foundation of this taking is rooted not in the economic and planning process with which [the plaintiff] has been charged"). Accordingly, the Illinois decision simply does not persuade us to abandon our conclusion that an economic development plan that the legislature rationally has determined will have the public benefits of increasing employment, tax and other revenues, and spurring the revitalization of a distressed city constitutes a valid public use for the exercise of the eminent domain power under either the state or federal constitution.

Moreover, beyond the case law, we observe that many commentators within the academic community also have addressed the issue of whether economic development satisfies the constitutional public use requirement. Support for both sides of the issue, of course, may be found within this array of law review articles. We note that most, however, tend to express alarm at what they consider to be a situation rife with the potential for abuse of the eminent



domain power. *See*, e.g., J. Lazzarotti, "Public Use or Public Abuse," 68 UMKC L. Rev. 49, 74 (1999) (cautioning against overexpansive interpretation of terms "public use" or "public purpose"; noting "if the only limit on meeting the public purpose requirement is what one can conceive or rationalize, the process is extremely vulnerable to abuse"); S. Jones, note, "Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment," 50 Syracuse L. Rev. 285, 288-89 (2000) (maintaining that private property rights are fundamental and proposing "an analytical framework, whereby the condemnation authority must demonstrate a 'compelling' socioeconomic need in transferring land to private interests").[48] We, however, conclude that responsible judicial oversight over the ultimate public use question does much to quell the opportunity for abuse of the eminent domain power. We, of course, acknowledge the existence of particularly

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[48] *See* also W. Pritchett, "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," 21 Yale L. & Policy Rev. 1, 7 (2003) (examining "how the interaction of renewal advocates and the courts changed legal conceptions of property in the middle of the twentieth century"); J. Klemetsrud, note, "The Use of Eminent Domain for Economic Development," 75 N.D. L. Rev. 783, 813 (1999) (urging, in wake of *Poletown Neighborhood Council*, that the "courts make a more meaningful examination [of] the nature of the proposed condemnation" in economic development eminent domain cases); L. Mansnerus, note, "Public Use, Private Use, and Judicial Review in Eminent Domain," 58 N.Y.U. L. Rev. 409, 411 (1983) (advocating for increased judicial review of public use determinations in public/private takings); D. Werner, note, "The Public Use Clause, Common Sense and Takings," 10 B.U. Pub. Int. L.J. 335, 358 (2001) ("Due to the current state of public use doctrine, the property of minority landowners is insecure. For that matter, any homeowner or small business owner who lacks the political clout to dissuade the government from taking his home or business is at risk.").

egregious cases, such as *Armendariz v. Penman*, *supra*, 75 F.3d 1320-21; *see* footnote 40 of this opinion; *99 Cents Only Stores v. Lancaster Redevelopment Agency*, *supra*, 237 F. Supp. 2d 1129-30, and *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 225. Such cases, however, would be outliers under the formulation that we adopt herein, which requires public economic benefit in order for the use of eminent domain for economic development to pass constitutional muster. As such, those cases are readily distinguishable from projects such as the carefully considered development plan at issue in the present case.[49] We, therefore, conclude that the plaintiffs have not proven beyond a reasonable doubt that the provisions of chapter 132 of the General Statutes authorizing the use of eminent domain are facially unconstitutional when used in furtherance of an economic development plan such as the development plan in the present case.

[49] Moreover, we note that the use of the eminent domain power for economic development certainly is not without support in the academic community. *See*, e.g., M. Harrington, " 'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245, 1249 (2002) (arguing "that attempts to craft devices to encourage judicial oversight of legislative takings are without warrant in the historical record . . . [and] the term 'public use' as used in the Fifth Amendment was meant to be descriptive, rather than proscriptive"); T. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 65 (1986) (discussing economics of and proposing models of judicial review of public use determinations); T. Benedict, note, "The Public-Use Requirement in Washington After *State ex. rel. Washington State Convention & Trade Center v. Evans*," 75 Wash. L. Rev. 225, 226 (2000) (noting confusing array of standards for determining public use and advocating for application of broader public purpose standard).



B

Whether the Public Will Benefit Sufficiently from the Condemnations

The plaintiffs next claim that, even if we were to assume that economic development constitutes a valid public use, the condemnations at issue in the present case do not serve that purpose because, the motives of the development corporation and the city aside, the effects of those condemnations primarily will benefit private entities, namely, the development corporation, Corcoran Jennison and Pfizer.[50] The plaintiffs claim that any public

[50] We note that the plaintiffs claim that the trial court improperly concluded that the parcel 3 condemnations promote sufficient public benefit to be considered in furtherance of the economic development that constitutes the public use in the present case. The plaintiffs also claim that the trial court correctly concluded that the parcel 4A condemnations do not promote sufficient public benefit to be considered in furtherance of the public use. The defendants contend, in response, that the court should not engage in a parcel-by-parcel analysis, and should consider the significant tax and employment economic benefits resulting from the development plan as a whole.

We decline to address the plaintiffs' parcel-specific claims in this context because an appropriate public use analysis necessarily requires evaluation of the development plan as a whole – the end result of the sum of all of its parts. Cf. *Broadriver, Inc. v. Stamford*, 158 Conn. 522, 534, 265 A.2d 75 (1969) ("although the plaintiff's concern is for its own parcel within the redevelopment area, the commission's responsibility was to consider conditions existing in the entire area including such matters as street layouts and the relation and significance of the plaintiff's property to the entire area"), cert. denied, 398 U.S. 938, 90 S. Ct. 1841, 26 L. Ed. 2d 270 (1970); *Pet Car Products, Inc. v. Barnett*, 150 Conn. 42, 52, 184 A.2d 797 (1962) (for urban renewal, "the plaintiff misconceives the agency's responsibility to consider the condition obtaining in the entire area rather than the condition of the individual property"). We will, however, address the plaintiffs' parcel-specific claims in the related context of reasonable necessity; that is, whether the taking of the plaintiffs' property was reasonably necessary to achieve the public purpose of the development plan. *See*, e.g.,

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benefit is incidental and insignificant when compared to the private benefit to those entities that will result from the condemnations. The defendants contend, in response, that the public purpose is not defeated by the transfer of land to private entities, especially when successful achievement of the public purpose of economic development necessarily requires private sector involvement. We agree with the defendants.

We set forth the following additional facts that are relevant to the disposition of this claim. As stated previously, the development corporation will own the property after the condemnation; it will then lease the property to Corcoran Jennison for $1 per year for a term of ninety-nine years. With respect to Pfizer, the plaintiffs point out that it is, in the words of James Hicks, the executive vice president of RKG Associates, the firm that assisted the development corporation in the preparation of the development plan, the "10,000 pound gorilla" and "a big driving point" behind the development project. Specifically, the plaintiffs point out that Pfizer's "requirements"[51] had been

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*Pequonnock Yacht Club, Inc. v. Bridgeport, supra*, 259 Conn. 600-04; *see* parts IV and VI of this opinion.

[51] The term "requirements" was contained in a December, 1997 letter from Claire Gaudiani, the president of the development corporation, to George Milne, the president of Pfizer's research division. In this letter, Gaudiani had stated that the development corporation was "pleased to make the commitments outlined below to enable you to decide to construct a Pfizer Central Research Facility in New London." The letter describes the efforts to "design a land plan to ensure that the new Pfizer facility will be the centerpiece of a concentrated reuse of the area surrounding the former New London Mills." It informs Milne that "in addition to your facility, the project includes the development of the state's fourth biotechnology incubator, the refurbishment of historic Fort Trumbull, the reuse of the vacant Naval Undersea Warfare Center and the development of mixed retail and residential space that will be

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met, namely, the inclusion within the development plan of a hotel for its clients and business associates, upscale housing for its employees, office space for its contractors, and other upgrades to the infrastructure of the general area.

The trial court's memorandum of decision, however, reveals that, although a great deal of consideration was given to the various demands and needs created by the new Pfizer facility, this consideration was given for the purpose of making the development plan more beneficial to the city. Indeed, Hicks testified that Pfizer's announcement was "key" because it was "unusual" for a major employer to move "into an urban area, especially into a brown site . . . that has environmental problems. They tend to go to suburban areas, tend to go to green fields. Finding them coming there just offered a unique property for New London to take advantage of a number of things that would happen at that site for development."[52]

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fully integrated into the surrounding neighborhoods of the city of New London. In order to achieve these goals, it will be necessary to relocate the Calamari Bros. scrap dealer, upgrade utilities and infrastructure, and acquire a number of surrounding properties." The conclusion of the letter states that the development corporation "will work with you to refine this proposal to meet Pfizer's requirements." As the trial court correctly points out, in the letter "no mention is made of a hotel or office buildings . . . or any direct link between new residential construction and any need by Pfizer executives for upscale housing."

[52] Indeed, Hicks testified that "the major gist of the [development corporation's] goals were to expand upon the Pfizer facilities. That is, to have not just Pfizer come in, but other ancillary economic benefits accrue before that. I mean, can you multiply it? Pfizer, with any large company, attracts other users, attracts people to provide them services. If you do what's commonly referred to as an economic analysis, cluster analysis, there's groups of firms and companies that relate to companies that also bring employment. So one of the major goals was to

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Hicks testified that he toured Pfizer's facilities during the development plan preparation process in order to gain a better understanding of its needs and the demands that it created. Pfizer did not tell him what details to add to the development plan, although he had been told that there was a need for a hotel as a result of Pfizer's arrival in the city. Hicks testified, however, that he was never told that Pfizer would not come to the city if the hotel was not built.[53]

The trial court also noted the testimony of William Longa, senior corporate counsel for Pfizer. Longa testified that Pfizer's only conditions for relocating its global development facility to the city were that: (1) the adjacent wastewater treatment facility be upgraded; (2) the state park be restored; and (3) its significant local investment be leveraged into a benefit for the entire city. He stated that Pfizer did make suggestions about "certain functions that the company was involved in that were natural stepping stones that the community could use to its benefit to leverage the investment that the company had made in its

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expand upon Pfizer for the benefit of citizens of New London to improve the tax base, [provide] employment opportunity. . . . *If you've got something that very rarely happens, in my experience, in an urban area, a major corporation moving a lot of jobs, high-paying jobs, it gives you really good opportunities to take advantage of that and expand some of the things that you see in your community.*" (Emphasis added.)

[53] We note that, during the testimony of William Longa, senior corporate counsel for Pfizer, the trial court wondered how Pfizer could move to the city without already having had the hotel and housing plans in place. In response to this, Longa testified that there were sufficient hotels and housing in the general area that already served its facility in nearby Groton. The Groton facility did not have housing and hotels immediately adjacent. Longa, however, testified that the hotels and housing are a significant part of ensuring that the city, rather than just the outlying towns, could take advantage of Pfizer's relocation.



own site." He stated that Pfizer had informed the development corporation of certain needs and demands that it had created, such as the company's guests who would need hotel space and employees who would need places to live.[54]

Longa did testify that Pfizer never made specific demands about the locations of uses within the development plan. Pfizer will not have an ownership or management interest in any of the facilities located within the development plan area. The trial court also observed that the team who had drafted the development plan considered alternatives that did not fit the needs communicated by Pfizer. Indeed, the development plan itself does not mention Pfizer's desires in the section describing its reasoning for choosing the final of the six alternatives.

The trial court acknowledged an October 21, 1998 e-mail to George Milne, president of Pfizer's research division, from James Serbia, a Pfizer employee involved in the development and management of company facilities. In the e-mail, Serbia indicated that he had left Milne with some concept drawings because of "some confusion" about Pfizer's "expectations" regarding the development of the Fort Trumbull area. The e-mail stated that Serbia thought the issue "boils down to . . . whether or not Pfizer is flexible regarding the development plans – I believe the answer is yes per all our previous discussions on this – as

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[54] The trial court also noted the testimony of James Mahoney, executive director of the development corporation from 1992 to 1998. Mahoney testified that the development corporation interacted with Pfizer during the environmental impact evaluation process, as part of a market analysis intended to determine appropriate uses for the development plan area. Pfizer did at this time inform them of the demand for hotel, conference and residential space that its presence would create.

long as some key components are included." It listed attractive residences, hotel and conference space, and upgrades to the wastewater treatment plant, state park and commercial space as "key components." Serbia then asked Milne whether the following items would fit with his "expectations" – seventy to eighty upscale residential units, and a 250 unit hotel. The trial court noted that the development plan incorporates these features.[55]

The trial court relied on *Katz v. Brandon*, *supra*, 156 Conn. 531-34, and *Bugryn v. Bristol*, 63 Conn. App. 98, 107-108, 774 A.2d 1042, cert. denied, 256 Conn. 927, 776 A.2d 1143, cert. denied, 534 U.S. 1019, 122 S. Ct. 544, 151 L. Ed. 2d 422 (2001), to begin with the proposition that a taking of land is impermissible if it is made primarily to benefit private interests. In other words, the primary purpose of the taking must be to serve the public interest; benefits to private entities must be incidental to this public purpose. The trial court also relied on *Merrill v. Manchester*, *supra*, 127 N.H. 237, for the use of a "net benefit" test, under which the "benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, [are] reduced by the social costs of the loss of the property in its present form. If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use."

[55] The e-mail indicated that the state did not want to locate new residences in a floodplain area, or condemn existing residential areas to replace them with more upscale housing. The e-mail did not mention office space or the need to clear the entire Fort Trumbull area of existing residences and businesses, which were the needs that precipitated the need for the condemnations in the present case.



The trial court considered the facts in the context of these principles and concluded that, viewed in the context of the severe economic distress faced by the city, with its rising unemployment and stagnant tax revenues, the benefits to the city will outweigh those to Pfizer. The court noted that the hotel, with many of its rooms subsidized by Pfizer, will employ many people at a variety of skill levels, which would tie into the city's desire to rejuvenate its downtown area. The court did note that the concentrated high end housing would not likely have a "multiplier" effect, but would increase the tax rolls.

With respect to parcels 3 and 4A, the trial court noted that Pfizer did not press for the development of these parcels, or demand office space. Thus, with respect to these parcels, Pfizer would only "tangentially benefit" from their development. The court, therefore, concluded that the primary motivation for the city and the development corporation was to take advantage of Pfizer's presence,[56] and that the primary motivation and effect of the development plan and its condemnations was to benefit the distressed city, not Pfizer.

Moreover, with respect to private entities besides Pfizer, the trial court concluded that "there is nothing in the record to indicate that as regards this project as a whole or considering parcel 3 and its planned office building separately . . . the city or the development corporation

[56] The trial also court [sic] quoted the proposition in *Katz v. Brandon*, *supra*, 156 Conn. 533, that "in this day of keen competition to attract industry and business to a state or to a particular locality, public officials are expected to cooperate in helping an industry to locate in their community. They must be at all times alert in providing for future as well as present needs." (Internal quotation marks omitted.)

[was] motivated by a desire to aid particular private entities." The trial court noted that tenants for the office space had not been chosen, Corcoran Jennison was selected as developer from a group of applicants, and that the project was linked to the "rejuvenation of the downtown area." Although the trial court acknowledged the "social cost"[57] of the implementation of the development plan, the court ultimately "failed to see a relevant constitutional distinction between redevelopment cases and a situation such as this where the very fact of permitting economic development by private entities permits an economically struggling city to attempt to rejuvenate its downtown area, increase its job market, improve its housing stock and give it sufficient tax money to meet its needs."

A trial court's determination that the legislative authority primarily intended a taking to benefit the public interest, rather than a private entity, is a question of fact that we review pursuant to the clearly erroneous standard of review. *Bugryn v. Bristol*, *supra*, 63 Conn. App. 103 (applying clearly erroneous standard to trial court's determination that benefiting local manufacturer was not primary purpose for taking). It is well established that "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

[57] The trial court was not, and we are not, blind to the social costs of the development plan in the present case. In the words of the trial court: "An old New London neighborhood with all of its memories, in effect, has been destroyed. People like the plaintiffs have been or might yet be removed from homes they love and in some cases from homes where their families have lived for generations."



that a mistake has been committed." (Internal quotation marks omitted.) *DiMartino v. Richens*, 263 Conn. 639, 661, 822 A.2d 205 (2003).

We begin our review of the trial court's finding with the proposition that the power of eminent domain must be used for a public use or purpose, and not primarily for the benefit of private entities. Moreover, "where the public use which justifies the taking of the area in the first instance exists . . . that same public purpose continues even though the property is later transferred to private persons." (Internal quotation marks omitted.) *Bugryn v. Bristol*, *supra*, 63 Conn. App. 104, quoting *Broadriver, Inc. v. Stamford*, 158 Conn. 522, 533-34, 265 A.2d 75 (1969), cert. denied, 398 U.S. 938, 90 S. Ct. 1841, 26 L. Ed. 2d 270 (1970); *see* also *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 143-44. Although the courts afford great deference to the legislature's public use or purpose determination; *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 244; *Olmstead v. Camp*, *supra*, 33 Conn. 551; the public use question remains ultimately a judicial question. *New York, N.H. & H.R. Co. v. Offield*, *supra*, 77 Conn. 421. That element of judicial review, however deferential, would be hollow in the absence of a standard by which the courts can determine intelligently whether the public interest is paramount. Accordingly, we agree with the trial court's utilization of a purposive standard that also takes into account the actual public benefit from the taking.[58]

[58] We take the opportunity, however, to state that the trial court's social costs analysis was an improper, but in this case, harmless, supplantation of a decision-making function better suited to legislative bodies. Although the courts remain charged with determining whether the facts and circumstances of the particular case reveal that the

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Thus, we conclude that an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public. *See Katz v. Brandon*, *supra*, 156 Conn. 534 ("there is nothing in the record to indicate that any conveyance of land has been made to [a manufacturing corporation] or that any agreement or understanding exists which would provide it with any advantage which is not available to others who may be interested as redevelopers"); *Bugryn v. Bristol*, *supra*, 63 Conn. App. 104 ("even if the taking [for an industrial park, an undisputed public use] would later provide a site for [a major local company], a consequence that would be neither undesirable to the defendants nor adverse to the goals that the park plan seeks to achieve, that fact would not support the plaintiffs' claim [of private taking] in light of the ample evidence in the record concerning the plan as a whole"); *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227, 232 (Del. 1986) ("A primary purpose determination in a constitutional context will normally turn upon the 'consequences and effects' of a proposed project. However . . . a reviewing court may consider evidence concerning the 'underlying purpose' of a public authority in proposing a project.");[59] *Jamestown v. Leevers*, *supra*, 552 N.W.2d 367

primary purpose of the taking is to benefit the public, the balancing of the benefits and social costs of a particular project is uniquely a legislative function.

[59] Indeed, *Wilmington Parking Authority v. Land With Improvements*, *supra*, 521 A.2d 232-34, is noteworthy as another example of the role of judicial review in curtailing the abusive use of the power of eminent domain; it is an excellent illustration of the line between public and private takings. In that case, a parking authority attempted to take

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(recognizing economic development as public use, but remanding for finding as to "whether the primary object of the development project was for the economic welfare of downtown Jamestown and its residents rather than for the primary benefit of private interests").

Applying this standard to the present case, we conclude that the trial court's finding that the takings were not primarily intended to benefit a private party, namely, Pfizer, is not clearly erroneous. The trial court's finding derives ample support from the record, particularly the fact that Pfizer's "requirements," complained of by the plaintiffs, do not impact parcels 3 and 4A. Moreover, the testimony of Hicks, Longa and James Mahoney, executive director of the development corporation, supports the trial court's conclusion that Pfizer did not dictate the form of the development plan. Although it is undisputed that Pfizer's presence spurred many of the plans within the development plan, we view this factor as did the trial court; Pfizer's arrival in the city afforded the development corporation an opportunity to create an economic

land ostensibly for garage construction, but then intended to transfer it to a neighboring newspaper company. *Id.*, 229. The newspaper company would use the land for facility expansion, but the parking authority would pay the newspaper company for the air rights over the land, and construct a garage there. *Id.* The trial court blocked the parking authority's use of eminent domain for this purpose. *Id.*, 230.

On appeal, the Delaware Supreme Court concluded that the trial court did not commit clear error when it concluded that the parking authority acted beyond its statutory authorization because "the primary purpose of the project was to retain [a newspaper company] as a corporate citizen rather than to provide the public with parking facilities." *Id.*, 234. The court also considered that other parking authority actions would dispose of 500 public parking spaces, offsetting the projected gain of 950 new spaces, of which 10 percent were reserved automatically for newspaper company employees. *Id.*

development plan that would go a long way toward the rejuvenation of a distressed city. Indeed, had the development corporation failed to consider demands created by the new Pfizer facility, its planning would have been unreasonable.

Moreover, the trial court correctly identified the ample public benefits that the development plan, once implemented, was projected to provide. Assuming them to be correct,[60] the development plan projected the generation of hundreds of construction jobs, approximately 1000 direct jobs, and hundreds of indirect jobs. Moreover, the property tax revenues are expected to be between $680,544 and $1,249,843; this would be a significant increase for an area that presently produces $325,000 in property taxes. Most importantly, as the trial court astutely observed, these gains would occur in a city that, with the exception of the new Pfizer facility that employs approximately 2000 people, recently has experienced serious employment declines because of the loss of thousands of government and military positions. As the trial court noted, the city's unemployment rate is close to double that of the rest of the state. Indeed, as the trial court observed, the city's regional labor market was up 17 percent, in comparison to 45 percent for the region and 40 percent for the state as a

[60] Cf. *Donahue v. Southington*, *supra*, 259 Conn. 795 (in equal protection context, "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker" [internal quotation marks omitted]); *Franklin Furniture Co. v. Bridgeport*, 142 Conn. 510, 514-15, 115 A.2d 435 (1955) ("while recitals of fact in a legislative act may not be conclusive, a decent respect for a coordinate department of the government requires the courts to treat them as true until the contrary appears").



whole. In light of these staggering economic figures, we conclude that the trial court did not commit clear error when it found that the development plan primarily was intended to benefit the public interest, rather than private entities.

The plaintiffs claim that "the purpose put forward by the defendants for these condemnations is that greater taxes will be generated if plaintiffs' homes are replaced by office buildings. That is true of nearly every home in the country. If greater tax revenues alone becomes a sufficient basis for condemnations in Connecticut, then Connecticut homeowners will lack any constitutional protection against eminent domain. Any home will be up for grabs to any private business that wants the property." This claim, while somewhat incalescent, affords us the opportunity to reiterate that an exercise of the eminent domain power is unreasonable, in violation of the public use clause, if the facts and circumstances of the particular case reveal that the taking specifically is intended to benefit a private party. Thus, we emphasize that our decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.

C

Assurances of Future Public Use

The plaintiffs next contend that the condemnations of the properties on parcels 3 and 4A lack "reasonable

assurances of future public use."[61] Before we turn to the specifics of the plaintiffs' claim, we note that both the plaintiffs' briefs and our research reveal no primary or secondary authorities that actually utilize the term "reasonable assurances of future public use." Nevertheless, the plaintiffs, relying primarily on *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 354-58, 727 A.2d 102 (1998), contend specifically that there is no assurance that the acquired properties will be used in accordance with the purposes of the development plan, because the development corporation owns the property, the city will not be a party to the development agreement with Corcoran Jennison, and the ultimate property uses will thus be chosen by private entities. The plaintiffs also claim that the trial court improperly concluded that supervision of the development corporation by the department, pursuant to chapter 132 of the General Statutes, will assure the future use of the property in accordance with the development plan because that supervision is financial and does not extend to the use of eminent domain. Finally, the plaintiffs claim, solely in regard to parcel 4A, that it is impossible to find reasonable assurances of future public use when the condemnor does not know what it is going to do with that parcel. The defendants contend in response that: (1) the development plan contains land use restrictions that assure future uses

[61] The trial court determined that the taking of parcel 4A was not reasonably necessary, and therefore only discussed the reasonable assurances of future public use for parcel 3. Accordingly, on appeal the plaintiffs claimed only that parcel 3 lacked reasonable assurances of future public use. In response to the defendants' cross-appeal, however, the plaintiffs expanded their argument to include parcel 4A and, therefore, we will address them together.



will be consistent with its purpose; and (2) land projects such as the development plan require time to complete; in other words, that "Fort Trumbull will not be built in a day." We agree with the defendants.

We first set forth the standard of review. A trial court's determination that there are sufficient statutory and contractual constraints in place to provide reasonable assurances of future public use is a question of fact, and "our review is limited to deciding whether such findings were clearly erroneous." *Powers v. Olson*, 252 Conn. 98, 105, 742 A.2d 799 (2000). It is well established that "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *DiMartino v. Richens*, *supra*, 263 Conn. 661.[62]

[62] The dissent claims that this court, sub silentio, is overruling the holdings of *Connecticut College v. Calvert*, 87 Conn. 421, 88 A. 633 (1913), and *Evergreen Cemetery Assn. v. Beecher*, 53 Conn. 551, 5 A. 353 (1886). More specifically, the dissent cites those two cases for the proposition that "the question whether in any given instance the use is or will be administered as a public or as a private use, is a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand." *Connecticut College v. Calvert*, *supra*, 428. Contrary to the dissent's claim, our conclusion in the present case is consistent with the principles set forth in those two cases.

We disagree with the dissent, however, on the appropriate standard the trial court should apply to the plaintiffs' claim of lack of reasonable assurance of future public use. We conclude that the trial court's factual determination about the statutory and contractual constraints on future public use is subject to the clearly erroneous standard of review. The dissent, to the contrary, proposes a new four step process of review

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In the present case, the trial court concluded that the city's lack of future involvement does not mean that the development corporation and the developers are not bound to use the property in accordance with the terms of the development plan. The trial court stated that the state, functioning through the department, is a signatory to the development agreement; it "provides the funding without which nothing goes forward."[63] The court then discussed

in which one of the steps would require the development corporation to prove by clear and convincing evidence that the specific economic development contemplated by the plan will, in fact, result in a public benefit. This step essentially subjects the plaintiffs' lack of reasonable assurances argument to an evidentiary standard that no other court, or even the plaintiffs themselves, has set forth. Furthermore, this court knows of no other area of the law where we, or any other courts, have imposed a clear and convincing standard on a prediction of future events. As the dissent itself makes clear, even in other civil cases involving property disputes, the clear and convincing standard is reserved for *past events,* and not for predictions of *future events. See,* e.g., *Wildwood Associates, Ltd. v. Esposito,* 211 Conn. 36, 42, 557 A.2d 1241 (1989) (clear and convincing evidence required to prove elements of adverse possession claim). Additionally, it is hard for this court to imagine how any plan, proposed and adopted according to the provisions of chapter 132 of the General Statutes, would be able to prove that the economic development will, in fact, occur in the future. Thus, there is simply no basis, in reason, precedent, policy or practicality for the dissent's proffered standard.

[63] The trial court also referred to its findings on the delegation issue; *see* part III of this opinion; wherein the court concluded that pursuant to chapter 132 of the General Statutes, there is substantial state oversight of the operations of the development corporation with respect to the implementation of the development plan. Specifically, the court discussed § 8-189 (development plan must conform to department regulations), General Statutes § 8-190 (department may make planning grants and advise development agency), General Statutes § 8-191 (department must approve final development plan if state grants have been made), General Statutes § 8-193(a) (if state grants have been made, department and city must approve land transfers by sale or lease in accordance with plan), and General Statutes § 8-200(a) ("substantial"

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several provisions of the development plan that assure that future land use will be on the terms contained therein, namely: (1) the durational clause providing that "the development plan and/or any modification hereof shall be in full force and effect for a period of thirty years from the date of first approval of this development plan by the city council of the city"; and (2) other land use restrictions contained therein.[64] The trial court concluded that, were a developer to violate these provisions, the development corporation could turn to the courts for relief; should the development corporation refuse to do so, the city could then terminate its arrangement with the development corporation and appoint a new development agency.

changes to development plan require approval in same manner as original plan). In discussing the delegation issue, the trial court noted that the state is a signatory to the development agreement, and it concluded that it "strained credulity to believe that the state . . . will not (1) have the wherewithal to control the activities of the [development corporation] to a sufficient degree so as not to allow that agency to be characterized as being able to act according to its own 'will and caprice'; and will not (2) have the ability to ensure through the development agreement that the developer and the [development corporation] will seek to meet the goals and purposes of the [development plan], which the commissioner had to approve in the first place. . . ."

[64] The development plan provides, in addition to an antidiscrimination clause, that the redeveloper must "[agree] for itself and its successors and assigns as successors in interest to the parcel, or any part thereof, that the deed conveying the Parcel shall contain language covenanting on the part of Redeveloper and its successors and assigns that: "The Parcel shall be devoted principally to the uses contemplated by the Plan, and shall not be used or devoted for any other purpose, or contrary to any of the limitations or requirements of said Plan. *All improvements made pursuant to the Plan and this Agreement shall be used in accordance with the Plan unless prior written consent is given by the [development corporation] and [department] for a different use*;

"The Parcel shall not be sold, leased, or otherwise disposed of for the purposes of speculation." (Emphasis added.)

We conclude that the trial court properly determined that there are sufficient statutory and contractual constraints in place to assure that private sector participants will adhere to the provisions of the development plan. We agree with the trial court that the terms of the development plan providing parcel-specific land uses, to which private developers participating in the project must adhere, provide significant control over the destiny of the parcels. *See* footnote 64 of this opinion. We also conclude that the trial court properly determined that the significant state involvement in this project, mandated by chapter 132 of the General Statutes, functions to provide a level of governmental oversight beyond that provided by the development corporation. *See* footnote 63 of this opinion. Finally, we conclude that despite the lack of formal commitments to the use of parcel 4A, there are sufficient assurances that the public use of the development plan will be carried out. We, therefore, reject the plaintiffs' claim that the existence of the development agreement requiring that the property be "primarily" developed in accordance with the development plan, which is in effect for thirty years, is no assurance because only the development corporation may enforce it.[65]

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[65] Although the present case provides no occasion for a complete exploration of the mechanisms for judicial enforcement of the development plan under chapter 132 of the General Statutes, it is elementary that the terms of the development plan, like any other "legal obligation may, of course, be dishonored. That is one reason why courts exist." *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 589, 87 A.2d 139 (1952). Although we need not address its precise workings, there is "ample judicial machinery"; *id.*; available for enforcement of the development agreement and the development plan, in the event of breach of their terms by either the development corporation or private developers.



Accordingly, the plaintiffs' reliance on *Casino Reinvestment Development Authority v. Banin*, *supra*, 320 N.J. Super. 342, is misplaced. In that case, the casino development authority had sought to take properties by eminent domain for the declared purpose of providing parking, green space and roadway access to an adjacent renovated hotel and casino complex owned by Trump Plaza Associates (Trump). *Id.*, 347. After the taking, the land would be transferred to Trump for redevelopment. *Id.* The court concluded that the primary consequence and effect of the taking was to benefit Trump because there was no adequate assurance that the property would be used by Trump for those purposes declared as justifications for the taking.[66] *Id.*, 355-56. In so concluding, the court noted that the agreements between the casino authority and Trump did not: (1) impose time restrictions on changes in the land use; or (2) require expressly that Trump use the acquired properties solely for the purpose for which they were taken; rather, they used the language "hotel development project and appurtenant facilities." *Id.*, 356.

The New Jersey court interpreted the "overbroad" term of "hotel development project and appurtenant facilities" as allowing Trump "to eliminate the park and fill the entire block with an expanded casino hotel . . . without [casino development authority] approval." *Id.* The court, therefore, concluded that the casino development authority's determination that the takings "fulfilled a public

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[66] Indeed, the court distinguished the project from "redevelopment projects . . . with the public agency identifying and putting together an assemblage of land in order to attract a developer" because all of the other land already was owned by the existing neighboring hotel and casino. *Casino Reinvestment Development Authority v. Banin*, *supra*, 320 N.J. Super. 355.

purpose" was unreasonable because, "in looking at the consequences and effects of these condemnation actions the court must conclude that under the circumstances present here, any potential public benefit is overwhelmed by the private benefit received by Trump in the form of assemblage and future control over development and use of parcels of prime real estate in Atlantic City."[87] *Id.*, 358; *see* also *Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (The taking of property for the construction of a riverboat casino was impermissible when the "city failed to provide conditions, restrictions, or covenants in its contract with [the casino] to ensure that the property will be used for the purpose of gaming enterprise or other related establishments. In fact, testimony indicates that [the casino] may do anything it wishes with [the defendant's] property. . . .").

Thus, we conclude that the plaintiffs' reliance on *Casino Reinvestment Development Authority v. Banin*, *supra*, 320 N.J. Super. 342, is misplaced because of the previously discussed controls that exist by statute and under the development plan in the present case, particularly when compared to the flexibility that impermissibly was afforded to the private entities in that case and in *Vicksburg v. Thomas*, 645 So.2d 943. The oversight and rigorous land use restrictions that are present with the

[87] The court stated that, in *Casino Reinvestment Development Authority v. Banin*, *supra*, 320 N.J. Super. 357, "a public agency, through the power of eminent domain, if successful, will have effectively created an assemblage of land for future development by Trump under circumstances where [the casino authority] could not do so under [the enabling statute] and where Trump is unable or unwilling to do so itself on the open market."



development plan simply did not exist in *Casino Reinvestment Development Authority*.[88]

## III

## WHETHER THE DELEGATION OF THE EMINENT DOMAIN POWER TO THE DEVELOPMENT CORPORATION WAS UNCONSTITUTIONAL

The plaintiffs next claim that the trial court improperly concluded that the city's delegation of the eminent domain power to the development corporation was constitutionally valid. Specifically, the plaintiffs contend that, in concluding that the delegation was constitutional, the trial court incorrectly determined that the development corporation satisfied the test for the constitutionality of delegations set forth in *Connecticut College v. Calvert*, 87 Conn. 421, 427, 88 A. 633 (1913), and *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 144-45. The defendants claim, in response, that the delegation in the present case is constitutionally valid because the development corporation is the city's statutorily authorized agent for the implementation of the development plan, a constitutionally valid public purpose, and is not acting to further its own operations. We agree with the defendants.

The record reveals the following additional undisputed facts relevant to the disposition of the plaintiffs' delegation claim. The development corporation is a

[88] Moreover, we also reiterate our previous conclusion that the public use or purpose in the present case is, in the first instance, the plan to induce the significant economic growth projected as a result of private sector development spurred by the terms of the development plan. As the defendants note correctly, such growth necessarily requires time to occur.

Connecticut nonprofit, private economic development corporation that originally was formed in 1978, and reactivated in 1997. In May, 1998, pursuant to General Statutes § 8-188,[69] the city council had adopted a resolution approving the designation of the development corporation as the city's "development agency" or "implementing agency." Thereafter, in January, 2000, the city council approved the development plan as conceived by the development corporation,[70] and appointed the development corporation to implement the development plan.[71] The

[69] General Statutes § 8-188 provides: "Any municipality which has a planning commission is authorized, by vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency and exercise through such agency the powers granted under this chapter, except that the Quinnipiac Valley Development Corporation, organized and existing by virtue of the provisions of number 625 of the special acts of 1957, may be designated as a development agency, for the purposes of this chapter, to act as such within the geographical area specified in section 2 of said special act. Any municipality may, with the approval of the commissioner, designate a separate economic development commission, redevelopment agency or nonprofit development corporation as its development agency for each development project undertaken by the municipality pursuant to this chapter."

[70] The development plan, as approved by the city council prior to its authorization of the development corporation to use eminent domain, expressly listed those properties needed for its implementation.

[71] The January, 2000 resolution specifically stated that "the New London City Council hereby resolves: (1) That the [development plan] is hereby approved. . . .

"(6) That to carry out and administer the project, public action under Chapters 130, 132 and 588(*l*) of the Connecticut General Statutes as amended is required; and, for the purposes of carrying out this project, that the New London City Council approves and bestows upon the [development corporation] all rights and powers that are permitted to accrue to a development agency or implementing agency under Chapters 130, 132, and 588(*l*) of the Connecticut General Statutes as

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January, 2000 resolution also expressly had authorized the development corporation, in the city's name, pursuant to § 8-193(a), to use the power of eminent domain within the project area if necessary to acquire properties for development. *See* footnote 71 of this opinion. Subsequently, in October, 2000, the development corporation enacted a resolution that exercised its power of eminent domain to acquire, in the city's name, certain properties within the project area, including those of the plaintiffs.[72] Indeed, we

amended, including the power of eminent domain with the project area in the name of the City of New London per Chapter 130, Section 8-128, and Chapter 132, Section 8-193."

[72] The October, 2000, development corporation resolution provided in relevant part: "WHEREAS, the New London City Council has designated the [development corporation], a nonprofit development corporation, as its development agency pursuant to the Connecticut General Statutes, and

"WHEREAS, the [development corporation] has prepared a project plan for [development plan] Area pursuant to Section 8-189 of the Connecticut General Statutes, and

"WHEREAS, the project plan for the [development plan] Area has been duly approved and adopted pursuant to Section 8-191 of the Connecticut General Statutes, and

"WHEREAS, it is necessary to acquire certain properties located in the [development plan] Area of [the city] in order to carry out and administer said project plan, and

"WHEREAS, pursuant to Section 8-193 of the Connecticut General Statutes the [development corporation] has the approval of the New London City Council to acquire by eminent domain properties within the [development plan] Area.

"NOW, THEREFORE, IT IS RESOLVED that the [development corporation], in the name of the [city], acquire certain properties located in the [development plan] Area of [the city] through the exercise of the power of eminent domain as granted to it under Chapter 132 of the Connecticut General Statutes. Said properties are more particularly described. . . .

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note that the development corporation resolution emphasized specifically the city's approval of the use of eminent domain, pursuant to § 8-193.

The trial court concluded that "from the perspective of political control over the [development corporation] by the city's legislative body, it can hardly be said that the [development corporation] vis-a-vis that entity is some free-wheeling private body attendant to its own affairs and acting as only it sees fit."[73] The trial court then cited the analysis of *Connecticut College v. Calvert*, *supra*, 87 Conn. 427, 430, as discussed in *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 144, for the proposition that "the exercise of eminent domain by the government itself or a public agency thereof is different from its exercise by a private person to whom the government has granted the power. And, in the second place, the basis of the decision is . . . that when a private person is granted the power to appropriate property, it must be for a use to which 'the public will have a common right upon equal terms, independently of the will or caprice of the corporation.'" The trial court then stated that this court, in *Gohld Realty Co.*, seemed to

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"IT IS FURTHER RESOLVED, that the [development corporation] take such steps as are necessary to effectuate such acquisition in the manner provided in Sections 8-128 through 8-133 of the Connecticut General Statutes."

[73] The plaintiffs also had argued in the trial court that the development corporation was entirely a private entity not subject to control by the state or city governments, and that the benefits of its actions accrued wholly to private parties, such as Corcoran Jennison. The trial court rejected these arguments after reviewing the extensive statutory framework under chapter 132 of the General Statutes governing the development corporation's use of eminent domain. *See* footnote 63 of this opinion. On appeal, the plaintiffs challenge only the trial court's constitutional analysis.



presume, without actually ruling, that an urban redevelopment agency is a public agency, before it concluded that blight removal was a public use in and of itself, regardless of the subsequent transfer to private developers. *Id.*, 145. On the basis of its analysis of the statutory framework governing the operation of the development corporation; *see* General Statutes §§ 8-188, 8-189 and 8-193(a); the trial court then concluded that it did not accept the plaintiffs' delegation argument because: (1) it deemed the development corporation more a public agency than a private entity; and (2) the public use prong of the test was more appropriately analyzed in the context of whether economic development was a public use.

We first set forth the appropriate standard of review. The plaintiffs' claim involves only the trial court's application of the constitutional standard of *Connecticut College v. Calvert*, *supra*, 87 Conn. 427, 430, to the undisputed facts. Our review of this question of law, therefore, is plenary. *See*, e.g., *Cunha v. Colon*, 260 Conn. 15, 18 n.6, 792 A.2d 832 (2002).

Our analysis begins with a brief review of this court's decision in *Connecticut College v. Calvert*, *supra*, 87 Conn. 427-30. In *Connecticut College*, the petitioner had challenged an act whereby the legislature had granted the right of eminent domain to a private educational corporation. *Id.*, 423. The court "accepted and endorsed the legislative declaration that the higher education of women is in its nature a public use," stating, however, that "the question whether in any given instance the use is or will be administered as a public or as a private use, is a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand." *Id.*, 428. The court relied on *Evergreen Cemetery*

*Assn. v. Beecher*, 53 Conn. 551, 552-53, 5 A. 353 (1886), in which this court refused to permit a private cemetery association to take land by eminent domain for cemetery purposes,[74] and stated that the fundamental inquiry in cases of the delegation to private parties is "whether it appears that the public will have a common right upon equal terms, *independently of the will or caprice of the corporation*, to the use and enjoyment of the property sought to be taken." (Emphasis added.) *Connecticut College v. Calvert*, *supra*, 430. The court expanded further, stating that "the right of eminent domain cannot constitutionally be delegated to a private person or corporation unless for a use which is governmental in its nature, and unless the public has or can acquire a common right on equal terms to the use or benefit of the property taken; *except only that the use, or right of use by the public, may be dispensed with when a public benefit results from the taking, which cannot otherwise be realized, and which*

[74] In *Evergreen Cemetery Assn. v. Beecher, supra*, 53 Conn. 552, this court acknowledged the public necessity of the proper burial of the dead, as a matter of "the safety of the living. . . ." The court also noted that the legislature provided for associations to exist with power to provide, maintain and protect public burial places, and that "the use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some." *Id.*, 553.

The court also noted that the cemetery association was a private facility not necessarily open to all, a category of cemetery whose "proprietors . . . cannot take land for such continued private use by right of eminent domain." *Id.* It, therefore, was distinguishable from public access cemeteries, as well as privately operated mills, toll roads and bridges, which, while they benefit their private operators, "[remain] a public use as long as all persons have the same measure of right for the same measure of money." *Id.* The court, therefore, denied the cemetery association's petition to take land by eminent domain. *Id.*



*continues to exist although the public has no use or benefit of the property taken.*" (Emphasis added.) *Id.*, 435.

The cou applied this principle, and concluded that, even having accepted the college's argument that "the higher education of women is a matter of great public utility"; *id.*, 436; the public would not necessarily have the right to enjoy the benefits of the land because the college did not have a legal obligation to admit "to its courses of instruction all qualified candidates, to the extent of its capacity, without religious, racial, or social distinction." *Id.*, 435-36. The court relied on a series of sister state public spending cases that distinguished private colleges like Connecticut College from public universities open to all qualified candidates, ultimately concluding that the grant of the eminent domain power was unconstitutional because of the exclusively private benefits from that grant of the eminent domain power to a private condemnor. *Id.*, 438-39.

We most recently restated the rule of *Connecticut College* in *Carofano v. Bridgeport*, 196 Conn. 623, 632, 495 A.2d 1011 (1985), wherein this court rejected a claim that General Statutes § 7-473c, the mandatory binding arbitration statute, was an unconstitutional delegation of the legislative power because "the arbitrators are not public officials accountable to the electorate." The court in *Carofano* discussed, inter alia, delegations of the eminent domain power, and cited *Connecticut College* as standing for the proposition that "the delegation of the governmental power of eminent domain to private persons rather than to public officials has frequently been approved where *a public purpose is thereby advanced and where the benefit of the property taken is considered to be available to the general public.*" (Emphasis added.) *Id.*, 633. Indeed,

this court "perceived no inherent vice that should preclude enlistment by the legislature of private individuals or agencies to achieve a public purpose by the exercise of a governmental power so long as adequate safeguards are provided. Although elected officials and those appointed by them as public officers may be more directly answerable to the electorate for their doings, the principle of accountability remains viable in the ability of legislators to terminate or modify any delegation of legislative power that has been made and in the ultimate authority of the people to change the law by electing those amenable to the public will." *Id.*, 633-34.

Although *Carofano v. Bridgeport*, *supra*, 196 Conn. 633-34, is not an eminent domain case, we find persuasive its rearticulation of the *Connecticut College* formulation that is applicable when the eminent domain authority has been delegated to a private entity. Its emphasis on public purpose and benefit is more harmonious with the well established purposive approach that we follow presently in resolving questions of public use, than the claim that *Connecticut College* requires actual access by the public. *See*, e.g., *Olmstead v. Camp*, *supra*, 33 Conn. 551. Indeed, this court implicitly recognized this in *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 143-44, when the court concluded that the rule of *Connecticut College* did not apply because, "if the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums, that same public use continues after the property is transferred to private persons. The public purposes for which the land was taken are still being accomplished." Moreover, the *Carofano* approach to delegation analysis is especially compatible with the concept that many governmental endeavors, such



as economic development or urban renewal, may be accomplished more expeditiously when governmental authorities are afforded the opportunity to utilize the expertise and resources of the private sector. Accordingly, we conclude that *Carofano* sets forth the appropriate standard to apply to the eminent domain delegation in the present case.

We now apply the *Connecticut College* standard, as articulated in *Carofano v. Bridgeport*, *supra*, 196 Conn. 633-34, to the delegation in the present case.[75] At the outset, we note that it is undisputed that the development corporation is a private entity. We next turn to the second prong, which itself is bifurcated into two factors: (1) whether "a public purpose is thereby advanced"; and (2) "where the benefit of the property taken is considered to be available to the general public." *Id.*, 633. Accordingly, we also note that we previously have concluded that the development plan in the present case constitutes an economic development plan that is, by itself, a public use or purpose under either the federal or state constitution. *See* part II A of this opinion. The "advancing a public purpose" factor, therefore, is satisfied because the delegation effectuates the public purpose directly, by giving the development corporation the power to acquire real property for the implementation of the development plan.

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[75] The power of eminent domain, which emanates from the *state* legislature; *see*, e.g., *Northeastern Gas Transmission Co. v. Collins*, *supra*, 138 Conn. 586-87; initially had been granted to the city through chapter 132 of the General Statutes. *See* General Statutes §§ 8-186, 8-193(a) and 8-199. The plaintiffs did not challenge this initial grant to the city, only the subsequent grant from the city to the development corporation.

A more complex inquiry in the present case, however, is whether "the benefit of the property taken is considered to be available to the general public." *Carofano v. Bridgeport*, *supra*, 196 Conn. 633. The plaintiffs claim that, under *Connecticut College*, availability to the general public requires public entrance into, or the benefits of tenancy in, the office buildings planned for construction on parcel 3. They further claim that such direct benefit is unavailable because the tenants will be selected solely by Corcoran Jennison, and not the development corporation or the city.[76] The defendants contend, in response, that direct access is not required because the public use of economic development necessarily requires the development corporation to turn the property over to private developers and their tenants, and that the development corporation is, unlike the college in *Connecticut College*, not acting in furtherance of its own benefit. We agree with the defendants.

We note that the *Connecticut College* rule as stated in *Carofano*, requires only that the "benefit" of the taking be available to the general public. *Id.* We conclude that the public benefit of the taking in the present case is the dramatic economic benefit that the development plan is expected to have for the public in the New London community, namely, the massive projected growths in employment and tax and other revenues. Indeed, the rule of *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 144, is particularly applicable, because in the present case, the public use and benefit in the first instance is the economic

[76] Goebel testified that Corcoran Jennison will select the tenants for the office buildings; the development corporation has no say over who the tenants will be.



revitalization; accordingly, that "same public use continues after the property is transferred to private persons. The public purposes for which the land was taken are still being accomplished." *Id.*, 143-44.

Moreover, in the present case, the development corporation is not acting exclusively for its own benefit, unlike in *Connecticut College*, wherein the college sought to acquire property to further its own operations. *Connecticut College v. Calvert*, *supra*, 87 Conn. 423-24. In the present case, the development corporation is acting to implement a development plan whose property acquisition provisions already have been accepted by the city itself; indeed, as the city resolved in January, 2000, after approving the development plan, the development corporation acquired the properties in the name of the city, pursuant to § 8-193(a).[77] Accordingly, we conclude that the delegation of the eminent domain authority to the development corporation was not unconstitutional.

[77] We note that the parties dispute whether an agency relationship exists between the development corporation and the city, and that the plaintiffs cite several instances of the development corporation being less responsive to the inquiries of the city than an agent customarily should be to the questions of a principal. The trial court, however, concluded that an agency relationship did in fact exist between the city and the development corporation, as well as the development corporation and the department. Nevertheless, in light of our resolution of the plaintiffs' claim by a straightforward application of the rule set forth in *Carofano* and *Connecticut College*, we note that the existence of an agency relationship is immaterial to the resolution of this appeal.

## IV

## PARCEL 3 REASONABLE NECESSITY CLAIMS

### A

### Whether the Taking of the Properties on Parcel 3 Was Reasonably Necessary

The plaintiffs next claim that the trial court improperly concluded that the taking of the four homes located on parcel 3 was "reasonably necessary" to achieve the intended public use because keeping the homes there would make the marketing and development of the intended office space more "difficult." Specifically, they claim that expert testimony introduced at trial indicated that there were alternatives available that would permit the office space intended for parcel 3 to be constructed exactly as planned without taking the homes. The defendants contend, in response, that the trial court properly deferred to the legislative determination of necessity, with respect to the parcel 3 properties, because there was no evidence that the takings were unreasonable, the product of bad faith, or an abuse of the power conferred. We agree with the defendants.

The record and the trial court's memorandum of decision reveal the following additional facts and procedural history. The trial court began its review of the necessity of taking the properties on parcel 3 by stating that it would follow the deferential approach articulated in *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146, and would review the legislative determination of necessity to "discover if it was unreasonable or in bad faith or was an abuse of the power conferred." The court reviewed the governing legal principles and the competing testimony submitted by the parties' planning experts. The trial court



then began its factual analysis by discussing the testimony of the plaintiffs' expert, John Mullin, a professor of economic and industrial development at the University of Massachusetts.[78] Mullin testified that he had reviewed the development plan and had visited the Fort Trumbull area, and that the plaintiffs' four properties occupied slightly more than three quarters of one acre of parcel 3. He testified that it is uncommon for land and housing to be cleared entirely for new development in urban waterfront areas. Mullin testified that, in his opinion, the taking of the four homes on parcel 3 was not reasonably necessary to carry out the goals of the development plan in that parcel, which included offices, parking, and the retention of the Italian Dramatic Club. He testified that retaining the homes was a "no-brainer" because of the small amount of land that they occupy, as well as their location on the parcel in "reasonable clusters"; three homes together in a row and one immediately adjacent to the Italian Dramatic Club.

Mullin then discussed an alternate proposal that he had created in conjunction with an architectural firm. He testified that this proposal provided the same parking and office space as the present development plan, without taking the plaintiffs' homes, but also added new homes. On cross-examination, Mullin testified that his plan would have located the office buildings and new homes overlooking a sewage treatment plant; a location that ideally was better suited for parking than these structures, although

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[78] The trial court acknowledged that Mullin "is a highly qualified and obviously knowledgeable individual." His qualifications included numerous fellowships, teaching positions, academic publication, military experience and government planning work.

such uses could be mixed.[79] Mullin testified that, in his opinion, the development plan was a good plan with the exception of its treatment of the existing housing.

The court then discussed the defendants' evidence, which consisted chiefly of the testimony of Hicks from RKG Associates,[80] which is the real estate planning and economic development consulting firm that aided the development corporation in preparing the development plan. Hicks stated that the team that prepared the plan primarily had wished to take advantage of Pfizer's unique decision to build a major facility in the city.[81]

Hicks discussed the six alternate plans that were considered; *see* footnote 6 of this opinion; and testified that, although two of the plans provided for the retention of existing housing, they were unworkable because it is difficult to turn residential properties into office space, which would frustrate the plan's goal of economic development. Hicks then explained how clearing all of the parcels was necessary to the success of the development

[79] Mullin also testified that, in his opinion, prospective purchasers of single-family detached homes would not necessarily "be more inclined to look in the suburbs or someplace other than immediately adjacent to a [sewage] treatment plant."

[80] Hicks has had experience in planning waterfront development projects in other cities, including Lewiston, Maine, and Fall River, Massachusetts. He also has governmental and academic experience in addition to his private sector work. Hicks also has worked as a developer, in addition to planning.

[81] In preparing the development plan, RKG Associates also worked on the statutorily required environmental impact evaluation, which described the city in great detail. Hicks testified that the environmental impact evaluation reflected the city's declining population, housing stagnation and rising unemployment, particularly in light of the closing of the United States Naval Undersea Warfare Center.



plan, stating that RKG Associates had recommended this approach to the development corporation because it would make the area far more attractive for the crucial private sector investment and development. Moreover, Hicks testified that, even if retaining the homes under a plan like Mullin's was feasible, in his professional opinion, "it would make it much, much more difficult for [the development corporation] and probably would lead to a situation that certain parts of the site would probably have a much higher degree of difficulty in being developed."[82]

[82] Specifically, Hicks testified as follows: "What they finally adopted was they would get a private sector developer to come in. What that basically means is a common redevelopment approach as you prepare the site. *You give them raw land with the necessary infrastructure, and the developer makes an investment.* This site, though, has a lot of risk. It's got hazardous waste. It's got [geographic] constrainment. It's got a lot of regulations dealing with it, and it's in an urban setting. That's not the most attractive for investment, and that's the reality you have to face. There's not a lot of people coming and investing in [the city]. *So if you're [going to] attract a private developer to this type of site setting, you've got to try to minimize as much uncertainty as much as possible. Most developers are good at understanding risks, but not uncertainty.* If you said we'll give you something that looks like a spotted leopard –

> "Q. What's the spotted leopard?
>
> "A. It's where a leopard has spots, spots are things that stay the same and you've got to work around them. Spotted leopard is just a way to refer at the configuration of land uses. If you're [going to] attract developers, if you're [going to] put out what you call requests for proposals and get them interested in the site, and after they overcome all the inherent problems with redevelopment, say to them also, well, you've got to work around this contingency . . . you greatly diminish your ability to finding competent capable people to come in. You take things that would possibly [be] risk and turn them into uncertainty. Developers operate with very short time frame financial conditions, and it was our recommendation that because the housing wasn't adaptable and a long-term use to the office related things,

(Continued on following page)

The trial court also reviewed the deposition testimony of Marty Jones, the president of Corcoran Jennison.[83] She testified that in early 1999, the development corporation selected Corcoran Jennison through a competitive bidding process to develop parcels 1, 2 and 3 of the development plan. A full development agreement between Corcoran Jennison and the development corporation still was being negotiated at the time of trial; there would, however, be a ground lease of the Fort Trumbull development area land from the development corporation to Corcoran Jennison for nominal rent, such as $1 per year. While the agreement was being negotiated between the development corporation, the department, and Corcoran Jennison, with the city being "intimately" involved, the development corporation and Corcoran Jennison had been working cooperatively under a letter of intent.

Corcoran Jennison's architectural staff has created site plans that comply with the terms of the development plan for the actual development of the parcels.[84] With respect to parcel 3, the trial court credited Jones' testimony that it would be "difficult [for Corcoran Jennison] to

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and that three, four kinds of the hodgepodge of certain things that we recommended, that most of those facilities be demolished." (Emphasis added.)

[83] The parties had stipulated to the admission into evidence of the deposition of Jones.

[84] Jones testified that public-private partnerships frequently have design review processes wherein the agency that selected the developer has a role in reviewing the developer's site plan. Jones and Goebel testified that, in the present case, the development corporation and the department would be the reviewing agencies, and that they had in fact engaged in informal reviews of Corcoran Jennison's plans. Jones also testified, however, that the formal process would occur pursuant to the development agreement, which had not yet been finalized.



attract a commercial tenant to these commercial office buildings without a full site available for the development of an office building and the associated parking."[85]

After reviewing the testimony[86] and the relevant exhibits, the trial court credited the effort that went into the creation and formatting of the development plan. The court stated that, although it did "not conclude there is an absolute necessity to take the property at the present time, [it] believes and, at the least, has no basis to doubt the reasonableness of the testimony of . . . Hicks and . . . Jones that development would be more difficult if these residences were allowed to remain." The trial court concluded that accepting the plaintiffs' argument would result in it "choosing an alternative to development different from the alternative chosen by the agency appointed to prepare the [development plan]," and stated ultimately that "the decision on which the necessity for the takings as set forth in the [development plan] and the present need for the takings of these particular properties involve the weighing of factors for which courts are not well equipped

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[85] Jones testified that it is important for Corcoran Jennison to have a full site because "first of all to be able to develop the amount of parking needed for economic feasibility, and also . . . that the grading issues in . . . parcel 3 are very complicated and the retention of isolated properties within that area could make it very difficult to develop this sort of property."

[86] The trial court also heard the testimony of Goebel, who stated that retention of the plaintiffs' homes in parcel 3 did not conform with the development plan. He also described the process by which the present development plan was chosen, and eventually approved by the city, development corporation and department, and the fact that it was a composite of six alternate plans. *See* footnote 6 of this opinion. Goebel also stated that the development corporation's decision to utilize the development plan at issue was informed by public comments during the selection process.

and which reflect broad 'legislative' type judgments which are best left to the appointed agencies of legislative bodies at state and local level and experienced state agencies all of which were involved and are involved in this taking process and the decisions which have led to it." Accordingly, the trial court denied the plaintiffs' request for permanent injunctive relief against the condemnation of their properties located in parcel 3, although it did grant temporary injunctive relief pending the appellate resolution of this case.

We begin by setting forth the standard of review. As an initial matter, the question of "whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . but, in resolving it, great weight must be given to the determination of the legislature." (Citation omitted.) *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 141. In part II of this opinion, we concluded that economic development projects created and implemented pursuant to chapter 132 of the General Statutes that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, namely, the development plan in the present case, satisfy the *public use clauses of the federal* and state constitutions.

The level of judicial review applicable to a development agency's determination of what land is reasonably necessary for the effectuation of an economic development plan, such as the development plan in this case, presents a matter of first impression for this court. The Appellate Court, however, in *Bugryn v. Bristol*, *supra*, 63 Conn. App. 107-08, has concluded that the deferential standards of



review applicable to that determination by a redevelopment agency in a redevelopment case under chapter 130 of the General Statutes; *see*, e.g., *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 599-601; *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146; also apply to the use of eminent domain in an economic development case under chapter 132 of the General Statutes. Thus, "it is well settled that 'the determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred.' *Gohld Realty Co. v. Hartford*, *supra*, [146]." *Bugryn v. Bristol*, *supra*, 107. We agree with the Appellate Court, and we conclude that this is the appropriate standard to apply during judicial review of the implementation of an economic development plan. Moreover, under this standard it is "the plaintiff [who has] the burden of establishing that the taking . . . was unreasonable, in bad faith or an abuse of power." *Hall v. Weston*, 167 Conn. 49, 66, 355 A.2d 79 (1974); accord *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 598; *Gohld Realty Co. v. Hartford*, *supra*, 146.

The trial court, of course, makes the first judicial assessment of the legislative or agency determination of necessity. Thus, "as a reviewing court, we are bound to determine whether the court's *factual* determination that the defendants did not act unreasonably in seeking to acquire all of the plaintiffs' property was clearly erroneous." (Emphasis added.) *Bugryn v. Bristol*, *supra*, 63 Conn.

App. 108. Whether the legislative body acted in "bad faith or . . . abused . . . the power conferred" also are questions of fact for the trial court that an appeals court reviews for clear error. (Internal quotation marks omitted.) *Id.*, 107; cf. *AvalonBay Communities, Inc. v. Orange*, 256 Conn. 557, 565, 579-80 (2001) (municipality's project plan was "pretext . . . to thwart affordable housing"; "the record fully supported the trial court's finding that the [chapter 132] project plan was hastily assembled, poorly envisioned and incomplete"). It is well established that "a finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *DiMartino v. Richens*, *supra*, 263 Conn. 661.

Furthermore, "the governing principles for our standard of review as it pertains to a trial court's discretion to grant or deny a request for an injunction [are]: A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion, or failed to exercise its discretion . . . the trial court's decision must stand." (Citations omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 598.

We conclude that the trial court did not commit clear error in upholding as a factual matter the development corporation's determination that the parcel 3 takings were



reasonably necessary to effectuate the goals of the development plan. Noting that "there is *no evidence*, credible or otherwise, that the condemnations in parcel 3 as originally envisaged in the [development plan] or at the time of the taking were done in bad faith, or not with an honest motive, or based on [any] pretext given any reasonable definition of the word," the court recognized that economic development planning is not the province of the courts and thus, properly deferred to the development corporation's necessity determination. (Emphasis added.) The trial court's determination with respect to parcel 3 derives ample support from the record, particularly as it credited the testimony of Goebel, Hicks and Jones as they described the deliberative process that ultimately produced the development plan. Accordingly, we conclude that the trial court did not commit clear error when it determined that the development corporation's reasonable necessity determination was not the product of bad faith, unreasonableness, or an abuse of the power conferred. The court, therefore, did not abuse its discretion by denying the plaintiffs the injunctive relief requested.

We note that the plaintiffs rely on our reasoning in *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 592, 790 A.2d 1178, and contend that the taking of their property is not reasonably necessary just because that taking will make it easier for Corcoran Jennison to market the office buildings to potential tenants. Specifically, the plaintiffs refer to our statements in *Pequonnock Yacht Club, Inc.*, a redevelopment case under chapter 130 of the General Statutes, quoting the trial court as stating that "just because the property may be desirable to the defendants does not justify its taking by eminent domain"; (internal quotation marks omitted) *Id.*, 606; and that "the

city provided no specific reasons, other than to enhance desirability of the area to investors, as to why the plaintiff's property, which both parties stipulated to be in good condition, is essential to the accomplishment of the redevelopment plan." *Id.*, 605.

The plaintiffs' reliance on *Pequonnock Yacht Club, Inc.*, however, is misplaced because our holding in that case specifically was based on General Statutes § 8-125(b),[87] which provides that nonblighted property located in a blighted area "may be taken by eminent domain when the property is essential to complete a development"; *Id.*, 604-05; as well as case law "establishing that a redevelopment agency must make reasonable efforts to negotiate and consider the integration of the property that is not substandard into the overall redevelopment plan." *Id.*, 603. In *Pequonnock Yacht Club, Inc.*, the plaintiffs' property was in good condition, but was surrounded by a blighted area with deteriorating properties. *Id.*, 604. The city, however, had refused to negotiate or correspond with the yacht club, or to consider integrating the yacht club's

[87] General Statutes § 8-125(b) provides: "'Redevelopment area' means an area within the state which is deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community. An area may consist partly or wholly of vacant or unimproved land or of land with structures and improvements thereon, and *may include structures not in themselves substandard or insanitary which are found to be essential to complete an adequate unit of development, if the redevelopment area is deteriorated, deteriorating, substandard or detrimental.* An area may include properties not contiguous to each other. An area may include all or part of the territorial limits of any fire district, sewer district, fire and sewer district, lighting district, village, beach or improvement association or any other district or association, wholly within a town and having the power to make appropriations or to levy taxes, whether or not such entity is chartered by the General Assembly. . . ." (Emphasis added.)



property into the plan, despite the yacht club's expressed willingness to be incorporated into the final redevelopment plan, which included making changes to its property if necessary. *Id.*, 605-06. We concluded that the trial court properly ordered the city to reconvey the property back to the yacht club because "the defendants acted unreasonably when they failed to consider or even discuss integration of the plaintiff's property into the redevelopment plan and that the defendants had failed to establish that taking of the plaintiff's property by eminent domain was therefore necessary and essential to the redevelopment plan." *Id.*, 606.

We conclude that the present case is readily distinguishable from *Pequonnock Yacht Club, Inc.* First, *Pequonnock Yacht Club, Inc. v. Bridgeport, supra*, 259 Conn. 599-600, is a redevelopment case under chapter 130 of the General Statutes; in such cases, the public use is blight clearance. Thus, the public use in such cases is accomplished as soon as the blighted conditions are cleared, regardless of the land's subsequent attractiveness to investors. *See*, e.g., *Gohld Realty Co. v. Hartford, supra*, 141 Conn. 143-44. Thus, nonblighted property located in blighted areas is subject to the essentiality requirement of § 8-125(b), a statutory requirement that does not exist under chapter 132 of the General Statutes. *See Pequonnock Yacht Club, Inc. v. Bridgeport, supra*, 603-06, 790 A.2d 1178. In contrast, in the present case, the public use is, by itself, the economic revitalization of the city. *See* part II of this opinion. Thus, for the development corporation to ignore considerations of investment and marketability would frustrate the effectuation of its project's public purpose, and would be an unreasonable and arbitrary legislative act. We, therefore, conclude that our decision in

*Pequonnock Yacht Club, Inc.*, does not require us to hold that the parcel 3 taking in the present case was not reasonably necessary.

B

Whether the Parcel 3 Takings Are for Reasonably Foreseeable Needs

The plaintiffs next contend that the trial court improperly concluded that the parcel 3 development was not impermissibly speculative because the office buildings will not be constructed unless a market develops for them. The defendants contend, in response, that the trial court properly concluded that the development of parcel 3 was not impermissibly speculative because of the logical progression that such long-term development projects necessarily follow. We agree with the defendants.

The record reveals the following additional facts relevant to the disposition of this claim. A market analysis completed in January, 1999, by RKG Associates for the preparation of the development plan stated that, at that time, rent levels for class A office buildings had stabilized and that "real estate conditions in the [city] have shown signs of modest recovery," as evidenced by a greater than 90 percent occupancy rate in those buildings. It acknowledged that those rent levels "remain below the level needed to support new speculative construction," and that "the historic sales values of class A office space, created by the past imbalances in the market, have not recovered sufficiently to justify new construction except for an end-user." It did state, however, that by 2010, a shortage of office and research and development space is expected within the Fort Trumbull area, and that "land area at Fort



Trumbull should be reserved for the future development of office buildings."

In addition to the development plan, the trial court also considered a report entitled, "Marketing Plan for Commercial Development Space" (report), which was presented by Jones to other Corcoran Jennison officers in January, 2001. The report echoed the development plan's analysis and concluded that then current "market conditions do not justify [the] construction of new commercial space at Fort Trumbull on a speculative basis." In the short term, the report recommended the renovation of "building 2," which is an existing office building constructed in 1991 and located at the closed United States Naval Undersea Warfare Center. The report, however, stated that long-term commercial development would have a "target market" of "newly recruited companies evidencing Pfizer-related demand, whether it is for general office use or biotech/bioscience use. This demand will most likely come from out-of-region companies that contract with Pfizer and value proximity to Pfizer's global development facility."

The trial court noted that a major goal of the development plan is to capitalize on the presence of Pfizer, and that the report and the development plan both were prepared prior to the construction and occupancy of the new global research facility. The court then credited the testimony of Bruce Hyde, the city's director of real estate development and planning, who testified that, although the market for office space in the city was "on the softer side," since the Pfizer announcement in 1998, there had been increased interest in real estate development in the

city.[88] The court also noted Hicks' testimony that Pfizer's business associates likely would occupy future office space in the Fort Trumbull area.

Finding no Connecticut authority directly on point, the trial court relied on sister state authority for the proposition that there need not be an immediate need for the property taken; planning for the future and changes in public needs are permissible, so long as the public use will be accomplished within a reasonable period of time. The trial court noted that "whether the effort is speculative in a particular case depends to a great extent on the nature of the public use involved," and that the legislature's assessment of whether a need is speculative receives the same judicial deference as other legislative necessity determinations; thus, the court will only disturb it if it is the product of bad faith, unreasonableness, or an abuse of discretion.

Applying these standards, the court concluded that "at least that in selected cases, cities like New London, given its economic situation, should be given time to develop a site which has built-in features that would be attractive to users – here, we have a city just beginning to come out of the economic doldrums, with a major international company alighting in its midst that has the ability to attract other businesses. . . ." Noting the prediction of a demand

[88] Hyde testified that when the United States Naval Undersea Warfare Center was in the city, "spin-off development" occurred as satellite companies opened up in the city to service it. He testified that these satellite companies then followed the sound lab to Newport, Rhode Island, when it relocated there. Hyde stated that he would expect similar spin-off development in the city as a result of Pfizer, although he personally was unsure about the kind of outside contractors with whom Pfizer interacts.



for space by 2010, and that substantial state and local resources and funds already had been spent on preparing the Fort Trumbull area for economic development, the court concluded that it could not "say that under the circumstances of this case that the planned development of parcel 3 is too speculative given the purpose of the development plan – economic development of an economically distressed community."

We will review the trial court's decision, as we do other reasonable necessity determinations, for clear error in determining the existence of bad faith, unreasonableness, or abuse of power on the part of the legislature in making the initial determination of whether the need is speculative, and therefore, not reasonably foreseeable. *See Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 599-601; *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146; *Adams v. Greenwich Water Co.*, 138 Conn. 205, 213-14, 83 A.2d 177 (1951); *Bugryn v. Bristol*, *supra*, 63 Conn. App. at 107-08.

We begin our analysis of the trial court's conclusion by reviewing the applicable legal principles. A taking that is purely speculative is not reasonably necessary. *New Haven Water Co. v. Russell*, 86 Conn. 361, 369-70, 85 A. 636 (1912) (population growth and increasing demand justify taking of streams by water company). We note, however, that "on the question of the necessity of a taking, needs which will arise in the reasonably foreseeable future must be taken into consideration." *Adams v. Greenwich Water Co.*, *supra*, 138 Conn. 214 (considering ten year water demand projections and stating that it was reasonably necessary for water company to create reservoir by damming river); accord *Phoenix v. McCullough*, 24 Ariz. App. 109, 536 P.2d 230, 236 (1975) ("The condemning authority

may, in acquiring private property for public use, take not only such property as is necessary to satisfy present needs, but may acquire such additional property as will be put to public use within a reasonable time thereafter. In determining what constitutes a reasonable time, the surrounding circumstances must be considered."); *Grand Rapids Board of Education v. Baczewski*, 340 Mich. 265, 271-72, 65 N.W.2d 810 (1954) (school board could not justify taking property thirty years before its need was anticipated solely on basis of saving future taxpayers' money).

Several sister state cases also considered by the trial court in its memorandum of decision have expanded upon these basic principles. For example, in an airport expansion case, the Florida Court of Appeals has stated that, the "condemning authority need not present evidence pinpointing the need for the specific property, rather it is sufficient to show that the taking is necessary for the accomplishment of an overall plan of development. . . . *Funds need not be on hand, nor do plans and specifications need be prepared for a condemnor to determine the necessity of a taking; in fact, it is the duty of public officials to look to the future and plan for the future.* . . . Thus, there need not be an immediate need for the property sought to be taken." (Citations omitted; emphasis added.) *Test v. Broward County*, 616 So.2d 111, 113 (Fla. App. 1993); cf. *Alsip Park District v. D & M Partnership*, 252 Ill. App. 3d 277, 286, 192 Ill. Dec. 80, 625 N.E.2d 40 ("[A] condemning authority should 'anticipate the future increased demands for the public use to which the land is to be devoted.' . . . The advance acquisition of parkland is practical in a society with a growing population and changing recreational needs." [Citation omitted.]), cert. denied, 152 Ill. 2d 553, 190 Ill. Dec. 882, 622 N.E.2d 1199 (1993); but *see*



*Phoenix v. McCullough*, *supra*, 536 P.2d 237 ("if the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative and remote as a matter of law and defeats the taking").

The condemnor's right "to acquire land for future expansion," however, is tempered by the need for "a suitable investigation" to inform its assessment of future needs. *In re Pittsburgh School District Condemnation Case*, 430 Pa. 566, 573-74, 244 A.2d 42 (1968). Indeed, the Pennsylvania court emphasized that the acquisition of land may not be "for real estate speculation and future sale," but rather, must be, in the "intelligent, informed judgment" of the condemnor, in furtherance of "an authorized public use. . . ." *Id.*, 574; *see* also *Kansas City v. Hon*, *supra*, 972 S.W.2d 415 (deferring to city's necessity conclusion that "it needs to acquire the land now so that it can compete with other cities for the location of aviation-related facilities").

With these principles, and the clearly erroneous standard of review, to guide our inquiry, we turn to the trial court's decision in the present case. We conclude that the trial court's determination that the parcel 3 takings were not impermissibly speculative was not clearly erroneous. Although the class A office building market was less than conducive to development and new construction at the time that the development plan was created, the trial court's deference to the legislative determination nevertheless was amply supported by the projections of future demand as a result of the new Pfizer facility. Numerous market studies were available and considered by the development corporation. Indeed, the trial court astutely observed that, at the time of the trial, the Pfizer facility had just opened; it, therefore, did not have the opportunity

to create demand. Moreover, the report formulated by RKG Associates for the development plan predicted demand in the Fort Trumbull area by 2010, which is less than seven years away, which certainly is reasonably foreseeable temporally. Compare *Adams v. Greenwich Water Co.*, *supra*, 138 Conn. 214 (ten year water demand projections acceptable for foreseeability), with *Grand Rapids Board of Education v. Baczewski*, *supra*, 340 Mich. 271-72 (taking unjustified when school board anticipated need for property thirty years after time of taking). In light of our previous conclusion that the trial court properly had found that the reasonable necessity determination was not the product of bad faith, unreasonableness, or an abuse of power, we also conclude that the trial court properly determined that the parcel 3 takings were not impermissibly speculative.

The plaintiffs rely on the holding in *Phoenix v. McCullough*, *supra*, 536 P.2d 237, in support of their contention that the parcel 3 takings are impermissibly speculative. Their reliance on *McCullough* is misplaced. We acknowledge that the Arizona court concluded that, "if the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative and remote as a matter of law and defeats the taking." (Internal quotation marks omitted.) *Id.* In *McCullough*, the Arizona court arrived at that standard after applying a reasonableness standard to a fact pattern wherein the city sought to acquire the plaintiffs' property for airport expansion purposes, but did not have a reasonably accurate time line for that expansion; the city planners' estimates for the date of use varied from fifteen to forty-six years. *Id.*, 236-37. Moreover, the city in *McCullough* had admitted that it



did not have a specific plan for the use of the plaintiffs' properties within that expansive time frame. *Id.*

We conclude that the reasoning of *McCullough* is inapposite to the present case because it developed out of a vastly different set of facts. In contrast to the airport expansion plans in *McCullough*, the development plan in the present case contains carefully considered predictions of development and market growth, spurred by the opening of Pfizer's major facility. It also projects demand for space by 2010, which is less than ten years from now, and thus, presents a dramatically different time frame than the uncertain fifteen to forty-six year gap of *McCullough*.[89]

[89] Additionally, in support of their claim that courts reject projects that are on uncertain timetables, the plaintiffs point us to *San Diego Gas & Electric Co. v. Lux Land Co.*, 194 Cal. App. 2d 472, 479-80, 14 Cal. Rptr. 899 (1961), *State v. 0.62033 Acres of Land*, 49 Del. 174, 179-80, 10 Terry 174, 112 A.2d 857 (1955), and *Meyer v. Northern Indiana Public Service Co.*, 254 Ind. 112, 113-15, 258 N.E.2d 57 (1970), superseded on other grounds, 259 Ind. 408, 287 N.E.2d 882 (1972). Their reliance on these cases is misplaced because of the considered effort that went into the development plan in the present case, and the fact that the marketing studies and other evidence have indicated a foreseeable need for office space as a result of the new Pfizer facility.

In contrast, we note that the California court concluded that, on the facts of that case, "the taking of the defendants' property by the plaintiff [power company] for [gas and telephone lines] is not necessary . . . because the plaintiff has no present or prospective plans to use it for that purpose." *San Diego Gas & Electric Co. v. Lux Land Co.*, *supra*, 194 Cal. App. 2d at 481. Similarly, the Indiana court rejected the electric company's attempt to maintain a 200 foot right-of-way for electric lines when the company had admitted that all it needed for the near future was the 150 feet that they already had; there was no evidence of plans that would require more room. *Meyer v. Northern Indiana Public Service Co.*, *supra*, 254 Ind. at 115. Moreover, the Delaware court concluded that the taking for highway construction was impermissible when no present or future need had been established, and the department of transportation had taken "no official action"

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We, therefore, conclude that the trial court did not commit clear error when it deferred to the legislative necessity determination and concluded that the parcel 3 takings were not impermissibly speculative.

Accordingly, we further conclude that, because the trial court's decision regarding reasonable necessity was not the product of a legal error or an abuse of its discretion, we must uphold its denial of permanent injunctive relief to the plaintiffs with respect to those properties that are located on parcel 3. *See Pequonnock Yacht Club, Inc. v. Bridgeport, supra*, 259 Conn. 598-99.

## V

## EQUAL PROTECTION CLAIMS

The plaintiffs next claim that the condemnation of the properties located on parcel 3 violated the equal protection clauses of the Connecticut[90] and United States[91] constitutions because the development corporation spared the Italian Dramatic Club (club) that also was located on that parcel. Specifically, they contend that the trial court improperly concluded that: (1) the club and the homes were not similarly situated; and (2) even if the club and

toward the highway's construction. *State v. 0.62033 Acres of Land, supra*, 49 Del. at 179-80. Accordingly, these cases are distinguishable from the present case wherein a carefully considered projection of need, and plans for achieving it, were in place prior to the taking.

[90] Article first, § 20, of the constitution of Connecticut provides in relevant part: "No person shall be denied the equal protection of the law. . . ."

[91] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."



the homes were similarly situated, the trial court utilized an improper legal standard by focusing on the defendants' subjective motivation in making the condemnation decision, rather than on whether the decision itself was arbitrary or irrational. The defendants claim, in response, that the trial court properly determined that the condemnations did not violate the equal protection clause of the federal constitution because: (1) the homes and the club are not similarly situated under the terms of the development plan or the relevant zoning laws; and (2) the development corporation's distinction between the two uses had a rational basis.[92] We agree with the defendants, and we conclude that the development corporation did not violate the plaintiffs' equal protection rights by condemning their properties, but not the club's building.

The trial court's memorandum of decision reveals the following additional facts relevant to our resolution of this claim. The club is a long-standing private social organization[93] in the Fort Trumbull area; its building is located on parcel 3 of the development plan. Originally, the club's building had been slated for acquisition and demolition in the development plan as approved by the city in January, 2000. In October, 2000, however, the

[92] In their brief, the plaintiffs do not "provide an independent analysis asserting the existence of greater protection under the state constitutional provision than its federal counterpart . . . [and] we will not of our own initiative address that question. . . . Accordingly, the federal equal protection standard is considered prevailing for the purposes of our review of both the state and federal equal protection claims in this case." (Internal quotation marks omitted.) *Donahue v. Southington, supra*, 259 Conn. 794 n.7.

[93] Membership in the club is limited to descendants of people who emigrated from a certain region in Italy. The club holds dinners for its members; they may bring guests to the dinners.

development corporation determined that the club's building could remain on parcel 3.

The trial court concluded that the plaintiffs did not satisfy the "preliminary step" of establishing that they and the club were "similarly situated";[94] the court, therefore, concluded that it did not need to proceed further with the equal protection analysis. The trial court based this conclusion on the properties' locations within the parcel; it concluded that the club's building was on the border, while two of the plaintiffs' properties were within the interior and ultimately would lack roadway access. The trial court also cited the previously credited testimony of Hicks and Jones that retaining the residences would pose problems for the future development of the parcel, while the club's building would not.

Nevertheless, the trial court did not end its equal protection analysis with the similarly situated issue. It went on to assume hypothetically that the properties were similarly situated, and it addressed the plaintiffs' claim that their right to equal protection was violated because the development corporation's decision was the "irrational"[95] result of politically motivated favoritism toward

[94] In so concluding, the trial court rejected the defendants' contention that the club and the plaintiffs were not similarly situated because the club's building was a commercial property while the plaintiffs' homes were residential. The court expressly noted that the club was not commercial property. The trial court, however, also rejected the plaintiffs' contention that they were similarly situated because both were slated for acquisition and demolition under the development plan and wanted to stay, but that the club's building was spared. The court concluded that this was more "[a] statement of the problem, not the solution."

[95] The plaintiffs had claimed in the trial court that the taking implicated a fundamental right to property ownership, and that the

(Continued on following page)



the club. The court analyzed the record and testimony with respect to the development plan's process of creation and approval, and concluded that it was "being asked to rely on speculation and conjecture by parties who . . . have the burden of proof."[96] The court, therefore, rejected the plaintiffs' equal protection claim.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is essentially a direction that all persons similarly situated should be treated alike." (Internal quotation marks omitted.) *Thomas v. West Haven*, 249 Conn. 385, 392, 734 A.2d 535

development corporation's decision thus was subject to the strict scrutiny standard of review. The trial court concluded that the right to property ownership was not fundamental for equal protection purposes and, therefore, the development corporation's action was subject only to the rational basis standard of review. On appeal, the plaintiffs do not contest the trial court's decision to use the rational basis standard of review.

[96] Specifically, the trial court noted the testimony of Mahoney and James Dunn, the director of real estate acquisition for the development corporation, to the effect that condemnation of the club and a nearby church could be politically difficult. Nevertheless, the trial court concluded that in January, 2000, the city council approved the development plan with the club condemnation intact. The trial court also noted the testimony of Goebel and Damon Hemmerdinger, a consultant to, and former director of real estate development for the development corporation, to the effect that, even after the city had approved the development plan, the development corporation, in response to public comments, continued to consider not demolishing other properties in addition to the club.

The trial court concluded that the plaintiffs' claim that Milne spoke to the governor about retaining the club was pure speculation, particularly because Milne was never deposed or called to testify, and the development corporation officers were never questioned about their involvement in this conversation. The trial court also noted multiple substantial state expenditures in support of the project, many months before the decision was made to retain the club's building.

(1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). Thus, we ordinarily would have to address the plaintiffs' claim that the trial court improperly concluded, as a preliminary matter, that they were not similarly situated with the club's building. In light of the trial court's comprehensive memorandum of decision and the parties' thorough briefing, however, we will assume without deciding[97] that the plaintiffs' homes and the club are similarly situated for equal protection purposes.[98] Accordingly, we now will proceed to determine whether the

[97] *See*, e.g., *State v. Ferguson*, 260 Conn. 339, 365-66, 796 A.2d 1118 (2002) ("even if we were to assume, without deciding, that the statement had been made with knowledge of its falsity and that this fact should therefore be excised from the affidavit, we conclude that probable cause still existed for the warrant to issue").

[98] "Equal protection does not just mean treating identically situated persons identically. . . . Moreover, the requirement imposed upon plaintiffs claiming an equal protection violation [is that they] identify and relate specific instances where *persons situated similarly in all relevant aspects* were treated differently. . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Thomas v. West Haven*, *supra*, 249 Conn. 402, quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989); accord *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 672, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). Entities are "situated similarly in all relevant aspects" if "a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." (Internal quotation marks omitted.) *Dartmouth Review v. Dartmouth College*, *supra*, at 19; accord *Equus Associates, Ltd. v. Southampton*, 37 F. Supp. 2d 582, 599 (E.D.N.Y. 1999) (utilizing test); *Kirschner v. Zoning Board of Appeals*, 924 F. Supp. 385, 392 (E.D.N.Y. 1996) (same).



trial court properly determined that the development corporation's decision had a rational basis and, therefore, did not violate the plaintiffs' equal protection rights. We conclude that the trial court correctly determined that there was a rational basis for the development corporation's condemnation decision.

Whether the development corporation's action sparing the club's building, but not the plaintiffs' residences, from condemnation violated the equal protection clause "must be gauged under the rational basis test. In the context of an equal protection challenge to social and economic legislation that does not infringe upon a fundamental right or affect a suspect group, the classification drawn by the statute will not violate the equal protection clause if it is rationally related to a legitimate public interest. *Nordlinger v. Hahn*, 505 U.S. 1, 8, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). . . .

"The United States Supreme Court has recently summarized the rational basis test as applied to social and economic legislation that does not infringe upon a fundamental right or affect a suspect group. *Nordlinger v. Hahn*, *supra*, [505 U.S. 11-12]. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, *see United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174, 179 [101 S. Ct. 453, 66 L. Ed. 2d 368 (1980), reh. denied, 450 U.S. 960, 101 S. Ct. 1421, 67 L. Ed. 2d 385 (1981)], the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker, *see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 [101 S. Ct. 715, 66 L. Ed.

2d 659, reh. denied, 450 U.S. 1027, 101 S. Ct. 1735, 68 L. Ed. 2d 222] (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, *see Cleburne v. Cleburne Living Center, Inc.*, [*supra*, 473 U.S. 446, 105 S. Ct. 3249]. *Nordlinger v. Hahn*, *supra*, [11]dots4}

"Therefore, the presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is a hostile and oppressive discrimination against particular persons and classes. *The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. . . . Miller v. Heffernan*, 173 Conn. 506, 509-10, 378 A.2d 572 (1977), appeal dismissed, 434 U.S. 1057, 98 S. Ct. 1226, 55 L. Ed. 2d 758 (1978). . . . *Johnson v. Meehan*, 225 Conn. 528, 535-37, 626 A.2d 244 (1993). Furthermore, when a court determines whether a legislative classification is a hostile and oppressive discrimination against a particular class, the challenger must establish that the legislature selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Stafford Higgins Industries, Inc. v. Norwalk*, 245 Conn. 551, 567-69, 715 A.2d 46 (1998); accord *City Recycling, Inc. v. State*, 257 Conn. 429, 445-46, 778 A.2d 77 (2001).

Armed with these well established principles, we now turn to whether the trial court properly concluded that the plaintiffs failed to prove that there was no conceivable rational basis for the development corporation's decision to spare the club's building, but not the plaintiffs' residential



properties, from condemnation. At the outset, we note that the parties do not dispute that this is a pure question of law; accordingly, we will engage in plenary review of the trial court's conclusion.

The plaintiffs contend that in determining whether there was a rational basis for the development corporation's decision, the trial court utilized an improper legal standard by focusing on the defendants' subjective motivation in making the condemnation decision, rather than on whether the decision itself was arbitrary or irrational. The plaintiffs also contend that the "defendants did not provide to the trial court a rational justification for its differential treatment between the property owners." The defendants claim, in response, that the plaintiffs have not carried their burden of proof, and that the decision to retain the club's building was rationally related to the achievement of the urban mixed-use community atmosphere of the development plan as a whole. We address each contention in turn.

We first address the plaintiffs' claim that the trial court applied an improper legal standard in its rational basis determination. Specifically, the plaintiffs contend that the trial court incorrectly had focused on the fact that they did not demonstrate adequately an improper or political motivation for the retention of the club's building, in violation of the United States Supreme Court's holding in *Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), as adopted by this court in *City Recycling, Inc. v. State*, *supra*, 257 Conn. 447. We disagree, and we conclude that the trial court did in fact apply the correct legal standard in evaluating the plaintiffs' claims.

In *Willowbrook v. Olech*, *supra*, 528 U.S. 56[99], the United States Supreme Court concluded that "our cases have recognized successful equal protection claims brought by a class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. . . . In so doing, we have explained that the purpose of the *equal protection clause of the Fourteenth Amendment* is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (Citations omitted; internal quotation marks omitted.) The court concluded that allegations of "'irrational and wholly arbitrary'" treatment by village officials "quite apart from the village's subjective motivation, [were] sufficient to state a claim for relief under traditional equal protection analysis."[99] *Id.*, 565.

[99] In *Willowbrook v. Olech*, *supra*, 528 U.S. at 563, property owners had asked village officials to connect their property to the municipal water supply. The village conditioned the connection on the property owners granting the village a thirty-three foot easement, despite the fact that it had connected other properties to the water supply upon the grant of fifteen foot easements. *Id.* After a three month delay, the village relented and connected the subject property to the water supply with a fifteen foot easement. *Id.* Thereafter, the property owners brought an action, contending that their equal protection rights had been violated by the thirty-three foot demand, which they alleged was "'irrational and wholly arbitrary'" and the result of ill will by the village toward them because of a prior action between the parties. *Id.* The District Court dismissed the claim; on appeal, the "Seventh Circuit reversed, holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.'" *Id.*, 563-64.

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We discussed the principles set forth in *Willowbrook* in *City Recycling, Inc. v. State*, *supra*, 257 Conn. 429. In that case, the commissioner of environmental protection (commissioner) had refused to process a recycling facility's application to expand its existing facility. *Id.*, 431. The commissioner's refusal was pursuant to General Statutes § 22a-208a (a), as amended by No. 97-300, § 2, of the 1997 Public Acts (P.A. 97-300), which "prohibited the commissioner . . . from approving, for a city with a population of greater than 100,000, the establishment or construction of 'a new volume reduction plant or transfer station located, or proposed to be located, within one-quarter mile of a child day care center. . . .' The statute also excepts from its purview existing volume reduction facilities and transfer stations without regard to their location." *City Recycling, Inc. v. State*, *supra*, 431-32.

After reviewing the extensive factual findings and the relevant legislative history, this court concluded in *City Recycling, Inc.*, that "under the principles of our equal protection jurisprudence, we conclude that P.A. 97-300, § 2, is unconstitutional as applied, because it is violative of the plaintiff's equal protection rights. The factual findings of the trial court negate any rational basis of which we can conceive, the most obvious of which is that the expansion

Applying this reasoning, the Supreme Court affirmed the Seventh Circuit's decision and concluded that the property owners' complaint stated a cause of action, stating that the allegations that "the village's demand was 'irrational and wholly arbitrary' and that the village ultimately connected [the] property after receiving a clearly adequate [fifteen] foot easement . . . quite apart from the village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis." *Id.*, 565. In so concluding, the court expressly did "not reach the alternative theory of 'subjective ill will' relied on by [the Seventh Circuit]." *Id.*

of the plaintiff's facility would have some negative impact on children in the day care center located within one-quarter mile of the facility. The plaintiff's equal protection claim is particularly compelling in light of the legislative history of P.A. 97-300, § 2, which demonstrates that the legislation was aimed solely at the plaintiff's permit application." *Id.*, 449.

Our review of the trial court's memorandum of decision in the present case indicates that, as the plaintiffs claim, the court did in fact devote a great deal of analysis to the evidence of the process by which the decisions to condemn properties, and later to spare the club's building, were made. The memorandum states, however, that the court did so because the plaintiffs "strenuously argued that the true and only motive of the decision to allow the [club] to remain while the same right was not extended to [the plaintiffs] was based not on any purpose to accomplish the [development plan's] goals, but to placate important political interests represented by the [club], its supporters and members." Our review indicates that the trial court's analysis and discussion of the decisional process supports its conclusion that the plaintiffs failed to carry their burden of proving that the development corporation acted arbitrarily or irrationally in making its decision to spare the club's building.

Moreover, our review of the record, including the plaintiffs' trial briefs and the trial court's memorandum of decision, indicates that beyond claims of preferential treatment for the club, the plaintiffs failed to offer arguments in support of the determinative proposition that the development corporation's decision to spare the club completely lacked any conceivable rational basis. Indeed, the trial court expressly found that the club's social functions



were related to the community and social aspects of the development plan, including the hotel. The court also found that, with respect to the goal of tying the development plan to other development in the downtown New London area, it "cannot say [that] it is beyond the realm of rational consideration to want to have a social club of admittedly some political clout, with members and guests from outside the Fort Trumbull area, remain in that area."

The plaintiffs also claim that the "defendants did not provide to the trial court a rational justification for its differential treatment between the property owners." The plaintiffs misstate the applicable burden of proof; indeed, as the trial court noted, they bear the burden of proving that there is no conceivable rational basis for the retention of the club's building. *See*, e.g., *City Recycling, Inc. v. State*, *supra*, 257 Conn. 446. Indeed, the plaintiffs' principal brief to this court discusses the applicable legal standard, but does not attempt to negative all conceivable reasons for keeping the club's building, but not their properties. Moreover, the city offers as a rational basis for the decision that the club's social functions are consistent with the social elements and community atmosphere of the development plan as a whole. Although the plaintiffs attack this determination in their reply brief as not worthy of being taken seriously, when engaging in analysis under the rational basis standard of review, we are constrained by the well established proposition, that "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction

arbitrary or irrational. . . ." (Citations omitted; internal quotation marks omitted.) *Id.*, 445. Thus, the rational basis proffered by the city, in combination with the plausible reasons found by the trial court, and the plaintiffs' failure to carry their high burden of proof, compel us to conclude that the plaintiffs' rights to the equal protection of the laws have not been violated by the development corporation's decision to retain the club's building, but not their properties.

## VI

## CROSS APPEAL: WHETHER THE TAKING OF PARCEL 4A WAS REASONABLY NECESSARY

We now turn to the defendants' cross appeal, wherein they contend, inter alia, that the trial court improperly concluded that the takings of the plaintiffs' properties on parcel 4A were not reasonably necessary and, therefore, improperly granted the plaintiffs permanent injunctive relief. Specifically, the defendants claim that the trial court's conclusion that the properties on parcel 4A were not reasonably necessary because proposals, but no definite plan, were yet in place for the use of that parcel, was the product of an improperly broad review that did not afford the appropriate deference to the legislative necessity determination. The development corporation also contends that the trial court incorrectly allocated the burden of proof to the defendants. The plaintiffs contend, in response, that the trial court: (1) utilized the correct legal standard in its inquiry; and (2) correctly concluded that the properties on parcel 4A were not reasonably necessary because, unlike with parcel 3, the trial court did not have sufficient information before it to pass on the necessity of those properties to the development as a



result of the lack of plans for parcel 4 development. We agree with the defendants, and we conclude that the trial court did not utilize the correct legal standard in evaluating the plaintiffs' parcel 4A claims and, therefore, improperly granted the plaintiffs permanent injunctive relief.

We begin by setting forth the standard of review applicable to a legislative or agency determination of reasonable necessity. As an initial matter, the question of "whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . but, in resolving it, great weight must be given to the determination of the legislature." (Citation omitted.) *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 141. In part II of this opinion, we concluded that economic development projects created and implemented pursuant to chapter 132 of the General Statutes that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, namely, the development plan in the present case, satisfy the public use clauses of the federal and state constitutions.

Once this court concludes that the enabling statutes support a public purpose, however, our review becomes much more limited in scope. "The determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive. . . . The agency's decision, however, is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power

conferred." (Citation omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 600; *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146; accord *Adams v. Greenwich Water Co.*, *supra*, 138 Conn. 213-14; *Bugryn v. Bristol*, *supra*, 63 Conn.App. 107-08. Moreover, under this standard it is "the *plaintiff* [who has] the burden of establishing that the taking . . . was unreasonable, in bad faith or an abuse of power." (Emphasis added.) *Hall v. Weston*, *supra*, 167 Conn. 66; accord *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 598; *Gohld Realty Co. v. Hartford*, *supra*, 146.

As stated in part IV A of this opinion, on appeal this court will apply the clearly erroneous standard of review to the trial court's underlying factual determination of whether the legislative or agency determination of necessity "'was unreasonable or in bad faith or was an abuse of the power conferred.' *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146." *Bugryn v. Bristol*, *supra*, 63 Conn. App. 107. It is well established that "a finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *DiMartino v. Richens*, *supra*, 263 Conn. 661.

Furthermore, "the governing principles for our standard of review as it pertains to a trial court's discretion to grant or deny a request for an injunction [are]: A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the



decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion, or failed to exercise its discretion . . . the trial court's decision must stand." (Citations omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 598.

The record reveals the following additional facts relevant to our resolution of this claim. As mentioned previously in this opinion, parcel 4 is subdivided into two smaller parcels, 4A and 4B. Eleven properties owned by four of the plaintiffs are located on parcel 4A; they occupy 0.76 acres out of the 2.4 acre parcel. Under the development plan, parcel 4A is designated for "park support" or "marina support. . . ." There is no development commitment or formal site plan in place for parcel 4A.

Although the development plan does not define the term "park support" expressly,[100] in describing the parcel's intended use, it states that "a portion of parcel 4A will be

[100] In its memorandum of decision, the trial court expressed its concern that the phrase "park support" is vague and undefined. Damon Hemmerdinger, who had been the development corporation's director of real estate development and presently serves as a consultant to the development corporation, called it "broad" and "[not] a statutory term," stating that parcel 4A would serve uses such as parking or "other ancillary uses" for the park or marina. Indeed, Claire Gaudiani, president of the development corporation, also was not sure of the exact definition of the phrase "park support."

We note, as did the trial court, that Mullin, the plaintiffs' expert, testified that he had never heard the term before, but understood it to mean "parking, storage [and] warehousing." Mullin also referred to parcel 4A as "a big nothing," but then acknowledged that it could provide parking for both the parcel 4B marina, as well as the state park. He did state that he had insufficient information to estimate the parking demand as a result of those two facilities.

redeveloped for uses that support the state park, such as parking, or for uses such as retail that will serve park visitors and members of the community." As the trial court correctly noted, the development plan later describes an alternative use for parcel 4A, which is "the development of support facilities for a marina, or a marina training facility, to be developed to the south on parcel 4B and the Fort Trumbull State Park to the east. Any development of ancillary buildings that may be located on these two parcels shall be oriented to help define their edges. . . . Surface parking developed on either of these parcels shall be appropriately screened."[101]

Claire Gaudiani, president of the development corporation, testified that the development corporation also was working with the United States Coast Guard to explore the possibility of placing its museum on parcel 4A.[102] The development corporation has not, however, obtained a commitment from the Coast Guard for museum development on parcel 4A, because the Coast Guard was still choosing sites; indeed, the museum also had been considered for parcel 2, as well. Gaudiani testified that, to her

[101] This section of the development plan also states that parcel 4B "is intended to accommodate a mix of water-dependent uses centered around the rehabilitated Fort Trumbull Marina, which will provide boat slips and upland support. The Marina may be developed as a working marina training center, with facilities designed in conjunction with improvements made to parcel 4A."

[102] Gaudiani testified that the museum would not be on the tax rolls, but would provide jobs and generate revenue by attracting thousands of visitors. If built, the museum would preclude the use of parcel 4A for parking.



personal knowledge, parcel 4A was the "preferred" and more likely site for the museum.[103]

The trial court began its analysis with the proposition that, "it is not necessary that the officials proceed to make *immediate* use of the property thus acquired, or that they have 'plans and specifications prepared and all other preparations necessary for *immediate* construction before it [the county] can determine the necessity for taking private property for public purpose.' *Carlor Co. v.* [*Miami*, 62 So. 2d 897, 902 (Emphasis added.) (Fla. 1953)]." *Wright v. Dade County*, 216 So. 2d 494, 496 (Fla. App. 1968), cert. denied, 225 So. 2d 527 (Fla. 1969), cert. denied, 396 U.S. 1008, 90 S. Ct. 565, 24 L. Ed. 2d 500 (1970). The trial court then stated that when the Florida court applied this proposition in *Miami Beach v. Broida*, 362 So. 2d 19, 20 (Fla. App. 1978), cert. denied, 372 So. 2d 466 (Fla. 1979), it had noted that there was a partially completed plan in place that justified taking the condemnees' property for a convention center. The trial court then cited *State Highway Commission v. Yost Farm Co.*, 142 Mont. 239, 243-44, 384 P.2d 277 (1963), and *Krauter v. Lower Big Blue Natural Resources District*, 199 Neb. 431, 439, 259 N.W.2d 472 (1977),[104] for the proposition that the "[condemnor] must in

[103] Goebel also testified that he was hoping for the museum to be located on parcel 4A.

[104] The trial court quoted *Krauter v. Lower Big Blue Natural Resources District, supra*, 199 Neb. at 439, as stating that "the landowner's right to own, possess, and enjoy his property free from an unlawful and unconstitutional exercise of the sovereign power of eminent domain may best be insured by requiring specific pleadings and proof. We hold that in a condemnation action under the power of eminent domain, the *condemn[or] must allege the specific public purposes for which the condemn[or] seeks to acquire and use the property sought to be taken.*" (Emphasis added.)

the first instance produce sufficient evidence to establish facts indicating the taking is necessary."

The trial court then stated that, under these standards, the statements in the development plan regarding parcel 4A are "too vague and uncertain to allow [it] to conclude [that] the takings here are necessary and would not be reasonable." It concluded that the hopes of placing the museum on the parcel were too speculative to justify the condemnations, and that the other plans were too vague to allow it to engage in a necessity analysis; in other words, "even if the court were prepared to give the legislative agency all the deference in the world under these circumstances . . . the court just cannot make the requisite constitutionally required necessity determination based on the information before it." On the basis of this conclusion, the court granted permanent injunctive relief against the demolition of the plaintiffs' properties located on parcel 4A, and ordered that the statements of compensation and certificates of taking with respect to those properties be dismissed.

On the basis of our review of the record and the trial court's memorandum of decision, we conclude that the trial court's review of the parcel 4A taking utilized a legal standard that permitted review far in excess of that provided for by our well established case law. More specifically, although the trial court did acknowledge nominally the judicial deference owed to the legislative necessity determination, our review of its analysis, particularly the inclusion of the Montana and Nebraska cases, indicates that it did not utilize the proper legal standard, as set forth in *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 598-601, and *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146, in reviewing the parcel 4A takings.



The trial court cited *State Highway Commission v. Yost Farm Co.*, *supra*, 142 Mont. 243-44, and *Krauter v. Lower Big Blue Natural Resources District*, *supra*, 199 Neb. 439, for the proposition that the "[condemnor] must in the first instance produce sufficient evidence to establish facts indicating the taking is necessary." As the development corporation correctly contends, this proposition improperly interposes burdens of production and persuasion that are dramatically different than the burden our state applies in cases wherein the necessity of a taking is attacked. In Connecticut it is not the condemnor, but rather "the *plaintiff* [who has] the burden of establishing that the taking . . . was unreasonable, in bad faith or an abuse of power." (Emphasis added.) *Hall v. Weston*, *supra*, 167 Conn. 66; accord *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 598; *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146.

We note further that the Montana and Nebraska decisions followed by the trial court utilize an approach to the necessity determination that is dramatically different from the deferential standard that our state applies in cases wherein the necessity of a taking is attacked. Unlike Connecticut, these courts consider necessity to be a question of fact for the judiciary. For example, in *State Highway Commission v. Yost Farm Co.*, *supra*, 142 Mont. 243-44, the court stated: "The foregoing statutes and cases clearly reflect that under [Montana's] eminent domain statutory provisions, the trial judge not only has the power to determine the question of necessity, but has been directed to make a finding that the public interest requires the taking of the lands before he has power to issue an

order of condemnation."[105] In Connecticut, to the contrary, a trial court is limited to the factual determination of whether the legislative or agency determination of necessity "was unreasonable or in bad faith or was an abuse of the power conferred." *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146. Despite acknowledging this deferential standard of review, and properly applying it in its review of the necessity of the taking of parcel 3 properties, the trial court improperly conducted a necessity review that went beyond the scope of review permitted and based its decision to grant permanent injunctive relief on an incorrect statement of the law with respect to the parcel 4A properties.[106] Accordingly, its decision to grant permanent

[105] The court in *State Highway Commission v. Yost Farm Co.*, *supra*, 142 Mont. at 243-44, 384 P.2d 277, stated: "In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined as other questions of fact, in view of all the evidence in the case. The evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. . . . The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizens whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions of fact to be determined in passing upon the question of necessity. . . .

"The foregoing statutes and cases clearly reflect that under our eminent domain statutory provisions, the trial judge not only has the power to determine the question of necessity, but has been directed to make a finding that the public interest requires the taking of the lands before he has power to issue an order of condemnation." (Citations omitted; internal quotation marks omitted.)

Similarly, the court in *Krauter v. Lower Big Blue Natural Resources District*, *supra*, 199 Neb. at 439, 259 N.W.2d 472, stated that "in a condemnation case issues as to the amount of property needed and the estate or interest in such property are questions of fact for the court." *See* also footnote 104 of this opinion.

[106] Accordingly, we need not address the plaintiffs' factual contentions in support of the trial court's opinion because they are offered in

(Continued on following page)



injunctive relief to those plaintiffs who own property located on parcel 4A was an abuse of its discretion.[107]

Furthermore, we note that the plaintiffs claim only that the trial court properly determined that the taking of parcel 4A was not reasonably necessary. As previously discussed, this argument is premised on the trial court applying a standard of review that is not applicable in Connecticut. The plaintiffs did not claim that the development corporation's decision violated the proper standard utilized in Connecticut for reviewing such decisions – whether the decision was "unreasonable or in bad faith or was an abuse of the power conferred." *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146. In reviewing the plaintiffs' parcel 3 claim, we affirmed the trial court's determination that "there is no evidence, credible or otherwise, that the condemnations in parcel 3 as originally envisaged in the [development plan] or at the time of the taking were done in bad faith, or not with an honest motive, or based on [any] pretext given any reasonable definition of the word. . . ." *See* part IV A of this opinion. Similarly, our review of the record as it concerns the development corporation's necessity determination for parcel 4A reveals that it was not the product of bad faith, unreasonableness, or an abuse of the power conferred. Compare *AvalonBay Communities, Inc. v. Orange*, *supra*, 256 Conn. 565 (municipality's project plan was "pretext . . . to

support of a factual finding that was the product of the application of an improper legal standard.

[107] We also need not address the defendants' other claim in support of their cross appeal, which is that the trial court improperly refused to permit the defendants to take the plaintiffs' properties on parcel 4A for the purpose of roadway and infrastructure improvements.

thwart affordable housing"; "the record fully supported the trial court's finding that the [chapter 132] project plan was hastily assembled, poorly envisioned and incomplete").

While there was no development commitment or formal site plan in place for parcel 4A, this is not necessarily indicative of bad faith, unreasonableness or abuse of power. As the trial court stated, "master planning is a process that evolves over time and must be flexible and subject to change as conditions warrant."[108] Similarly, this court has rejected a challenge to a town's condemnation based upon the town's lack of a detailed plan designating exactly what part of the defendants' land it needed for what purpose. *West Hartford v. Talcott*, 138 Conn. 82, 91, 82 A.2d 351 (1951); cf. *American Trading Real Estate Properties, Inc. v. Trumbull*, 215 Conn. 68, 79, 574 A.2d 796 (1990) ("land is indeed held for public use even when a municipality is not presently making use of the land but is

[108] As the development corporation points out, accomplishment of the development plan's general plan for development requires that the development corporation have flexibility in carrying out the plan. The general plan states that "the Fort Trumbull [development plan] area shall be developed as a dynamic mixed-use urban district that fully develops the opportunities presented by its waterfront location and its adjacency to the developing regional assets of the Fort Trumbull State Park and the Pfizer global development facility. The development of its proposed land uses shall support the formation of a vibrant Waterfront Urban Village, which binds each of its components into a highly cohesive urban district.

"The integrated nature of the proposed development shall (a) increase public access and use of the waterfront, (b) maintain a community atmosphere, and (c) enhance the location's attractiveness and desirability. *The establishment of strong functional, spatial and physical interrelationships between the district's various buildings, streets, public spaces and the waterfront, shall orient the development of each of the proposed land use components.*" (Emphasis added.)



simply holding it for development at some later time"). Furthermore, the development plan reveals that intended uses of parcel 4A include parking for a state park, or retail that will serve visitors and members of the community, or support facilities for a marina or a marina training facility. These intended uses, while not subject to definite commitments, do demonstrate that the development corporation has given reasonable attention and thought to the potential use of parcel 4A. Accordingly, under our deferential standard of review, the record does not support a finding that the development corporation acted in bad faith, unreasonably or in abuse of its power when it decided that parcel 4A was necessary to accomplish the objectives of the development plan. *See Berman v. Parker*, *supra*, 348 U.S. 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."); *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146 (necessity determination open to judicial review only to discover if it was "unreasonable or in bad faith or was an abuse of the power conferred").

The judgment is affirmed with respect to the parcel 3 takings; the judgment is reversed with respect to the parcel 4A takings, and the case is remanded to the trial court with direction to render judgment for the defendants.

In this opinion BORDEN, PALMER and VERTEFEUILLE, Js., concurred.

**DISSENT BY:** ZARELLA (In Part)

**DISSENT:**

ZARELLA, J., with whom SULLIVAN, C. J., and KATZ, J., join, concurring in part and dissenting in part. Another court observed in a different context: "A man's home may be his castle, but that does not keep the Government from taking it." *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). That is because, "as an incident to its sovereignty, the Government has the authority to take private property for a public purpose."[1] *Id.* At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as for a public building. *Id.* As the population grew and the collective needs of our society changed, however, the takings power was construed more broadly. Governmental authorities condemned private properties not just for a "public use," but also to achieve a "public benefit" such as the elimination of urban blight. Today, an even more expansive interpretation of public use in certain jurisdictions permits the taking of property for private economic development. To many, this represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be used to favor purely private interests. This

[1] "It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government. . . . It attaches to every man's land and is paramount to his right of ownership. . . . It lies dormant in the state until set in motion by legislative enactment." (Citations omitted.) *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 586, 87 A.2d 139 (1952).



case therefore presents the court with a rare and timely opportunity to address a constitutional issue of great significance, that is, whether there are limits to the government's authority to take private property by eminent domain when the public purpose is private economic development, and, if so, how those limits should be defined and enforced.

I believe that the majority reaches the wrong result with respect to the plaintiffs' properties, in part because it overlooks the fact that private economic development differs in many important respects from how we have defined a public use in the past. Accordingly, although I concur in parts I,[2] III and V[3] of the majority opinion regarding the applicability of chapter 132 of the General Statutes[4] to nonvacant land, the constitutionality of delegating the eminent domain power to the New London Development Corporation (development corporation), and the plaintiffs' equal protection claims, respectively, I disagree with the majority's conclusions in parts II, IV and VI pertaining to private economic development[5] as a public

[2] I disagree in large part with the majority's analysis in part I of its opinion. Any discussion about this issue is unnecessary, however, in light of my conclusion that chapter 132 of the General Statutes applies to nonvacant land.

[3] Although I agree with the majority's conclusion in part V of its opinion, my conclusion that the taking of the plaintiffs' properties is unconstitutional for other reasons is dispositive of the appeal, and, thus, the court need not reach the plaintiffs' equal protection claims.

[4] General Statutes §§ 8-186 through 8-200b.

[5] The term "private economic development," as used in this opinion, refers to the type of development permitted under chapter 132 of the General Statutes.

use under the Connecticut and federal constitutions and the taking of the plaintiffs' properties on parcels 3 and 4A.

Because this case is one of first impression, this court previously has not considered many of the issued raised by the parties to this appeal, including whether chapter 132 of the General Statutes is constitutional. In addition, for nearly a century, this court has not examined the authority of the state – or a subdivision thereof – to exercise its power of eminent domain for the public benefit when that public benefit is accompanied by a corresponding private benefit.[5] *See Connecticut College v. Calvert*, 87 Conn. 421, 424-28, 88 A. 633 (1913); *Evergreen Cemetery Assn. v. Beecher*, 53 Conn. 551, 553, 5 A. 353 (1886). Thus, it is important to undertake a review of property rights, the eminent domain power and the evolution of the public use requirement before addressing the issues raised by the plaintiffs in this appeal.

In part I A of this dissent, I briefly explore, from a historical standpoint, the nature of the sovereign's taking authority and the development of the concept of private property rights. In part I B, I examine the historical development of the takings clauses of the state and *federal constitutions*, with particular emphasis on the changing concept of public use.

In part II, I examine the degree of deference due to the legislature in its determination of what constitutes a public use, as well as the appropriate role of the court in ensuring that the condemnees' constitutional rights under

[5] In redevelopment projects, it is the elimination of blight, and not the development that follows, that constitutes the public benefit. *See* generally General Statutes § 8-124.



the state and federal constitutions are not infringed. In part II, I also addresse what level of judicial review is necessary depending on the nature of the public use under consideration.

In part III, I apply the principles enunciated in part II to the specific facts of this case as found by the trial court. In part IV, I summarize my concerns, expressed throughout this dissent, about the use of the eminent domain power in furtherance of private economic development.

In sum, I conclude that: (1) the legislature should be accorded great deference in determining what constitutes a public use; (2) the courts have a limited role in reviewing that determination; (3) chapter 132 of the General Statutes is facially constitutional; (4) as the category of public use changes from one of direct public use to indirect public benefit in the form of private economic development, the level of judicial inquiry must increase in order to protect the legitimate interests of the condemnee; (5) the taking of parcels 3 and 4A, as described in the master development plan, was not warranted on the basis of the facts found by the trial court and the principles set forth in this opinion.

## I

## HISTORICAL DEVELOPMENT OF PRIVATE PROPERTY RIGHTS, EMINENT DOMAIN AND THE PUBLIC USE CLAUSE

### A

### Private Property Rights and Eminent Domain

I agree with this court's observation that "[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences,

changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation." (Internal quotation marks omitted.) *Katz v. Brandon*, 156 Conn. 521, 532, 245 A.2d 579 (1968). I also recognize that the concept of public use has evolved over the course of our nation's history from the taking of private property for actual use by the public to the taking of property to further the public good or to secure some public benefit. *See* 2A P. Nichols, Eminent Domain (3d Ed. Rev. 2003, J. Sackman ed.) § 7.01, p. 7-16. I believe, however, that when this court is called upon to decide claims arising under chapter 132 of the General Statutes, it must be ever mindful, not only of a sovereign's historical power to acquire private property for a public use, but also of our nation's long-held commitment, shared by this state, to protect private property from unnecessary takings. *See* J. Lazzarotti, "Public Use or Public Abuse," 68 UMKC L. Rev. 49, 55 (1999); *see* also *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 601, 790 A.2d 1178 (2002) (authority to condemn strictly construed against taking party).

Private property rights developed as a legal concept in Europe during the demise of feudalism. *See* J. Lazzarotti, *supra*, 68 UMKC L. Rev. 53. The Magna Carta recognized the necessity of protecting private property rights in 1225 in providing that "no Freeman shall be . . . desseised of his Freehold . . . but by lawful Judgment of his Peers, or by the Law of the Land." Magna Carta, c. XXIX (1225). The text of our federal constitution reflects a similar intent that private property rights be fully protected. *See*, e.g., U.S. Const., amends. V and XIV. The idea that the protection of private property is a principal aim of our society



was affirmed by former United States Representative John A. Bingham, drafter of the fourth amendment, when he declared that "natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word 'person' . . . guarding those sacred rights which are as universal and indestructible as the human race, that 'no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.'" Cong. Globe, 35th Cong., 2d Sess., p. 983 (1859). Bingham also declared that "the absolute equality of all, and the equal protection of each, are principles of our Constitution. . . . It protects not only life and liberty, but also property, the product of labor." Cong. Globe, 34th Cong., 3d Sess., App., p. 140 (1857). In Connecticut, private property rights were so firmly entrenched by the time of the state constitutional convention in 1818 that the takings clause of the new constitution, which provided that "the property of no person shall be taken for public use without just compensation therefor"; Conn. Const. (1818), art. I, § 11; was adopted without debate. W. Horton, The Connecticut State Constitution: A Reference Guide (1993) p. 70.

Nevertheless, the right of the sovereign to condemn private property also has deep historical roots, purportedly dating back to the Romans. L. Berger, "The Public Use Requirement in Eminent Domain," 57 Or. L. Rev. 203, 204 (1978). The term "eminent domain" was used in the seventeenth century work, De Jure Belli et Pacis, in which Hugo Grotius, a renowned legal scholar, discussed the government's authority "to take private property for reasons of extreme necessity or public utility upon payment of compensation." *Id.* In our own country, the taking

of private property for a public use was a well accepted principle in colonial times. 2A P. Nichols, *supra*, § 7.01, p. 7-17. Eminent domain was employed to support mills, to create roads, to build canals and bridges; *Id.*, § 7.07, p. 7-200.1; and to drain private lands. *Id.*, § 7.01, p. 7-17. As the power was used more frequently, however, controversy ensued. *Id.*, pp. 7-17 through 7-18. Beginning with Pennsylvania and Vermont, in 1776 and 1777, states sought in their early constitutions to place specific limitations on the power of eminent domain. *Id.*, p. 7-18. Since that time, courts have sought, and sometimes struggled, to interpret the public use clause in light of state regulations and changes in the nation's economy that have transformed our society in unforeseen ways.

B

Evolution of the Public Use Requirement

A review of the law on takings reveals that the definition of "public use," when considered in the context of the eminent domain power, has no precise or fixed meaning. *Id.*, § 7.02, p. 7-24. Some courts have narrowly construed the public use clause to mean that property acquired by eminent domain actually must be used by the public, or that the public must have the opportunity to use the acquired property. *Id.*, § 7.02, p. 7-26; *see*, e.g., *Rockingham County Light & Power Co. v. Hobbs*, 72 N.H. 531, 534, 58 A. 46 (1904). Under a narrow reading of the term, public use includes public buildings, utilities, schools and roads. *Pocantico Water-Works Co. v. Bird*, 130 N.Y. 249, 259, 29 N.E. 246 (1891); 2A P. Nichols, *supra*, § 7.02, p. 7-36.1.



Other courts have construed the public use clause more broadly to include a use that furthers the public good or the general welfare, or one that secures some public benefit. 2A P. Nichols, *supra*, § 7.01, pp. 7-15 through 7-16; *see Id.*, § 7.02, p. 7-29; *see* also *Olmstead v. Camp*, 33 Conn. 532, 546 (1866) ("'public use' may . . . mean public usefulness, utility or advantage, or what is productive of general benefit"). Under this more expansive interpretation of the term, the United States Supreme Court has held that the scope of eminent domain is "coterminous with the scope of a sovereign's police powers."[7] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). Historically, the most dramatic example of takings under a broad construction of the public use clause is the acquisition of property for the redevelopment of blighted areas, whereby the stated public purpose is to reduce the menace to the public health, safety, morals and welfare of the community by "eliminating substandard, insanitary, deteriorated, deteriorating, slum or blighted conditions . . . [and] preventing recurrence of such conditions in the area. . . ." General Statutes § 8-124.

Private economic development pursuant to chapter 132 of the General Statutes can be distinguished in at least two important respects from previous notions of public use. First, traditional takings almost always are

[7] The police power has been described as "extensive, elastic, and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the state's power to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health, and general welfare of the community. . . ." 16A Am. Jur. 2d 251, Constitutional Law § 315 (1998).

followed by an immediate or reasonably foreseeable public benefit. *See*, e.g., *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 138-39, 104 A.2d 365 (1954) (condemnation of properties followed soon thereafter by relocation of project area residents and demolition of substandard structures); *Olmstead v. Camp*, *supra*, 33 Conn. at 551 (land taken by flooding contemporaneously with continuous operation of grist mill). In contrast, large-scale, private economic development projects authorized under chapter 132 of the General Statutes may not be completed for decades. In the present case, the municipal development plan (development plan), by its own terms, will be in full force and effect for a period of thirty years.[8] Accordingly, there may be much more uncertainty as to when and how the public may benefit when property is condemned for private economic development.

Second, the public benefit derived from a conventional taking typically flows from the actions of the taking party. *See*, e.g., *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 229 (public benefit achieved as result of housing authority's transfer of title from lessors to lessees); *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 142 (public benefit achieved by redevelopment agency's elimination of substandard structures and other evidence of blight on condemned properties); *Olmstead v. Camp*, *supra*, 33 Conn. at 551 (public benefit achieved by private property owner's operation of grist mill). In contrast, takings for private economic development require the taking party to

[8] Section 12.0 of the development plan provides in relevant part: "This [development plan] and/or any modification hereof shall be in full force and effect for a period of thirty . . . years from the date of first approval . . . by the City Council of the City of New London. . . ."



transfer ownership of the condemned land to private developers who subsequently execute a plan to accomplish the public purpose. Because public agencies must work hand in glove with private developers to achieve plan objectives, the taking agency may employ the power to favor purely private interests. *See*, e.g., *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill. 2d 225, 240-41, 768 N.E.2d 1, 263 Ill. Dec. 241, cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2000) (taking of property for expansion of private parking facility deemed not for public purpose). The trial court in the present case recognized this problem when it stated in its memorandum of decision that "powerful business groups or companies [may] exercise their influence to gain their ends with . . . little corresponding benefit to the public." The majority makes a similar observation. *See* part II A of the majority opinion (recognizing "potential for abuse of the eminent domain power").

A direct comparison of the statutory provisions on redevelopment and the corresponding provisions pertaining to private economic development illustrates the unique constitutional problem that may arise when the taking of private property for a public purpose also bestows significant benefits on private developers. Under chapter 130 of the General Statutes,[9] the redevelopment scheme, an area in need of revitalization is identified, properties are acquired, structures are demolished as necessary to eliminate blighted conditions and site improvements are made prior to the disposition of the cleared and improved land. *See* generally General Statutes § 8-124 et seq. The

[9] General Statutes §§ 8-125 through 8-169w.

declaration of public policy contained in chapter 130 expressly provides that the disposition of property is "incidental to" the elimination of blight and the activities surrounding the elimination of blight enumerated in the statute,[10] which are "public uses and purposes for which public money may be expended and the power of eminent domain exercised. . . ." General Statutes § 8-124. Consequently, the public benefit in a redevelopment project is clearly defined and well understood. It also can be accomplished relatively quickly and with a high degree of certainty because a public agency, funded with public money, is charged with bringing it about.

In contrast, municipal development projects undertaken pursuant to chapter 132 of the General Statutes involve the expenditure of funds to acquire and to improve land, water and vacated commercial plants for the far more abstract and ill-defined goals of promoting the "continued growth of industry and business within the state" and "meeting the needs of industry and business. . . ."[11] General Statutes § 8-186. The statutory scheme contains no clear description of how those goals are to be accomplished, except by conveyance of the properties to private parties. Disposition of the properties

[10] Pursuant to § 8-124, those activities include the acquisition of property, the removal of structures, the improvement of sites, the exercise of powers by municipalities, and any assistance offered by any public body.

[11] General Statutes § 8-187(10) defines the term "business purpose" as "including . . . any commercial, financial or retail enterprise and . . . any enterprise which promotes tourism and any property that produces income." This definition does little, however, to illuminate the meaning of "private economic development" as that term is used in chapter 132 of the General Statutes.



is thus essential, rather than incidental, to achieving the public purpose. Although the properties, once conveyed, are subject to land use restrictions and, in some cases, oversight by state agencies, there is no *statutory* assurance that the public will benefit from the development to follow or that the development even will occur. As the trial court observed, "the very nature of economic development-type projects is such that their accomplishment [is] based on financial predictions and possibilities that cannot be certain and [is] dependent on equally uncertain competitive factors."

The underlying uncertainty as to whether the public benefit will be achieved as planned in private economic development projects is expressly recognized in General Statutes § 8-200(b). That statute provides that a development plan may be abandoned within three years of its approval, and that any properties acquired thereunder may be conveyed free of the plan's restrictions if they cannot be conveyed to a private party at fair market value pursuant to the plan.[12] General Statutes § 8-200(b). The statutory scheme dealing with redevelopment contains no similar provision, and need not, because the public purpose of eliminating blight is accomplished at the time of

[12] General Statutes § 8-200 provides in relevant part: "(b) If after three years from the date of approval of the development plan the development agency has been unable to transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property acquired in the project area to any person in accordance with the project plan, and no grant has been made for such project pursuant to section 8-195, the municipality may, by vote of its legislative body, abandon the project plan and such real property may be conveyed free of any restriction, obligation or procedure imposed by the plan but shall be subject to all other local and state laws, ordinances or regulations."

the taking. Whatever occurs thereafter is irrelevant to the takings issue. Accordingly, under chapter 132 of the General Statutes, the possibility that a project may be abandoned after properties have been taken by eminent domain, when combined with the inherent uncertainty that the expected public benefit will be achieved in any particular case, raises serious concerns regarding the limits of the takings power that cannot be ignored.

Recent developments in the law of certain jurisdictions that permit condemnations for private economic development have caused one commentator to remark that most observers believe that the public use limitation on the power of eminent domain is a "dead letter." T. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 61 (1986). Critics question the propriety of condemning private property merely because a newly proposed use promises a greater public benefit than an existing use. *See*, e.g., *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 647, 676, 304 N.W.2d 455 (1981) (Ryan, J., dissenting). They note that "any business enterprise produces benefits to society at large," and, consequently, "there is virtually no limit to the use of condemnation to aid private businesses." *Id.*, 644 (Fitzgerald, J., dissenting). Thus, it is not surprising, as the majority concedes, that many "express alarm at what they consider to be a situation rife with the potential for abuse of the eminent domain power." Part II A of the majority opinion. In its memorandum of decision, the trial court acknowledged the danger of rendering the takings clauses of the federal and state constitutions meaningless and ignoring the private values of home and property "by allowing free rein to expanding capital markets." Ironically, the controversy has developed notwithstanding the existence of well established law advising that "the authority to



condemn is to be strictly construed in favor of the owner and against the condemnor." *Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 601; accord *State v. McCook*, 109 Conn. 621, 630, 147 A. 126 (1929); *see* also 3 P. Nichols, *supra*, § 9.02, pp. 9-19 through 9-20.

Growing fears regarding the potential abuse of the eminent domain power cannot be dismissed as idle speculation on the part of commentators. As municipalities increasingly struggle to provide public services with limited financial resources, governmental authorities are encouraging more intensive economic development to generate additional tax revenue, to create new jobs and to jump start local economies. Accordingly, there is a gathering storm of public debate as to whether the use of eminent domain to acquire property for private economic development in nonblighted areas is justified. I believe that such debate is essential to clarify the role of the legislature in making determinations of public use and the corresponding role of the courts in safeguarding the rights of private property owners who fear that the takings power will be used solely to benefit private interests. The complementary roles of the legislature and the judiciary as interpreters and guardians of the takings power thus require further examination.

## II

## JUDICIAL DEFERENCE TO LEGISLATIVE DETERMINATIONS OF PUBLIC USE

### A

### Determinations by State Legislatures

The suggestion frequently is made that courts have abdicated their role as interpreter of the law by showing

unusual deference to legislative determinations of public use. *See*, e.g., S. Jones, Note, "Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment," 50 Syracuse L. Rev. 286, 301 (2000). Proper consideration of the issue, however, requires that a distinction be made between public use determinations by state legislative bodies and determinations by local public authorities that specific properties should be condemned.

It is well established that judicial deference to determinations of public use by state legislatures is appropriate. E.g., *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954) ("subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive"); *see Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. at 241. The logic behind this principle is that the power to take property is a function of the "principle of consent inherent in a representative government." M. Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245, 1247 (2002). "Legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Hawaii Housing Authority v. Midkiff*, *supra*, 244.

Nevertheless, judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility. *Id.*, 240 ("There is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use. . . . But . . . it is an extremely narrow one." [Internal quotation marks omitted.]); *Olmstead v. Camp*, *supra*, 33 Conn. 551 ("the sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross



error or extreme wrong, controlled, by the dispassionate judgment of the courts"). In fact, the last Connecticut case to address the issue recognized that the question of "whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . but, in resolving it, great weight must be given to the determination of the legislature." (Citation omitted.) *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 141. Accordingly, I agree with the majority that judicial deference to determinations of public use by state legislative bodies is appropriate, but emphasize that the courts are empowered to resolve disputes when such determinations are challenged.

B

Determinations by Local Public Agencies

The majority notes, with respect to the decisions of local public authorities regarding specific condemnations, that "the determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power." (Internal quotation marks omitted.) Part IV A of the majority opinion; accord *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. 146. The majority further notes that Connecticut courts typically defer to the legislative determination of necessity and limit their review to whether the decision of the taking agency was unreasonable, had been made in bad faith or constituted an abuse of power. *See* part IV A of the majority opinion; *see* also *Gohld Realty Co. v. Hartford*, *supra*, 146; *Adams v. Greenwich Water Co.*, 138 Conn. 205, 213-14, 83 A.2d 177

(1951); *Water Commissioners v. Johnson*, 86 Conn. 151, 159, 84 A. 727 (1912).

For example, when a local legislative body determines that a new road is required, the court must defer to the local body's determination as to where the prospective road should be located and which properties should be taken to accomplish that purpose. In the absence of unreasonableness, fraud, or abuse of power, the determination regarding the location of the prospective road falls within the discretion of the local legislative body. The fact that there may be another possible road location that would accomplish the same objective will not avail a property owner who seeks to challenge the taking because local legislative determinations concerning what constitutes a public use and what properties need to be taken to effectuate that use are entitled to judicial deference. I agree with the majority with respect to the foregoing principles.

I disagree with the majority, however, on the issue of whether the *actual* use to be implemented will serve the public purpose described in the development plan at issue in the present case. The trial court and the majority frame the issue as whether there are reasonable assurances of a future public use. They treat the matter as one of control over development of the property *following* its disposition and focus on the statutory and contractual constraints in place to ensure that private sector participants will adhere to the provisions of the development plan. The majority concludes that the terms of the development plan regarding parcel-specific uses and continuing state oversight during the development process will provide sufficient assurances that the properties will be developed in accordance with the objectives of the development plan.



I submit that such an analysis must focus not only on the possible statutory, contractual and planning constraints that would ensure a public use, but also on the *temporal* question of whether there is any reasonable prospect that the expected development will, *in fact*, occur. Moreover, in determining whether the actual use to be implemented will serve a public purpose, I would follow the standard established in two earlier cases and grant no deference to the legislative authority because such a determination lies within the province of the trial court. *See*, e.g., *Connecticut College v. Calvert*, *supra*, 87 Conn. at 428.

In *Connecticut College*, this court "accepted and endorsed the legislative declaration that the higher education of women is in its nature a public use" for which the eminent domain power may be exercised. *Id.* The court reserved for itself, however, the authority to resolve questions regarding the *implementation* of the claimed public use in any specific case. *See Id.*, 423-24. "It is for the legislature to say whether any given use is governmental in its nature or not, subject to review by the courts only in exceptional cases of extreme wrong. . . . But the question whether in any given instance the use is or will be *administered* as a public or as a private use, is *a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand.*" (Emphasis added.) *Id.*, 428.

In making the foregoing distinction, the court relied on *Evergreen Cemetery Assn. v. Beecher*, *supra*, 53 Conn. 551, in which the court sustained a demurrer to a petition for the appointment of appraisers in condemnation proceedings brought under state law concerning the taking of property for the establishment of cemeteries. *Id.*, 552-53;

*see Connecticut College v. Calvert, supra*, 87 Conn. 428-29. The court in *Connecticut College* noted: "In the course of its opinion [the court in *Evergreen Cemetery Assn.*] pointed out that although the establishment of cemeteries was a use which was public in its nature . . . the petition was insufficient because it did not appear that the petitioner's cemetery was one in which the public had or could acquire the right to bury their dead. . . ." *Connecticut College v. Calvert, supra*, 429; *see Evergreen Cemetery Assn. v. Beecher, supra*, 553. That precedent, which the majority, sub silentio, overrules today, stands for the proposition that a trial court charged with determining whether the *actual* use of the property taken will in fact be for a public or private purpose need not defer to the views of the local legislative body.[13] *See Connecticut College v. Calvert, supra*, 428.

Connecticut is not alone in concluding that courts may inquire into the *actual* purpose for which property is to be condemned, even when it is claimed that the condemnation is for a public purpose. *See* 27 Am. Jur. 2d 112-13, Eminent Domain § 555 (1996). In *State ex rel. Tacoma*

[13] The majority's claim that its "conclusion in the present case is consistent with the principles set forth in [*Connecticut College* and *Evergreen Cemetery Assn.*]"; footnote 62 of the majority opinion; is misplaced. The majority misses the point in concluding "that the trial court properly determined that there are sufficient statutory and contractual constraints in place to ensure that private sector participants will adhere to the provisions of the development plan." Part II C of the majority opinion. As I note in this opinion the question is not whether the development plan and the statutes reasonably ensure adherence to the development plan, but, rather, whether "private sector participants" are available and willing to develop the property and whether the terms by which they agree to develop the property will result in a public benefit such that the private benefit will be incidental thereto.



*Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 P. 150 (1905), the respondent power company was authorized to build and operate water-generated power plants that supply electricity to, inter alia, public users in designated cities in the state of Washington. *Id.*, 661. The power company filed a petition seeking to condemn certain private property. *Id.* At a preliminary hearing on the matter, the lower court found that the proposed use was public in nature and ordered a jury impaneled to assess the damages owed to the property owners. *Id.* In reviewing the lower court's order, the Washington Supreme Court concluded that "the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefited by the use of it . . . is by no means fixed and definite. . . .

"It is not claimed that there is a present demand for the 50,000 electrical horse power. It is not claimed that the [power company] has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize its product. It is not under contract or obligation to furnish electricity to any person, or for any purpose." *Id.*, 667. The court determined that the proposed condemnation was not for a public purpose and, therefore, reversed the lower court's order. *Id.*, 670-71.

Significantly, the Washington Supreme Court did not rely merely on the stated purpose of the taking in reaching its conclusion but, rather, examined all of the available evidence to determine whether the actual use would, in fact, be for a public or private purpose. *See Id.*, 667-71. Many other courts have adopted similar reasoning. *See Kessler v. Indianapolis*, 199 Ind. 420, 426, 157 N.E. 547

(1927) (courts not limited to consideration of whether use described in condemnation proceedings is public but may consider "surrounding facts and circumstances tending to show what is the *actual, principal and real use to be made* of the property" [emphasis added]); *see* also *Walker v. Shasta Power Co.*, 160 F. 856, 860 (9th Cir. 1908) (corporation's right of eminent domain is not tested solely by description of public uses and private purposes contained in articles of incorporation, but may be determined "by evidence aliunde showing the *actual* purpose in view" [emphasis added]); *Wilton v. St. Johns*, 98 Fla. 26, 47, 123 So. 527 (1929) ("courts have the ultimate power and duty to determine . . . whether . . . [condemnation in any given case] is *in fact* for a public or a private use" [emphasis added]); *Brown v. Gerald*, 100 Me. 351, 357, 61 A. 785 (1905) (*actual purpose* of taking authorized by power company's charter was "open to judicial inquiry"); *Kirkwood v. Venable*, 351 Mo. 460, 466-68, 173 S.W.2d 8 (1943) (inasmuch as evidence indicated that condemned property was needed for public park, was suitable for public park and would be used by city for public park, court determined that condemnation was for public use); *Kansas City v. Liebi*, 298 Mo. 569, 591, 593, 252 S.W. 404 (1923) (evidence established that protective ordinance restricting use of and condemning rights to property would prevent overcrowding and make city more attractive, thereby promoting health, general welfare, growth and general prosperity of city, and that considerable part of community would *actually use or benefit from* contemplated improvement); *Charlotte v. Heath*, 226 N.C. 750, 754, 756, 40 S.E.2d 600 (1946) (evidence established that intended use of right-of-way allowing property owners living outside city limits to connect to sewer lines *would be* public); *State ex rel. Harlan v. Centralia-Chehalis Electric Ry. & Power*



*Co.*, 42 Wash. 632, 639-40, 85 P. 344 (1906) (in determining question of public use in case in which power company sought to condemn land, court was "not confined to . . . the description of those objects and purposes as set forth in the [company's] articles of [incorporation], but [could consider] evidence aliunde . . . showing the *actual* business proposed to be conducted" [emphasis added; internal quotation marks omitted]); cf. *Linggi v. Garovotti*, 45 Cal. 2d 20, 27, 286 P.2d 15 (1955) (private party authorized by statute to acquire easement by eminent domain for sewer connection to existing public sewer system must make strong evidentiary showing establishing that taking *will* benefit public). Accordingly, judicial review to determine whether a particular use will *in fact* be for a public or private purpose has been an accepted practice for nearly a century.

The importance of judicial review in determining whether property taken by eminent domain for private economic development will in fact be used for a public purpose cannot be underestimated. Economic growth is a far more indirect and nebulous benefit than the building of roads and courthouses or the elimination of urban blight. Indeed, plans for future hotels and office buildings that purportedly will add jobs and tax revenue to the economic base of a community are just as likely to be viewed as a bonanza to the developers who build them as they are a benefit to the public. Furthermore, in the absence of statutory safeguards to ensure that the public purpose will be accomplished, there are too many unknown factors, such as a weak economy, that may derail such a project in the early and intermediate stages of its implementation.

The economic conditions that existed when this court rendered its earliest decision regarding a taking for

private economic development;[14] *Olmstead v. Camp*, *supra*, 33 Conn. 532; were very different in nature from the economic conditions that now define our world. The petitioner in that case, Samuel E. Olmstead, was a grocery merchant in a manufacturing community in which the public relied on Olmstead's store for all of their supplies, including ground feed for pigs, poultry, cows and other domestic animals. *Id.*, 536 (reporter's case summary). Olmstead owned land upon which he had erected a water mill "for the purpose of grinding [the] flour and feed [that were sold at his store] and for doing custom work such as is usually done in a country mill. . . ."[15] *Id.*, 533 (reporter's case summary). The land also contained a mill pond and a dam. *Id.* Olmstead found it necessary to raise the dam and flood the property of the respondent, Samuel R.P. Camp, in order to ensure the proper operation of the mill. *Id.* Olmstead petitioned the court under the Flowage Act of 1864[16] to grant him the right to flood Camp's land and to

[14] In *Olmstead*, a private party effected the taking; *see Olmstead v. Camp*, *supra*, 33 Conn. 532 (reporter's case summary); but for a purpose that the court concluded was public. *Id.*, 551.

[15] The court found that Olmstead had leased the mill to his brother-in-law, Jonathan Camp, Jr., for an indefinite period. *Olmstead v. Camp*, *supra*, 33 Conn. at 535 (reporter's case summary). The court also found that "there was no agreement that Camp should do custom grinding for the public, which obligated him to do it; but such had been the practice from the time when the mill was erected, and it was the expectation of the parties to the lease that the practice would be continued." *Id.*, 535-36 (reporter's case summary).

[16] Public Acts 1864, c. XXVI, §§ 1 and 2, codified as amended at General Statutes (1866 Rev.) tit. 1, c. 16, § 388, provided: "Sec. 1. That when any person shall desire to set up a water mill on his own land, or upon land of another with his consent, and to erect a dam on the same, for working such mill by water, which dam would flow water on to land belonging to any other person, he may obtain the right to flow said land

(Continued on following page)



determine the damages owed. *Id.*, 532 (reporter's case summary).

A court-appointed committee concluded that the flooding of Camp's property was for a public use. *Id.*, at 534 (reporter's case summary). The committee determined that Olmstead could raise the dam, had a right to keep and to maintain it permanently and, consequently, owed certain damages to Camp. *Id.* Camp appealed from the committee's decision.

On appeal, this court upheld the committee's decision and found in favor of Olmstead. *Id.*, 552. The court characterized the issue to be decided as one "involving [the] rights of property guaranteed by the fundamental law, and . . . the interests of business and the prosperity of the state." *Id.*, 545. The court concluded: "From the first settlement of the country grist-mills of this description have been in some sense peculiar institutions, invested with a general interest. Towns have procured them to be established and maintained. The state has regulated their tolls. In many instances they have been not merely a convenience, but almost a necessity in the community." *Id.*, 552.

upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sec. 2. Any person wishing to flow land as aforesaid, if he can not agree with the owner, or owners, as to the damages to be paid, may bring his petition to the superior court for the county where the land to be overflowed, or any part of it, lies, which petition shall contain such a description of the land to be overflowed and of the dam, its location, and proposed height, as that the record will show with certainty the matter that shall be determined, and shall be served on the respondent according to law requiring service of petitioners in such court."

The court thus observed that grist mills played an integral part in the subsistence of the local community because they ground the feed and flour upon which the economic lifeblood of the community depended. The court described the proper functioning of grist mills not only as consonant with the public interest, but, in certain instances, as essential to the community's continued viability. Accordingly, the raising of the height of the dam and the taking of Camp's property were akin to the taking of property today for use by a public utility. *See*, e.g., *Connecticut College v. Calvert*, *supra*, 87 Conn. 426 (characterizing public use for which land was taken in *Olmstead* as "governmental" in nature because of great advantage to community). In stark contrast, the private development contemplated under chapter 132 of the General Statutes only can be described as "governmental" in nature if the benefits of increased tax revenue and new jobs are actually realized.

I therefore submit that, just as the taking of nonblighted property in a blighted area is subject to additional scrutiny to determine whether the taking is "essential" to the redevelopment plan; *see Pequonnock Yacht Club, Inc. v. Bridgeport*, *supra*, 259 Conn. 605; so, too, should a heightened standard of judicial review be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for private economic development under chapter 132 of the General Statutes. Justice demands no less.



C

Heightened Judicial Review

Other jurisdictions with similar concerns have attempted to create more exacting standards of judicial scrutiny in the context of takings for private economic development. In *Poletown Neighborhood Council v. Detroit*, *supra*, 410 Mich. 616, 304 N.W.2d 455, in which property was to be acquired for the construction of a General Motors assembly plant; *Id.*, 628 455; the majority adopted a standard of heightened scrutiny requiring substantial proof of a clear and significant public benefit in determining whether the contemplated use constituted a legitimate public purpose. *Id.*, 634-35. Finding that standard insufficient, one of the two dissenting justices in *Poletown Neighborhood Council* proposed a stricter standard of review that would require a showing of "1) *public* necessity of the extreme sort, 2) continuing accountability to the *public*, and 3) selection of land according to facts of independent *public* significance." (Emphasis in original.) *Id.*, 674-75 (Ryan, J., dissenting). More recently, the suggestion has been made that property rights should be elevated to the status of a "fundamental" right and that a strict scrutiny analysis should be conducted when property is taken for private economic development. *See* S. Jones, Note, *supra*, 50 Syracuse L. Rev. 314.

In its memorandum of decision, the trial court in the present case declared that "there are, in fact, limits on the constitutional propriety of using the power of eminent domain for . . . 'pure economic development. . . . '" The trial court rejected a standard of heightened scrutiny, however, on the basis of *Bugryn v. Bristol*, 63 Conn. App. 98, 774 A.2d 1042, cert. denied, 256 Conn. 927, 776 A.2d 1143, cert. denied, 534 U.S. 1019, 122 S. Ct. 544, 151 L.

Ed. 2d 422 (2001), in which the Appellate Court stated that "our Supreme Court has not applied a heightened standard of review in previous disputes concerning the nature of a taking . . . ." *Id.*, 102 n.7. The present case, therefore, provides this court with an opportunity to consider the heightened standard of judicial review that the court in *Bugryn* identified as lacking.

I submit that judicial review of the condemnations in the present case should consist of a four step process in which the burden of proof is shifted between the respective parties at various stages in the analysis. *See*, e.g., *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 235-37, 694 A.2d 1319 (1997) (setting forth evidentiary framework through which burden of proof is shifted between parties in product liability action). Judicial review should begin with consideration of whether the statutory scheme is facially constitutional. In light of well established judicial deference to determinations of public use by state legislative bodies, the party opposing the taking should bear the initial burden of proving that the contemplated public use of private economic development is unconstitutional. Should that party succeed in meeting its difficult burden, the inquiry should end and no taking should be permitted.

If the court concludes, however, that the proposed economic development is a valid public use, the party opposing the taking should bear the additional burden of proving, in accordance with the deferential standard of review afforded to legislative determinations of public use, that the primary intent of the particular economic development plan is to benefit private, rather than public, interests. Should that burden also be met, any taking pursuant to the plan should be deemed unconstitutional and the inquiry should end.



In the event that the court concludes that the plan is constitutional, the burden should shift to the taking party to prove that the specific economic development contemplated by the plan will, in fact, result in a public benefit.[17] "The burden [of proof] properly rests upon the party who must establish the affirmative proposition, to whose case the fact in question is essential, who has the burden of pleading a fact, who has readier access to knowledge about the fact, or whose contention departs from what would be expected in the light of everyday experience." *Albert Mendel & Son, Inc. v. Krogh*, 4 Conn. App. 117, 124 n.6, 492 A.2d 536 (1985). Accordingly, shifting the burden of proof is appropriate at this point in the inquiry because the taking party has greater access than the opposing party to information regarding developer interest in the properties and the progress of negotiations relating to the disposition of the properties.

The level of proof necessary to meet the burden of establishing that the anticipated economic development

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[17] The majority's conclusion that there is "no basis, in reason, precedent, policy or practicality" for judicial review to determine whether the proposed economic development will, in fact, occur; footnote 62 of the majority opinion; reflects a complete misunderstanding of the law of this and other jurisdictions. *See* part II B of this opinion; *see* also *Walker v. Shasta Power Co.*, *supra*, 160 F. 860; *Connecticut College v. Calvert*, *supra*, 87 Conn. 428, 88 A. 633; *Evergreen Cemetery Assn. v. Beecher*, *supra*, 53 Conn. at 553; *Linggi v. Garovotti*, *supra*, 45 Cal.2d 27; *Wilton v. St. Johns*, *supra*, 98 Fla. 47; *Kessler v. Indianapolis*, *supra*, 199 Ind. 426; *Brown v. Gerald*, *supra*, 100 Me. 357; *Kirkwood v. Venable*, *supra*, 351 Mo. 466-68; *Kansas City v. Liebi*, *supra*, 298 Mo. 591; *Charlotte v. Heath*, *supra*, 226 N.C. 754; *State ex rel. Harlan v. Centralia-Chehalis Electric Ry. & Power Co.*, *supra*, 42 Wash. 639-40; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, *supra*, 39 Wash. 667-71.

will result in a public benefit should be clear and convincing evidence. The clear and convincing standard traditionally applies in civil cases "to protect particularly important individual interests. . . ." (Internal quotation marks omitted.) *State v. Rizzo*, 266 Conn. 171, 211 n.22, 833 A.2d 363 (2003), quoting *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). "In cases governed by this burden, because society regards the individual interests involved to be very important, and because society imposes most of the risk of error on the party so burdened, we also require a very high degree of subjective certitude for the burden to be satisfied: the fact finder must be persuaded to a high degree of probability."[18] *State v. Rizzo*, *supra*, 211 n.22. In other words, the party must prove that "the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are

[18] I contrast this standard of proof with the standard of proof in the typical civil case between private parties, i.e., preponderance of the evidence. In the typical civil case, society is minimally concerned with the outcome, and the litigants share the risk of error in roughly equal fashion. E.g., *State v. Rizzo*, *supra*, 266 Conn. at 210. In such a case, "we require only a modicum of subjective certitude on the part of the fact finder: [as] long as the fact finder is persuaded that the plaintiff's assertions are probably more true – by no more than a ratio of fifty-one to forty-nine – the plaintiff has met his burden of persuasion.

"At the other end of the spectrum is the criminal case. In such a case, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error on itself . . . by requiring . . . that the state prove the guilt of an accused beyond a reasonable doubt." (Internal quotation marks omitted.) *Id.*, 210-11.



false or do not exist. . . . [The clear and convincing standard is] a very demanding standard that should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citation omitted; internal quotation marks omitted.) *Durso v. Vessichio*, 79 Conn. App. 112, 123, 828 A.2d 1280 (2003).

In civil cases involving property disputes, differing levels of proof are required depending on the type of claim under consideration. For example, clear and convincing evidence is required to prove a claim that land has been taken by adverse possession. E.g., *Wildwood Associates, Ltd. v. Esposito*, 211 Conn. 36, 42, 557 A.2d 1241 (1989). This is because title becomes absolute in the adverse possessor if that standard of proof is satisfied. Takings for private economic development resemble takings by adverse possession because property owners in both situations lose title to their land. Accordingly, it is consistent with existing law to place the burden on the taking party and to require that the standard of proof be clear and convincing evidence when property is taken by eminent domain for private economic development.

I also believe that the clear and convincing standard is compelled in this context because of the tremendous social costs of the takings, costs that are difficult to quantify but that are nonetheless real. The fact that certain families have lived in their homes for decades and wish to remain should not, in my view, be summarily dismissed as part of a cost-benefit analysis typically performed by the legislature. At a minimum, the distress suffered by the plaintiffs because of their relocation to another neighborhood that lacks the same comforting familiarity and associations as their old neighborhood

should be considered as additional justification for a higher level of proof. I therefore believe that the best way to protect the rights of property owners in cases involving takings for private economic development is to require that the taking party prove by clear and convincing evidence that development prospects are such that the condemned property will, in fact, be used for the intended public purpose.

Courts and legislatures have employed the clear and convincing standard of proof in other constitutional, legislative and common-law contexts involving important questions of fact. *Miller v. Commissioner of Correction*, 242 Conn. 745, 796, 700 A.2d 1108 (1997). For example, when constitutional rights are at stake, as in the present case, a nonparent petitioning for visitation pursuant to General Statutes § 46b-59 must prove the requisite relationship and the harm that would result from the denial of visitation by clear and convincing evidence in order to protect the parents' liberty interests in the care, custody and control of their children. *Roth v. Weston*, 259 Conn. 202, 228, 232, 789 A.2d 431 (2002). "Due process [also] requires [that] the clear and convincing test be applied to the termination of parental rights because it is the *complete severance* by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent. . . ." (Emphasis in original.) *Id.*, 231. In still another context, we have held that, in order to protect a criminal defendant's constitutional right of confrontation, the state must prove "a compelling need for excluding the defendant from the witness room during the videotaping of a minor victim's testimony"; *State v. Jarzbek*, 204 Conn. 683, 704, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); by establishing, by clear and



convincing evidence, that the defendant's presence would seriously call into question the trustworthiness of the victim's testimony. *Id.*, 704-05. I submit that the taking of private property for private economic development is equally deserving of this very demanding standard of proof for all of the foregoing reasons,[19] especially in light of the fact that such projects may be abandoned within three

[19] The majority's assertion that the clear and convincing standard should not be applied to evidence that the proposed development will, in fact, occur because the standard "is reserved for past events, and not for predictions of future events"; footnote 62 of the majority opinion; is not only incorrect, but entirely misses the point of the present analysis. As to the assertion's validity, the majority need only consider the fact that when the state wishes to exclude a criminal defendant from the witness room during the videotaping of a minor victim's testimony, it must establish by clear and convincing evidence that the defendant's presence "would . . . seriously [call] into question" the trustworthiness of the victim's testimony. *State v. Jarzbek, supra*, 204 Conn. at 704-05, 529 A.2d 1245. Obviously, the testimony in question is the *future* testimony of the minor victim. The clear and convincing standard also is used in proceedings involving the termination of parental rights to determine whether the evidence is sufficient to establish that "the natural parent cannot or *will not* provide a normal family home for the child." (Emphasis added; internal quotation marks omitted.) *Santosky v. Kramer*, 455 U.S. 745, 767, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), quoting N.Y. Soc. Serv. Law § 384-b (1)(a)(iv) (McKinney Sup.1981). More important, however, is the fact that the evidentiary showing suggested in the present case does not require a prediction of future events, but testimony and documentation as to the *present development environment*, which, if persuasive, might include signed development agreements, marketing studies that indicate a near-term demand for the proposed uses and evidence of economic trends that would support economic development within the three year time period before the condemnor is permitted to abandon the project and convey the acquired properties to developers free of the plan's restrictions. In other words, although the purpose of such evidence is to document the probability that future development will occur as planned, the evidence itself would be grounded in present realities, which cannot, by definition, be conclusive as to future events.

years of their approval if market conditions change and the plan of development cannot be implemented. *See* General Statutes § 8-200(b).

The trial court's subsidiary findings as to the actual future use of the properties taken are findings of fact that should not be overturned unless they are clearly erroneous. *See*, e.g., *State v. Pinder*, 250 Conn. 385, 420, 736 A.2d 857 (1999); *State v. Atkinson*, 235 Conn. 748, 759, 670 A.2d 276 (1996). In light of the constitutional interests at stake, however, the issue of whether the properties actually will be used for a public purpose is an ultimate issue that should be reviewed by this court on the basis of its own "scrupulous examination" of the record. *State v. Pinder*, *supra*, 420. This is necessary to ensure that judicial review "comports with constitutional standards of due process." (Internal quotation marks omitted.) *State v. Hafford*, 252 Conn. 274, 298, 746 A.2d 150 (trial court's finding that confession was voluntary closely scrutinized to protect defendant's constitutional rights), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Finally, if the trial court concludes that the condemned property will be used for a public purpose, it should be incumbent upon the party opposing the taking, on the basis of the deferential standard of review that we accord to legislative determinations of public use, to prove that the specific condemnation at issue is not reasonably necessary to implement the plan.

The shifting of the burden of proof, as suggested, is not unusual in circumstances in which we have deemed constitutional interests to be extremely significant. For example, a burden shifting analysis has been adopted in employment discrimination cases. *McDonnell Douglas*



*Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (after complainant establishes prima facie case of discrimination, employer must articulate legitimate, nondiscriminatory reasons for adverse employment action and complainant then must prove employer engaged in intentional discrimination); *see* also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *Board of Education v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505-06, 832 A.2d 660 (2003). The burden of proof also is shifted to the decision-making party in affordable housing land use appeals. General Statutes § 8-30g (in administrative appeal from decision to deny application, burden on local commission to prove that decision is supported by sufficient evidence in record); *see* *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674, 733, 780 A.2d 1 (2001); *see* also *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 514, 636 A.2d 1342 (1994) (legislature "placed the burden of proof on the commission . . . and not, as in traditional land use appeals, on the applicant" [internal quotation marks omitted]). Claims that a prosecutor has used peremptory challenges in violation of the equal protection clause are treated in a similar manner. *See*, e.g., *Batson v. Kentucky*, 476 U.S. 79, 97-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (following defendant's prima facie showing that prosecutor exercised peremptory challenge on basis of race, burden shifts to prosecutor to articulate race-neutral explanation for striking juror after which burden shifts to defendant to show that prosecutor's articulated reasons are insufficient or merely pretextual); *see* also *State v. Dehaney*, 261 Conn. 336, 344-45, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). Harmless error analysis

involves a comparable approach when the alleged impropriety is of constitutional magnitude in that the burden to prove that the constitutional error was harmless beyond a reasonable doubt rests with the state. E.g., *State v. Francis*, 267 Conn. 162, 188, 836 A.2d 1191 (2003); *State v. Cavell*, 235 Conn. 711, 720, 670 A.2d 261 (1996). Accordingly, the adoption of a burden shifting analysis in cases involving the taking of property for private economic development is consistent with our approach in other contexts in which a constitutional right is at stake.

The adoption of a burden shifting analysis also is consistent with the takings procedure followed in other jurisdictions that do not place the burden of attacking a routine taking on the property owner, as Connecticut does. *See* generally 27 Am.Jur.2d 45, *supra*, § 479. General Statutes § 48-23 provides in relevant part: "When, under the provisions of any statute authorizing the condemnation of land in the exercise of the right of eminent domain, an appraisal of damages has been returned to the clerk of the Superior Court . . . and when the amount of appraisal has been paid or secured to be paid or deposited with the State Treasurer . . . any judge of the Superior Court may, upon application and proof of such payment or deposit, order such clerk to issue an execution commanding a state marshal to put the parties entitled thereto into peaceable possession of the land so condemned."[20] The procedure for taking property by eminent domain in Connecticut is less hospitable to the property owner than in most other jurisdictions because "the party to whom is delegated the right to determine whether particular land is necessary for

[20] *See* also General Statutes §§ 8-128 through 8-133.



a public use need only allege in his application to the court that he has so determined, leaving the burden of attack upon the adverse party." *Bridgeport Hydraulic Co. v. Rempsen*, 124 Conn. 437, 442, 200 A. 348 (1938); *see* also *Hall v. Weston*, 167 Conn. 49, 63, 355 A.2d 79 (1974) ("burden of attacking [town's statutory] authority [to condemn land] rested upon the [property owner]"). The primary means available to challenge the condemnation are: (1) an action to enjoin the taking; e.g., *Bridgeport Hydraulic Co. v. Rempsen*, *supra*, at 442, 200 A. 348; or (2) a request that the court review the statement of compensation filed by the taking party. *See* General Statutes § 8-132.

In contrast, the most common method of condemning land in other jurisdictions is for the taking party to file in court a petition to take the property. 27 Am. Jur. 2d 45, *supra*, § 479. After the property owner and all other persons having an interest in the land sought to be condemned are joined in the action, a hearing is held at which the condemnor first must establish "its right to condemn the land, and, in some [jurisdictions], the necessity of the taking." *Id.* If the court is satisfied that the taking is justified, damages are assessed and a final award is rendered. *Id.* In jurisdictions that follow this procedure, the burden, therefore, is not on the property owner to attack the condemnation but, rather, on the condemnor to establish its right to condemn. *See Id.* A similar approach has been adopted for use in the federal courts. Pursuant to rule 71A of the Federal Rules of Civil Procedure, the condemning party files a complaint identifying the property to be taken. Fed. R. Civ. P. 71A (c)(2). If the property owner objects to the taking, he may file an objection or defense, and the issue subsequently may be tried to the

court or a jury. Fed. R. Civ. P. 71A (e) and (h). Accordingly, shifting the burden of proof, as proposed in this opinion, is consistent with the allocation of the burden of proof in other jurisdictions.

## III

## JUDICIAL REVIEW OF THE CONDEMNATIONS

Applying the foregoing principles to the facts of this case, I agree with the majority that the legislative determination of public use, as expressed in chapter 132 of the General Statutes, is constitutional. I also agree that the primary purpose of the takings is to benefit the public. I do not agree, however, that the condemnations are constitutional in light of the fact that the record does not contain clear and convincing evidence to establish that the properties actually will be developed to achieve a public purpose. The foregoing conclusion being dispositive of this appeal, the court need not reach the issue of whether the condemnations are reasonably necessary to implement the development plan.

### A

### The Facial Constitutionality of Chapter 132 of the General Statutes

The first issue to be addressed under the proposed standard of review is whether chapter 132 of the General Statutes – § 8-186 in particular – is facially constitutional insofar as it authorizes the use of the eminent domain power for private economic development. The majority explains that its analysis of this issue will be guided by the principle that the challenging party must prove the unconstitutionality of the statute beyond a reasonable



doubt; e.g., *State v. Ball*, 260 Conn. 275, 280-81, 796 A.2d 542 (2002); and that it will review the statutory scheme pursuant to the well settled standard of substantial deference to the legislature's determination of public use. *See* part II A of the majority opinion. After examining the relevant case law of our state, our sister states and the United States Supreme Court, the majority ultimately concludes that private economic development projects, created and implemented pursuant to chapter 132 of the General Statutes, which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions. *See Id.*

I agree with the conclusion of the majority but do not agree entirely with the majority's analysis. Although the plaintiffs must prove the unconstitutionality of the statutory scheme beyond a reasonable doubt, the proper standard for reviewing the underlying claim is whether the state legislature "*rationally could have believed* that the [statute] would promote its objective." (Emphasis in original.) *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 672, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981); accord *Hawaii Housing Authority v. Midkiff, supra*, 467 U.S. 242, 104 S. Ct. 2321; *see* also *Housing Authority v. Higginbotham*, 135 Tex. 158, 165, 143 S.W.2d 79 (1940) (legislative declaration of particular use is "binding upon the courts unless such use is clearly and palpably of a private character" [internal quotation marks omitted]); 26 Am. Jur. 2d 503, Eminent Domain § 61 (1996).

In *Hawaii Housing Authority*, the United States Supreme Court declared that "the 'public use' requirement is . . . coterminous with the scope of a sovereign's police

powers." *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. 240, 104 S. Ct. 2321. As was previously noted; *see* footnote 7 of this opinion; the police power is commonly understood as "the state's power to preserve and to promote the general welfare and . . . whatever affects the peace, security, safety, morals, health, and general welfare of the community. . . ." 16A Am.Jur.2d 251, Constitutional Law § 315 (1998); *see* also *Reid v. Zoning Board of Appeals*, 235 Conn. 850, 855, 670 A.2d 1271 (1996); *Raybestos-Manhattan, Inc. v. Planning & Zoning Commission*, 186 Conn. 466, 471, 442 A.2d 65 (1982). Guided by the principle of judicial deference to the legislative determination of public use, I therefore conclude, like the majority, that takings for private economic development are facially constitutional because Connecticut and federal courts have embraced, for more than a century, a broad construction of the public use clauses of the federal and state constitutions.

Almost 140 years ago, this court expressly rejected a narrow interpretation of the term "public use" as "possession, occupation . . . [or] direct enjoyment . . . by the public"; *Olmstead v. Camp*, *supra*, 33 Conn. at 546; and determined, instead, that the term means "public usefulness, utility or advantage, or what is productive of general benefit. . . ." *Id.* The court in *Olmstead* also advocated an interpretation of public use that could include private economic development when it made the following remarks about the far-reaching regional, and even national, effects of the water powered grist mill: "It would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby



build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state. It is obvious that those sections of the country which afford the greatest facilities for the business of manufacturing and the mechanic arts, must become the workshops and warehouses of other vast regions not possessing these advantages. . . . It is of incalculable importance to this state to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition." *Id.*, at 551.

The court's broad definition of public use in *Olmstead* was reaffirmed in *Gohld Realty Co. v. Hartford*, *supra*, 141 Conn. at 141, 104 A.2d 365 ("public use means 'public usefulness, utility or advantage, or what is productive of general benefit' "), and later echoed in *Katz v. Brandon*, *supra*, 156 Conn. 532-33, 245 A.2d 579 ("The modern trend of authority is to expand and liberally construe the meaning of public purpose. The test of public use is . . . the right of the public to receive and enjoy its benefit." [Internal quotation marks omitted.]).

In *Hawaii Housing Authority*, the United States Supreme Court determined that a compensated taking is not proscribed by the takings clause when it is "rationally related to a conceivable public purpose. . . ." *Hawaii Housing Authority v. Midkiff*, *supra*, 467 U.S. at 241, 104 S. Ct. 2321. Accordingly, the definition of public use in General Statutes § 8-186, namely, "the continued growth of industry and business within the state," survives the plaintiffs' facial constitutional challenge inasmuch as our legislature rationally could have concluded that the taking

of private property for such a purpose would be of general benefit to the public.[21]

B

Whether the Primary Purpose of the Condemnations Is To Serve the Public Interest

The next step in the analysis is to consider, under the deferential standard of review, whether the primary purpose of the condemnations is to serve the public interest, with private benefits being incidental thereto, or whether private interests are paramount and the public

[21] I note that the plaintiffs have not raised the issue of whether the statutory scheme is facially unconstitutional on the basis of a lack of adequate standards to ensure that the public purpose will be achieved. "When a legislative body retains a police power, articulated standards and guidelines to limit the exercise of the police power are unnecessary. . . . Police powers which are delegated, however, must include minimum standards and guidelines for their application. . . . The failure to provide standards and guidelines for the application of the police power constitutes a delegation of legislative power repugnant to the due process clause of the Fourteenth Amendment." (Citations omitted.) *Cary v. Rapid City*, 1997 SD 18, 559 N.W.2d 891, 895, (S.D. 1997); *see* 16A Am. Jur. 2d 257, *supra*, § 320; *see* also *Berman v. Parker*, *supra*, 348 U.S. 35 (standards contained in redevelopment statute sufficiently definite to sustain delegation of authority to administrative agencies to execute plan for eliminating blight).

Chapter 132 of the General Statutes contains numerous technical specifications regarding the content and adoption of a plan, project financing, the acquisition and transfer of properties and other matters. *See* generally General Statutes § 8-186 et seq. There are no statutory guidelines and criteria, however, to ensure that the plan primarily will benefit the public and, thereafter, that the proposed public benefit will be achieved. This is in stark contrast to chapter 130 of the General Statutes, in which the public purpose is defined as the elimination of blight and detailed guidance is provided as to how that purpose is to be accomplished. *See* generally General Statutes § 8-124 et seq.



purpose is incidental. In its discussion of this issue, the majority characterizes the trial court's determination that the takings were intended primarily to benefit the public as a finding of fact to be reviewed by this court under the clearly erroneous standard. *See* part II B of the majority opinion. The majority then concludes that the trial court's finding that the takings primarily were intended to serve the public interest, with private benefits being incidental thereto, was not clearly erroneous. *See Id.*

I agree with the majority that the takings were *intended* primarily to benefit the public. I disagree, however, that the trial court's determination regarding the public purpose of the condemnations is a factual finding subject to deferential review.

"The question [of] what is a public use is always one of law"; 2 T. Cooley, Constitutional Limitations (8th Ed. 1927) p. 1141; accord *Poletown Neighborhood Council v. Detroit*, *supra*, 410 Mich. 639, 304 N.W.2d 455 (Fitzgerald, J., dissenting); or, as in the present case, a mixed question of fact and law, because the trial court's determination as to public use rests on numerous factual findings regarding the goals, motives and interests of the public officials and private parties associated with the project. *See*, e.g., *State v. Silva*, 65 Conn. App. 234, 255, 783 A.2d 7 (mixed questions of fact and law involve application of legal standard to historical fact determinations), cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001). Accordingly, we review the trial court's factual findings for clear error but review de novo the court's legal determination that the takings primarily were intended to serve the public interest. *See*, e.g., *State v. Gibbs*, 254 Conn. 578, 592, 758 A.2d 327 (2000).

"The line of demarcation between a use that is public and one that is strictly and entirely private is a line not easily . . . drawn." (Internal quotation marks omitted.) *Olmstead v. Camp*, *supra*, 33 Conn. 547. This is especially true in the present case, in which private interests potentially stand to gain significant financial benefits under the development plan. I nonetheless agree with the majority that the evidence in the record supports a finding that the condemnations of the plaintiffs' properties primarily were intended to serve the public interest, and that the development plan, on its face, and the goals and objectives set forth therein are in accord with chapter 132 of the General Statutes. Accordingly, there is no need to repeat in detail all of the facts upon which the majority relies.

The record clearly demonstrates that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront. Furthermore, the proposed project is being undertaken in an economically "distressed" municipality in need of a stimulus to invigorate the local economy. Accordingly, the goals of the development plan are consistent with the important public interest described in General Statutes § 8-186 of promoting the economic welfare of the state through the "growth of industry and business within the state" and "meeting the needs of industry and business. . . ." Nevertheless, the conclusion that the development plan was intended primarily to benefit the public, per se, is insufficient to justify the takings.



C

Whether the Development Plan Will Result in a Public Benefit

In my view, the development plan as a whole cannot be considered apart from the condemnations because the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met.[22]

The record contains scant evidence to suggest that the predicted public benefit will be realized with any reasonable certainty. To the contrary, the evidence establishes that, at the time of the takings, there was no signed agreement to develop the properties, the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur.

The development plan calls for a hotel and conference center on parcel 1, residential dwellings on parcel 2,

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[22] In my view, the evidence in the record also is insufficient to establish that the preponderance of the evidence standard has been met.

commercial office space on parcel 3, parking and marina support on parcel 4A, marina and water-related uses on parcel 4B, commercial office and retail space on parcels 5A, 5B and 5C, waterfront commercial uses on parcel 6, and additional office space on parcel 7. Despite extensive negotiations, however, no development agreement, which the trial court described as a "necessary engine to start any development project," had been signed at the time of the takings. In fact, Marty Jones, president of Corcoran Jennison, the designated developer for parcels 1, 2 and 3, testified at a deposition that she could not even predict when such an agreement would be signed, although she was "optimistic" that it would be soon. Without an agreement, however, it is impossible to determine whether future development of the area primarily will benefit the public or even benefit the public at all. Several key project participants expressly recognized the importance of an agreement to such a determination in correspondence regarding the project and anticipated lawsuit.[23]

[23] On March 6, 2002, Claire Gaudiani, president of the development corporation, sent an e-mail to several other project participants, including Jones and David Goebel, executive director of the development corporation, which stated: "What became clear during the executive committee meeting with the [development corporation] yesterday morning [is] that we absolutely positively need a fully signed and executable set of documents, including the real estate agreement, by May [1]. The importance of this fact to the law suit is apparently very high." The same sentiment was expressed by Goebel in an e-mail sent to Jones, among others, on March 27, 2001, when he stated that "concluding the development agreement prior to the start of the Institute law suit will go a long way to deflate the argument that property is being taken with no plan in place. In fact, we feel this is crucial." Corcoran Jennison also realized the importance of a signed development agreement when Jones testified in a deposition taken on June 22, 2001, that she had received communications from others involved in the project that such an agreement should be in place prior

(Continued on following page)



Nevertheless, some minimal evidence was admitted as to the terms of a "proposed" agreement,[24] and, insofar as those terms provide for the leasing of parcels 1, 2 and 3 to Corcoran Jennison by the development corporation at a rate of $1 per year for a term of ninety-nine years, they appear to be more beneficial to the developer than to the city. Under the agreement, it appears that the city would be locked into a long-term commitment to a single developer, who then would be in a position to reap substantial financial rewards without a corresponding penalty if the developer does not perform as expected. In addition, the very generous terms of the proposed agreement are indicative of either an extremely weak real estate market or a possible violation of General Statutes § 8-200(b) because that statute suggests that property acquired pursuant to chapter 132 of the General Statutes must be sold or leased to a developer at "fair market value" or "fair rental value. . . ." Accordingly, the terms of the unsigned, proposed agreement do not appear to be consistent with the long-term public interest.

Furthermore, the evidence in the record establishes that the real estate market at the time of the takings was depressed and that prospects, therefore, were poor that

to commencement of the trial in order to demonstrate that the project was moving forward.

[24] The court's knowledge of the agreement is derived from the very brief document entered into evidence as plaintiff's exhibit JJJ and the testimony of various witnesses and deponents. The document in evidence contains only the first page of the proposed agreement. That page refers to the acquisition and demolition of properties by the development corporation, but not to any obligation on the part of the developer or other terms regarding the leasing of the properties in question.

the contemplated public use could be achieved with any reasonable certainty. Specifically, the trial court stated that "the [development plan] itself says that as of the date of its preparation its studies show that rent levels [of] class A office buildings have stabilized, but are below the level needed to support new speculative construction. In fact, historical values of class A office buildings have not recovered sufficiently to justify new construction except for end users." The trial court also referred to testimony that "[the city of] New London is still recovering from the recession of the early 1990s . . . market values are still well below replacement cost and new construction is generally not feasible. . . . The demand for class A office space in New London at the present time is soft. . . ." (Internal quotation marks omitted.) Indeed, testimony revealed that newly constructed office buildings in Shaw's Cove, an area adjacent to the project area, had not been fully occupied for more than fifteen years. Similar testimony described unsuccessful efforts by the redevelopment agency, over the course of several years, to attract investor interest in the construction of commercial office space at still another nearby location.

Additional testimony revealed that commercial real estate brokers had received few inquiries from companies with similar needs to those of Pfizer, Inc., and that, because it is difficult for the city of New London to compete against the city of New Haven in the market for biotechnology-bioscience office space, it is not economically feasible to develop this type of office space without a definite end user that will pay the rent to support the cost. Specific testimony adduced as to parcel 3 revealed that, in light of the uncertainty surrounding demand and the feasibility of creating biotechnology-bioscience office space,



and in light of the fact that office development on parcel 3 probably would be deferred until after the development of office space on parcel 2, any design should remain flexible to accommodate future demand. The trial court relied on testimony that "market conditions do not justify construction of new commercial space . . . on a speculative basis." (Internal quotation marks omitted.) Furthermore, the trial court noted that "buildings are not built without tenants and as of June, 2001, there were no tenant commitments as to . . . the newly proposed office buildings." (Internal quotation marks omitted.) The court also relied on testimony that "flexibility is needed in this type of planning. Market conditions change and sites are developed over decades not years. There must be an ability reserved to make alterations as market conditions change."

A close examination of the proposed plan from a financial standpoint also suggests that there were only limited prospects of a public benefit at the time of the takings. Although the trial court noted that the project ultimately would generate increased tax revenue, there apparently was no consideration of the loss in revenue that could result from the relocation of former residents and taxpayers out of the area during the ten, twenty or even thirty years that might be needed to fully implement the development plan.

Moreover, although the city tax assessor projected that annual tax revenue from the project, when fully implemented, was expected to increase sevenfold to approximately $2.6 million, she also testified that her projection was based on an estimate of the square footage to be constructed, a figure that was subject to change. Indeed, testimony confirmed that the square footage and proposed uses very likely would change over the course of

the project. In addition, due to the lack of a development schedule, there was no testimony as to when the projected tax revenue would be realized. Accordingly, the tax assessor's revenue projection may not come to fruition if the area is not developed in the manner and in the time frame predicted.

For example, the projected receipt of $422,100 in annual revenue from parcel 4A does not take into account the tax assessor's opinion that the property may be exempt from taxation if developed for a museum owned by the federal government, as one proposal had suggested. State or nonprofit ownership of the museum would generate a portion of the projected revenue, but revenue would fall well below the $422,100 currently estimated. Moreover, the tax assessor's opinion that the market value of a museum that costs $30 million to build would be only $18 million is yet another indication of the depressed real estate market. Finally, and perhaps most significantly, the expected public investment in the project area of close to $80 million for a potential increase in annual tax revenue of $680,544 to $1,249,843,[25] at best, hardly can be considered a major financial benefit to the public. Accordingly, the projected increase in tax revenue should not be accepted at face value and does not support the conclusion that the project will further the public good.

[25] These figures, which differ from the figures to which the tax assessor testified, are the figures contained in the development plan and quoted in the majority opinion. According to the tax assessor, the annual property tax revenue derived from the project area was approximately $362,111 prior to project approval, but was expected to increase to approximately $2,603,696 following completion of the project. If borne out, this constitutes an increase of approximately $2,241,585, far more than that projected by the development plan.



Various other elements of the plan also are problematical. The record contains no evidence that the indirect benefits projected under the plan, namely, spin-off economic activities and between 500 and 940 indirect new jobs, will indeed be realized. There also is no evidence as to when in the next thirty years such benefits might be realized. In addition, although the trial court relied on testimony that the city of New London has limited high end housing, it also noted that there was little explanation as to why seventy to ninety high end attached residences would significantly improve the overall housing situation in a distressed municipality. The trial court further noted that high end housing concentrated in one small area of the city would not be likely to have a multiplier effect. Accordingly, the only possible positive consequence of the housing to be constructed appears to be a limited increase in tax revenue. This revenue is impossible to evaluate, however, because it is not yet known whether a future development agreement will include a tax abatement incentive to encourage development of the property or other terms and conditions that may not be in accord with the general purposes set forth in the development plan or the applicable statutory scheme.

The development plan also contains few, if any, performance requirements for future developers. Section 6.2 of the plan, which concerns the disposition of the properties, contains a general description of restrictions on parcel use but no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives that might not be in the public interest, and no indication of possible penalties if developers do not perform as required. Moreover, § 6.2.3 of the development plan provides that "proceeds from sale

of disposition parcels shall be used to offset costs of implementation of this [development plan]." The provision in the development plan that purports to lease parcels 1, 2 and 3 to a developer at the sum of $1 per year for a term of ninety-nine years is particularly troubling when viewed in this context.

The defendants note that the budget for the project is almost $80 million, of which approximately $31.1 million has been spent to date, that the project has been approved by numerous state and local agencies, that the city of New London has spent thousands of dollars planning road improvements to make the site more attractive to prospective tenants and that other properties in the project area have been acquired in accordance with the plan objectives. This has little bearing, however, on whether there is any reasonable certainty that the planned public benefit will be realized. As the trial court conceded, "the protections afforded by the [takings] clauses of the federal and state constitutions would be hollow indeed" if takings were found to be constitutional merely because the condemning authority and various government agencies thought and acted as if they were so.

The record, therefore, fails to establish that there was any momentum in the project from a development standpoint or any reasonable development prospects for parcels 3 and 4A at the time of the takings. Evidence to the contrary consists of vague predictions of future demand. The trial court noted, for example, that according to the development plan, "the city [of New London] is at the *threshold* of major economic revitalization and the key catalyst is the Pfizer [Inc.] research facility"; (emphasis added); and that "a significant shortage of office space [was expected] by 2010," but none of the evidence in the



record supports this conclusion. In most of the important economic development cases cited by the majority to support its analysis, developers had been identified and were prepared to develop the properties in question. *See*, e.g., *Poletown Neighborhood Council v. Detroit*, *supra*, 410 Mich. 628, 304 N.W.2d 455 (property to be conveyed to General Motors Corporation for construction of automobile assembly plant); *Southwestern Illinois Development Authority v. National City Environmental, LLC*, *supra*, 199 Ill. 2d 229-30, 263 Ill. Dec. 241, 768 N.E.2d 1 (property to be conveyed to Gateway International Motorsports Corporation for expansion of racetrack parking facilities); *Olmstead v. Camp*, *supra*, 33 Conn. 551 (property subject to taking to be used in operation of existing grist mill).

Although the trial court acknowledged that, for economic development policy to be practical, a substantial period of time might have to pass before a project plan can be accomplished, it nonetheless declared that "the intent of chapter 132 [of the General Statutes] would be crippled if government intervention would only be feasible if immediate project development is possible – economically distressed communities are the very ones where, despite state intervention, project accomplishment might be difficult." On the other hand, I would submit that government intervention to take nonblighted properties by eminent domain is unwarranted in *any* circumstance in which there is no realistic prospect of a future public benefit. In the present case, there is no development agreement or time frame within which the proposed development must take place; indeed, all of the evidence suggests that the real estate market is depressed and the development plan itself contains no detailed provisions to *ensure* that the future use will serve the public interest.

Accordingly, the record in the present case does not contain clear and convincing evidence to establish that this portion of the test has been satisfied. I therefore would conclude that the takings are unconstitutional.

Having concluded that there is no reasonable certainty that the proposed public benefit will be accomplished, there is no need to consider whether the condemnations are reasonably necessary to implement the plan.[26] I therefore need not address the majority's analysis of that issue.

## IV

## CONCLUSION

In summary, I believe that chapter 132 of the General Statutes is constitutional on its face.[27] Additionally, there is very little evidence to support the plaintiffs' claim that the development plan was created primarily for the benefit of private interests. The benefits expressed in the development plan, namely, an increased tax base, job creation and the revitalization of the city of New London, as well as other evidence presented at trial, support the majority's conclusion that the plan is consistent with the public purpose and the goals set forth in chapter 132 of the General Statutes. *See* part II of the majority opinion. Nevertheless, the takings of the plaintiffs' properties are

[26] I note, however, that I disagree with the majority's conclusion that the trial court improperly determined that the takings on parcel 4A were not reasonably necessary because the proposed use was too vague and uncertain. *See* part VI of the majority opinion.

[27] *See* footnote 21 of this opinion, however, for a brief discussion of constitutional concerns that the plaintiffs have not raised on appeal.



unconstitutional because, in my view, the evidence is not clear and convincing that the property taken *actually* will be used for a public purpose.

To highlight this concern, consider the following hypothetical. A town is economically distressed and has seen no significant development for years. In good faith, and in accordance with the procedural prerequisites contained in chapter 132 of the General Statutes, the town creates a master plan of development in 1999 that designates an area within the city limits for mixed use development. A marketing study is completed while the plan is being drafted and demonstrates no significant shortage of office space until 2010, no immediate demand for hotel space without a corporate user that will subsidize the occupancy of up to one half of the projected 200 room facility, and no demonstrated demand for up-scale residential units to fulfill local housing needs. Despite this scenario, the town proceeds with the plan of development and settles on the above uses.

Further efforts result in a determination regarding the scope of the project and the location and general size of various proposed buildings. The master plan is submitted to a public hearing and subsequently approved by the local governing body. The plan projects that the new development will create between 518 and 867 construction jobs and 1200 and 2300 direct or indirect permanent jobs, and will result in an estimated sevenfold increase in annual property tax revenue. The master plan does not include any minimum standards that the contemplated private

developer will be required to satisfy.[28] While the taking authority has had numerous discussions with a particular developer, there has been no agreement on the terms of a development agreement. Nevertheless, the taking authority purchases certain parcels of land in the economic development area and takes other properties by eminent domain. No one contends, under this scenario, that the properties acquired by eminent domain are not reasonably necessary for development to occur as provided in the master plan.

Now consider the following scenario. *Six months after the takings are completed*, an interested developer is located. The developer contends that the economic conditions of the town and region are such that the project is not economically feasible unless the development agreement requires the town and the taking authority to do the following: (1) remediate the environmental conditions affecting the property, (2) replace the road and utility infrastructure, and (3) take measures to reduce the risk of coastal flooding, all at a cost of more than $70 million. Additionally, the developer insists that the town abate property taxes on properties located in the development area for a period of years and, rather than require the developer to purchase the improved property at fair market value, enter into an agreement with the developer to lease the property for ninety-nine years for the sum of $1 per year. Furthermore, the developer agrees to

[28] Such minimum standards might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value.



commence construction only after he is able to find viable tenants for the property or when a particular economic index for the area indicates demand for the uses, such as when the vacancy rate for class A office space drops below a certain level.

As I understand the majority's view, after according deference to the taking authority, the takings in the above scenario, which occur six months before any of the terms of the development agreement are known, would withstand a challenge by property owners who wish to remain in their homes. I, however, would find the takings to be, at best, premature. The majority has created a test that can aptly be described as the "Field of Dreams"[29] test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.

I am not suggesting that an absolute guarantee is necessary to ensure that private economic development will occur as planned. Such a guarantee would be unrealistic in light of the fact that many unforeseen events could affect the plan's implementation. For example, positive economic trends might falter and committed developers might be confronted with unanticipated difficulties that impair their ability to carry out plan objectives. When such difficulties are apparent at the very outset of the planning process, however, a course of action should not be endorsed based entirely on speculation.

[29] Field of Dreams (Universal Studios 1989).

To conclude, I would grant the legislature no deference on this issue and place the burden on the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement is reasonably ensured. This, in my view, cannot be accomplished without knowing initially what the actual public benefit will be. In the present case, it is entirely unknown whether the public interest will be served. There are no assurances of a public use in the development plan; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized. The determination of whether the private benefit will be incidental to the public benefit requires an examination of all of the pieces to the puzzle. Accordingly, I respectfully dissent from parts II, IV and VI of the majority opinion.

(2)

SUPREME COURT, U.S.

No. 04-108 JUL 19 2004

OFFICE OF THE CLERK

In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 191 TO 453


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**Susette Kelo et al. v. City of New London et al.**

**557299**

**SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW LONDON, AT NEW LONDON**

***2002 Conn. Super. LEXIS 789***

**March 13, 2002, Decided**
**March 13, 2002, Filed**

**JUDGES**: Corradino, J.

**OPINION BY**: Corradino

**OPINION**: MEMORANDUM OF DECISION ON REQUEST OF THE PLAINTIFFS FOR INJUNCTIVE RELIEF

The City of New London has approved a development plan for a 90-acre parcel of land known as the Fort Trumbull area. Acting under the authority of that plan, the New London Development Agency has taken various properties in the Fort Trumbull Development area.

In this case, the plaintiffs who own homes and property in the Fort Trumbull Development area seek injunctive relief to prevent the taking of their homes by eminent domain. These plaintiffs do not want compensation for their property, as must in any event be provided when property is taken by the state; they want to remain in their homes and argue that the issue of fair compensation does not even arise. Article 1 § 11 of our constitution states: "The property of no person shall be taken for public use, without just compensation therefore." Implicit in this language is the principle that no person's property can be taken if it is not taken for a "public use" regardless of any procedure providing for compensation. It is argued that a

taking cannot be for a public use if it is motivated by a private entity, here, the Pfizer Corporation, and if ultimately a private entity is to determine "the fate of the property owners" – and, it might be added, the ultimate use of the land.

Related at least to some of the latter assertions is the plaintiffs' argument that apart from the question of the propriety of the takings as such, the delegation of the power of eminent domain to the New London Development Corporation (NLDC) was illegal and unconstitutional since it is also a private entity.

The plaintiffs have also raised claims outside those made under the eminent domain clauses of the state and federal constitution. They have raised arguments under the equal protection clause and have claimed violation of their rights to procedural and substantive due process.

Apart from all these constitutional or constitutionally-related claims, the plaintiffs maintain that whether or not the takings in this case could otherwise pass constitutional muster they are illegal because the Municipal Development Plan (MDP), pursuant to which their property is to be acquired, is not authorized by Chapter 132 ("Municipal Development Projects") of the Connecticut General Statutes. Also, even if they were so authorized, the takings to be legal had to be exercised in accordance with the New London City Charter; this, it is argued, was not done.

Conceptually, at least, the final position taken by the plaintiffs is that the propriety of the acquisition of their property is to be determined not at the time the MDP was adopted by the New London City Council, but at the time of the takings – that time, practically speaking, being frozen in place by the bringing of this suit. In other words,



when all is said and done, the court must find that to accomplish the goals of the MDP it is "necessary" to take the property of the plaintiffs. Several of the plaintiffs testified and their position seems to be both prior to and at trial that they do not object to the MDP but they do not want to lose their homes and, in fact, there is no need to destroy their homes in order for the MDP or at least development in the Fort Trumbull area to go forward.

The defendant city and NLDC take issue with all of the plaintiffs' constitutional claims. They argue that taking private property for economic development purposes that will benefit the whole city is appropriate. They further argue that the power of eminent domain can appropriately be delegated by the NLDC. It is further maintained that it is not improper for a municipality to try to take advantage of the development plans of a major corporation, nor does the fact that a development project will benefit private businesses necessarily mean that a taking which creates the possibility of that benefit cannot be a public use. Underpinning much of the defendants' argument under the taking clauses of the state and federal constitution is their position that court decisions have made it clear that in this area the courts cannot interfere with what is after all the proper exercise of legislative discretion. They also take issue with the plaintiffs' claims that their rights to equal protection and procedural and substantive due process were violated.

The defendants argue that Chapter 132 of the Connecticut General Statutes does, in fact, authorize the MDP and the acquisitions of property included in that plan and approved by the city. They further argue that the plaintiffs give too narrow a reading to the city's charter; the charter does not require that the sections relied upon must be

followed; state statutes can be relied upon. Also the charter sections cited by the plaintiffs, it is said, do not apply to the issues before the court.

The defendants further argue that it is necessary to take the homes of the plaintiffs if the goals of the MDP are to be accomplished and in any event the road infrastructure plans and land filling required by the fact that some of the properties are within the one hundred year flood plain make the takings necessary.

The court will give a brief factual rendition of the events surrounding this litigation. Like the foregoing discussion of the various legal issues, it is necessarily incomplete, life, after all, is short, unlike this decision and the excellent briefs filed by the parties. In the various sections of the decision dealing with the specific legal issues that have been raised, the court will more completely refer to the relevant facts.

In 1978, the NLDC was established to assist the city in planning economic development. In January 1998, the State Bond Commission authorized bonds to support planning activities in the Fort Trumbull area and property acquisition to be undertaken by NLDC in support of the project and other money toward the ultimate creation of a state park at Fort Trumbull. In February 1998, Pfizer announced it was developing a global research facility on the so-called New London Mills site which is adjacent to the Fort Trumbull area. In April 1998, the New London City Council gave initial approval to prepare a development plan for the Fort Trumbull area and the NLDC began holding informal neighborhood meetings regarding the MDP process. In May 1998, the city council authorized



NLDC to proceed under Chapters 130, 132 and/or 588(1) of the state statutes.

The State Bond Commission approved more funds for NLDC activity. In June 1998, the city formally conveyed the New London Mills site to Pfizer. In July 1998, a consulting team was appointed for the state Environmental Protection Act process and to prepare the MDP. Six alternative plans for the project area were considered as part of the required Environmental Impact Evaluation. A Municipal Development Plan was prepared and approved by the NLDC board in early 2000 and shortly thereafter by the city council of New London. The MDP was also approved by the Department of Economic and Community Development (DECD), the Department of Environmental Protection (DEP), the State Office of Policy and Management (OPM) and the Southeastern Connecticut Council of Governments. The city council in approving the MDP authorized the NLDC to acquire properties within the development area. On October 16, 2000, the NLDC voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to convey their property. In November 2000, the NLDC began to file the condemnation actions which are the subject of this suit.

The development area consists of approximately 90 acres divided into various parcels. Four of the properties owned by three plaintiffs are situated on parcel 3 which is currently scheduled for R&D/office space. Eleven properties owned by four of the plaintiffs are located in parcel 4A which in the MDP is designated as "park support."

Each of the plaintiffs testified and said they wished to remain in their homes for a variety of personal reasons.

Two of the people referred to the fact that their families have lived in their homes for decades. They all testified that they loved their homes and the Fort Trumbull area. Several have put a lot of work into their property and all of them appeared to the court to be sincerely attached to their homes. One owner, Mrs. Kelo, loved the view her house afforded her and the fact that it was close to the water. All testified that they were not opposed to new development in the Fort Trumbull area. Also, two of the plaintiffs own their property as business investments – the rental of apartments. These two people have put much time, money and effort into renovating their properties, one has owned his property for seventeen years, the other for about eight years.

The testimony of the plaintiffs as well and the evidence presented by the defendants underlines the difficulty presented in deciding this case. Really what is involved is conflicting dreams. The plaintiffs wish to live out the typical American dream of abiding and owning in peace homes and property that they have chosen. Any threat to that dream is understandably forcefully and emotionally opposed as it should be in a free society. In fact, they are to be respected because whether their position is agreed with or not their very struggle reinforced shared values in our society.

On the other side of this controversy are what may be considered abstract entities – the City of New London, the New London Redevelopment Agency. But the people behind these abstractions have a dream also. The accomplishment of their dream presents no opportunity of personal gain or favor. Their dream is for their city buffeted for decades by hard times and until recently declining prospects. They hope by this development project and



resistance to the plaintiffs' litigation to provide an economic and social uplift for their city – jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city that can be realized.

With these observations in mind, the court will attempt to discuss the issues raised by the parties.

## Applicability of Chapter 132

As the court will discuss, the plaintiffs argue that under the state and federal constitution the power of eminent domain can only be exercised for a public use. They further argue that even where property is condemned for a constitutionally acceptable use which can be defined as a *public* use, eminent domain may only be used in our state when the taking is reasonably necessary to achieve or accomplish the public use.

Before addressing these questions, the court will discuss two issues raised by the plaintiffs which, at least analytically, can be considered preliminary and indeed somewhat independent of the foregoing claims. In other words, even if hypothetically the takings here could have been constitutionally justified as a public use and reasonably necessary to accomplish that purpose, the takings were unjustified, it is argued, because not statutorily authorized or because they were orchestrated by a purely private organization, the New London Development

Corporation (NLDC) in an improper delegation of eminent domain power.[1]

The plaintiffs' position that the takings were not authorized under Chapter 132 as well as the improper delegation argument are at least in part based on the extraordinary nature of the eminent domain power and the need to limit its arbitrary exercise. It is a broader power than the right to tax property in the possession of the owner. Under eminent domain, even with the requirements of just compensation, the fact remains that the property is taken from the owner.

All would agree that in some circumstances property justifiably can be taken by the state, but a rudimentary concern is the necessary effect or nature of eminent domain taking. That is, taxation in most cases affects broad classes of the population; this provides a salutary limit on its indiscriminate exercise and, perhaps more to the point, helps ensure, if not guarantee, that an unfair burden or cost is not placed on particular individuals or a discrete group by a majority or governmental agencies acting for a majority even with the best of intentions.

Because of these concerns, eminent domain statutes have been subjected to strict construction; *Waterbury v. Platt Brothers & Co .*, 75 Conn. 387, 392, 53 A. 958 (1902); *State v. McCook,* 109 Conn. 621, 629, 147 A. 126 (1929); *West Hartford v. Talcott,* 138 Conn. 82, 89-90, 82 A.2d 351 (1951); *Northeastern Gas Transmission Co. v. Collins,* 138 Conn. 582, 87 A.2d 139 (1952), where the court said at p.

[1] The court will discuss separately the claim that the eminent domain actions are improper because the provisions of the city charter regarding condemnation of property were not followed.



592, "when (the legislature) delegates to another the power to exercise the right of eminent domain, the extent of the power is limited by the express terms or clear implications of the statute authorizing its exercise . . . *Connecticut Light & Power Co. v. Bennett,* 107 Conn. 587, 593, 141 A. 654 . . . "; cf. *City of Birmingham v. Brown,* 241 Ala. 203, 2 So. 2d 305, 308 (Ala. 1941) (statute conferring eminent domain power on municipality); *Baycol, Inc. v. Downtown Development Authority,* 315 So. 2d 451, 455 (Fla. 1975), where the court said: "The power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates the power to a political unit or agency, a strict construction must be given against the agency asserting the power."

It is not disputed in this case that the NLDC purports to exercise eminent domain under Chapter 132, Section 8-186 et seq. The city council authorized the Municipal Development Plan under that Chapter, Ex. 1; the NLDC resolution authorizing the takings were made under that chapter, Ex. I; the Statement of Compensation filed by the city states the proceedings were brought under that chapter.

The plaintiffs argue that Chapter 132 does not authorize the taking in this case and raise several arguments. Section 8-186 refers to the acquisition and improvement of unified land and water areas and vacated commercial plants. The plaintiffs note that the core of the statute was enacted in 1967. They point to portions of the legislative history. In 1967, the legislature was concerned with areas of land contiguous to two or more municipalities not being developed. The debate on Public Act 760 "was primarily

concerned about ways to insure that multiple municipalities would be able to receive tax revenue in the same proportion in which they contributed to the development of such parcels" argue the plaintiffs. The director of the Connecticut Development Corporation told the legislature that ways must be found so more than one town can join together to develop industrial parks. The plaintiffs also note that this 1967 history does not mention the need to condemn prior existing structures or that the "unified land areas" might have any existing structures. The plaintiffs point to the fact that although Chapter 132 does not define the word "unified land areas" the word is often used to describe the united efforts of municipal jurisdictions or multiple state entities." *See* §§ 17a-37 and 18-99a which under particular circumstances allow the creation of "unified school districts." When seeking to unite different jurisdictions to achieve a set goal, the word "unified" is used to describe the result. *See* § 22a-352 (unified planning program "crossing several municipalities to manage water resources"); § 26-159a, which calls for "unified coast wide management" of certain fish species across multiple coastal towns.

In fact, the plaintiffs argue the act was meant to apply to undeveloped land – the word "development" is used, not redevelopment, as in Chapter 130 – "The Connecticut Redevelopment Act."

The plaintiffs note that in 1967, Chapter 132 gave municipalities the power to acquire land "only" but in 1972 "vacated commercial plants" was added to § 8-186. "If unified land area meant any piece of land whether improved with structures or not, there could be no need to add something as specific as vacated commercial properties"



maintain the plaintiffs. Clearly, the plaintiffs' homes are not "vacated commercial plants."

The plaintiffs cite several cases which typify how Chapter 132 is to be and was intended to be used – disputes regarding joint contiguous towns were involved in these cases. *City of Milford v. South Central Conn. Regional Council of Governments,* 27 Conn. L. Rptr. 48 (2000); *City of New Haven v. Town of East Haven,* 35 Conn. Supp. 157, 402 A.2d 345 (1977); *Manchester Environmental Coalition v. Stockton,* 184 Conn. 51, 441 A.2d 68 (1981). The plaintiffs thus argue that the development plan for the Fort Trumbull area "is not in accord with prior Chapter 132 projects as reported in Connecticut case law. The Fort Trumbull neighborhood is completely enclosed within New London." In a slight analytical variation of the theme, the plaintiffs then say "there is simply no municipality with which New London *can* 'unify' its efforts to 'develop' the neighborhood." (Emphasis added by the court.) In their reply brief, the plaintiffs make an additional argument in support of their position that "land" areas as used in the declaration of policy section, § 8-186, refers to undeveloped property. In a 1974 amendment to that section, the legislature in addition to allowing vacated commercial property to be acquired and improved also added the word "demolish" – that is, municipalities were permitted to acquire and improve or demolish vacated commercial plants." In effect, demolition as applied to land areas "was not needed because there would be no structures to demolish on the unified land areas."

The court will now attempt to address the plaintiffs' various positions regarding the appropriate interpretation and ambit of Chapter 132.

First, the court will refer to some general rules of statutory interpretation. In *Bortner v. Woodbridge,* 250 Conn. 241, 258-59, 736 A.2d 104 (1999), the court said:

> The process of statutory interpretation involves a reasoned search for the intention of the legislature . . . we seek to determine in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine the meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement and to its relationship to existing legislation and common law principles governing the same general subject matter . . .

In *Gateway Co. v. Dinoia,* 232 Conn. 223, 237, 654 A.2d 342 (1995), the court said:

> In determining the meaning of a statute [it] must be considered as a whole, with a view to reconciling its separate parts in order to render a reasonable overall interpretation . . . We presume there is a purpose behind every sentence, clause or phrase used in an act and that no part of a statute is superfluous.

In *Rutledge v. State,* 63 Conn. App. 370, 379, 776 A.2d 477 (2001), the court said: "It is the duty of courts to interpret statutes as they are written . . . In addition, the statute must be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation."

Many of the more recent appellate cases concentrate on use of legislative history to interpret statutory language but



it is well to keep in mind that which *Rutledge* implies – in interpreting a statute, a court should *first* look to the words of the statute itself and *then* the court resolves any ambiguity by turning to the legislative history and purpose of the statutory scheme. *Westport Taxi Service v. Westport Transit District,* 235 Conn. 1, 39, 664 A.2d 719 (1995). Indeed as the court said in *Rhodes v. Hartford,* 201 Conn. 89, 93, 513 A.2d 124 (1986): "When the words of a statute are plain and unambiguous, we need look no further for interpretive guidance because we assume the words themselves express the intention of the legislature, however, with ambiguity in a statute, we seek to ascertain the actual intent by looking to the words of the statute itself . . . the legislative history and circumstances surrounding the enactment of the statute and the purpose the statute is to serve."

The court will now try to discuss the points raised by the plaintiffs. Assuming it is appropriate to refer to the legislative history given the explicit wording of various sections of Chapter 132, it must be said that the plaintiffs' reading of the 1967 legislative history of Chapter 132 when first adopted is somewhat selective.

If structures of various types were not contemplated as being on the "land" referred to in § 8-186, the section that defines the act's purposes, what on earth did Representative Mayer mean when he said in support of the act that under it "state aid (for implementation of the act) would include planning, land acquisition, *demolition,* and so forth, not just sight improvement" (emphasis added) – what would there be to demolish on vacant land?

Furthermore, as plaintiffs note, Representative Mayer and others saw a great advantage in the act's facilitation

of joint development projects by municipalities on contiguous land; this may have been the primary purpose of the act. However, Representative Mayer did not think this was the exclusive purpose. At one point he said: "This particular bill will be *of interest to towns interested in industrial development not only within their own confines* but within multi-town districts." (Emphasis added.)

Tracking the legislative history of the act in the broad sense the plaintiffs also point to the 1972 amendment to § 8-186. In that year, the plaintiffs argue that the wording "vacant commercial plants" was added to the statute – why, it is argued, use this language if it had been contemplated in 1967 or 1972 that other types of structures would be on such land. This argument ignores the entire language of the 1972 amendment – "*acquire and improve* vacated commercial plants." The *underlined* language was an attempt to make clear that the act applied to such buildings, and perhaps by indirection more importantly, that state funding would also be provided for rehabilitating and improving vacated commercial property as opposed to just demolishing such structures. All of this has nothing to do with whether the act envisaged the presence of other structures.

The plaintiffs' reference to other statutes[2] using the word "unified" in situations of united efforts by more than one jurisdiction is not helpful since these statutes have diverse purposes unrelated to each other and certainly to the topic of development of municipal areas.

[2] *See* references to § 17a-37; § 22a-352; § 26-159a.



As noted, the plaintiffs reference several cases which they say typify how Chapter 132 has been used in the past – they involved disputes between towns regarding joint development projects under the chapter and have been previously cited by the court. But there are other cases not referred to which involve the use of Chapter 132 by individual municipalities to develop parcels located within such municipalities and not as part of a joint development project with another town; *see*, for example, *Manchester Environmental Coalition v. Stockton,* 184 Conn. 51, 53, 441 A.2d 68 (1981); *Avalonbay Communities, Inc. v. Town of Orange,* 256 Conn. 557, 561-62, 775 A.2d 284 (2001). Frankly, none of these cases are particularly helpful since none of them address an issue that has been specifically raised here as to the appropriate ambit of Chapter 132 – is it limited to development of vacant land and the power to acquire, improve or demolish vacated commercial plants?

Turning to its own analysis of Chapter 132, the basic problem the court has with the plaintiffs' position as to the applicability of the chapter to the Fort Trumbull area is the fact that there are references throughout the chapter which belie any notion that (1) the act only applies to the development of vacant land areas apart from vacated commercial plants thus, of course, barring the demolition of the homes of the plaintiffs; and (2) that the act in any event only applies to joint development projects by towns on land contiguous to more than one town.

In other words, the court has to read the act as it reads it in its entirety now not by applying a scholastic analysis of the meaning of each accretion over the past thirty-plus years. Insofar as possible, the court must give a harmonious reading to the statute and interpret its plain words as written, *see Rutledge v. State, supra; Westport*

*Taxi Service v. Westport Transit District, supra; Gateway Co. v. DiNoia, supra.*

Let us look at the complete language of Chapter 132 to examine the plaintiffs' position. The plaintiffs' view of the universe covered by Chapter 132 – vacant land areas with the only structures being vacated commercial plants – makes other statutory language inexplicable. That is, if the only structures the legislature understood as being located on Chapter 132 land were vacated plants which could be acquired and improved, how does one explain subsection (f) of § 8-189? That statute states that the designated development agency of a municipality may initiate a development plan under Chapter 132 and the "project plan *shall* include . . . (f) a plan for relocating project area occupants." (Emphasis added.) The "occupants" cannot be owners or lessees in the vacated commercial plants – the occupants of such plants, if there be any, are not relocated, the city acquires the plants, if it so desires, for the purpose of improving them. The "project area occupants" referred to in § 8-189(f) must be occupants of other structures – homes and functioning (not vacated) businesses in the project area. In fact, Chapter 135, the Uniform Relocation Assistance Act, mandated by federal law, is being administered in the Fort Trumbull project area by the NLDC – a designated "state agency" for applying the Relocation Act under § 8-267(1). That act must be the reference suggested in subsection (f) of § 8-189. The relocation Act explicitly was set up to assist residents and businesses displaced "by the acquisition of *real property* by state and local acquisition programs," § 8-266 of the Relocation Act. Section 8-193 of Chapter 132, "Municipal Development Projects," authorizes development agencies to "acquire by eminent domain *real property*



within the project area." (Emphasis added as to both statutes.)

Also, § 8-187 is the definition section of Chapter 132 and in subsection (9) it says that "*real property* means land, subterranean or subsurface rights, *structures* . . . etc." (Emphasis added.) The people who enacted Chapter 132, realizing it contained subsection (f) of § 8-189, must be taken to have been aware of the fact that the Relocation Act was also in our statutory scheme and that it applied to structures understood to exist in Chapter 132 project areas. They must further be taken to have understood that the only structures in such project areas were not "vacated commercial plants" which in subsection (5) of § 8-187 are defined as "buildings formerly used principally for business or industrial purposes, etc . . . "

That is why it was necessary to include the previously referred to definition of "real property" in subsection (9) of § 8-187 which includes "structures" as part of the definition. There was a realization that the Relocation Act applied and "vacated" businesses might not have occupants subject to the assistance mandated by that law. Furthermore, subsection (5) of § 8-187 describes vacated commercial plants as "buildings." Subsection (9) describes "real property" as including "structures." The definition of "building" in Webster's Third International Dictionary indicates a building as a "structure"; the third edition of Ballentine's Law Dictionary says a "building" is a structure designed and suitable . . . for use and occupation for private and public business . . . , in the broad sense any structure erected and fixed upon or in the soil." If vacated commercial plants were the only "structures" contemplated on Chapter 132 project areas, why was it necessary to include "structures" in the definition of "real property"

in subsection (9) of § 8-187? The apparent reason was that a variety of different structures were envisaged as existing in these project areas, not just vacant commercial plants.

There are other statutory sections of Chapter 132 which make the plaintiffs' narrow reading difficult to accept if the statutory language is to be given meaning. Subsection (c) of § 8-195 states the commissioner of economic development "is authorized to make special development grants to municipalities . . . for the purpose of assisting industrial and business firms to locate *or expand* within development projects and which, upon such location or *expansion* would result in a significant increase in employment or municipal real estate tax revenue to the municipality within which such redevelopment project is located." (Emphasis added.) This language assumes the existence of businesses on project area land prior to development area designation – they are to be "expanded." The language cannot be referring to "vacated commercial plants" because before they are "improved" they are "acquired" by the municipality under § 8-186 – not something that would happen with ongoing businesses receiving money for expansion of their business under § 8-195(c).[3]

The statutory language of Chapter 132 also presents difficulties for the plaintiffs' other characterization of the ambit of that act – that it only applies to joint development

[3] Further indication that Chapter 132 project land was understood to contain buildings or structures that could not be defined as "vacated commercial plants" is provided by § 8-194. There, the "removal" of a "public service facility owned or operated by a utility" was authorized if required by development plan needs and such a facility was defined as including a "building."



projects by municipalities on contiguous land areas. It is certainly true that the facilitation of such joint projects was an important aim of the act but not its only goal. If that were not the case, as the defendants point out, why include § 8-196 which was part of the original 1967 legislation and specifically addressed joint development of contiguous land parcels. Interestingly, in 1975 an amendment to the act deleted the initial requirement that the municipalities jointly initiating the project be contiguous (*see* history of § 8-196). If towns engaged in joint development project need not be contiguous how could the parcel being developed be contiguous to both municipalities?

Also, if joint development projects by more than one municipality are the only type of project contemplated by Chapter 132 the language and purport of subsection (k) of § 8-189 is somewhat odd. Again, that subsection indicates a development agency of a municipality may initiate a project plan which shall include among other things "a statement of the number of jobs which the development agency anticipates would be created by the project and the number and types of existing housing units in the municipality in which the project would be located, *and in contiguous municipalities,* which would be available to employees filling such jobs." (Emphasis added.) In a joint project why would one town provide this information to the contiguous town with which it is engaged on the development plan? And why put in the underlined language at all if it was assumed the statute applied only to development projects by contiguous towns?

Subsection (b) merely reflects how the statute's operation and applicability was envisaged by Representative Mayer – it can apply to situations where a town, acting on its own, wishes to initiate a development project

within its own borders and not on land necessarily contiguous to another municipality.

For all the foregoing reasons, the court does not accept the plaintiffs' interpretation of Chapter 132.

Delegation

As indicated, separate from the question of whether the exercise of eminent domain would be appropriate given the facts of this case no matter what entity, including the state exercised that power, the plaintiffs also argue that in this case, the NLDC cannot appropriately and indeed constitutionally exercise that power.

The plaintiffs do not challenge the delegation of eminent domain power to the City of New London. The argument raised is that "some things may only be done by governmental bodies. The NLDC is a private body, yet the city council has delegated the power of eminent domain to it. The NLDC decides whether particular properties will be condemned and whether possible future uses within the Municipal Development Plan (MDP) area serve a public purpose. Public use decisions should be made by the city council, not by the NLDC in the guise of 'Minor' changes to the MDP. Finally, the NLDC does not serve as an agent of the city . . . and cannot . . . be treated as the functional equivalent of the city in decision making. Instead, the city has delegated away to a private party its responsibility for these condemnations and for insuring that properties are condemned for public use."

In their usual thorough fashion, the plaintiffs then support each of the foregoing assertions.



The NLDC is indeed a private non-stock corporation and it is not elected by popular election or directly "controlled by the political process."

The record is replete with the many ways in which the city has delegated its eminent domain power to the NLDC. The city council authorized the NLDC to use eminent domain but

– the NLDC, not the city, has made decisions about when and more importantly, whether particular property will be condemned;

– the NLDC, not the city, decided not to condemn the Italian Dramatic Club (IDC) although it was not to remain in the MDP as approved by the city council;

– the NLDC, not the city, has decided not to condemn the property of the Pasquilinis occupied by two elderly ladies (at least for the time being);

– through the "minor" modification process referred to in § 8-200(a) the NLDC has made decisions about future uses within the MDP without attempting to get city council approval; e.g. (1) action re IDC; (2) elimination of stand alone athletic club; (3) increased area in MDP devoted to office use; (4) added extended-stay facilities while reducing residential use; (5) eliminated reference to Coast Guard Museum but now resurrected it as a possible future use.

In making their argument that the NLDC is not an agent of the city, the plaintiffs also point to its actions. For example, the NLDC has selected a developer for the development project, Corcoran Jennison. Before actual work can begin on the project, a development agreement must be arrived at. Various draft proposals have been prepared over a period of several months in an attempt to

reach a final development agreement. New London's City Manager made several requests to see these draft proposals which were not complied with by the NLDC. The city manager only received one of the drafts when the DECD told the NLDC that the city should receive a copy. Also, the final development agreement for the project area is to be signed by the developer, the NLDC and the DECD. The city is not a signatory to the agreement which sets forth what is to be built under the MDP and where various parts of the project will be located within the various parcels of the project.

Given all of these circumstances, it can hardly be said that an agency relationship existed between the city and the NLDC according to the plaintiffs. For such a relationship to be found, there must be an understanding that the principal, here the city, will be in control of the undertaking with the right, that is, to direct and control the agent's work. *Beckenstein v. Potter & Carrier,* 191 Conn. 120, 133, 464 A.2d 6 (1983).

The NLDC is more an agent of the state than the city, according to the plaintiffs, and they point to the fact that the NLDC's executive director testified to that effect. That is underlined by the just noted fact that the state received draft proposals of the development agreement and the city manager got one only when the state suggested to the NLDC that that would be a good idea. Furthermore, the NLDC consulted with the state (DECD) on the question of how to determine whether a change to the MDP was major or minor in light of the requirements of § 8-200(a) of the General Statutes, which talks of the effect of a substantial change in the plan. Finally, as the project moves forward, compliance with the MDP will be monitored by the NLDC, not the city.



The thrust of what the plaintiffs argue is that the delegation of eminent domain to the NLDC is unconstitutional.

This argument of improper delegation is predicated as the plaintiffs seem to concede on the premise that they "have established that the eminent domain power was completely delegated to the NLDC." *Gohld Realty Co. v. Hartford,* 141 Conn. 135, 144, 104 A.2d 365 (1954), is cited for the proposition "that the exercise of eminent domain power by the government itself or a public agency thereof is different from its exercise by a private person to whom the government has granted the power." *Gohld* drew this position from *Connecticut College v. Calvert,* 87 Conn. 421, 427, 88 A. 633 (1913), and *Gohld* referred to 87 Conn. at 430 of that case for a second proposition which the plaintiffs rely upon here. There, the *Gohld* court said, referring to the *Connecticut College* case "the basis of the decision is . . . that when a private person is granted the power to appropriate property, it must be for a use to which 'the public will have a common right upon equal terms independently of the will or caprice of the corporation.'" The *Gohld* court points out at 141 Conn. at 143-44 that under our Redevelopment Act, removal of slum conditions is a public use by definition and prevention of the recurrence of slum conditions by requiring private parties to develop and use the land to be cleared in accordance with the development plan is also a benefit to the public. "These uses (slum clearance and prevention of slum recurrence) will continue in the public whether title to the land stays in the city or is transferred to private persons. 141 Conn. 144.

The plaintiffs argue that not only is the NLDC a private entity, but a private developer chosen by the

NLDC will choose the tenants of the office buildings to be constructed on parcel 3. The benefits of tenancy or entrance to the buildings will not be "available to the general public." Especially in parcel 4A, future uses will be determined by the NLDC, "the private condemnor" – that is, at the "will or caprice of a private party." *See Connecticut College,* 87 Conn. 436.

The court will now discuss the issues raised by the plaintiffs.

As noted, the plaintiffs take the position that the NLDC is a "private body" – "not elected by popular election or controlled by political process." It is compared to other non-profit organizations doing worthy work but not entitled to acquire the power of the sovereign for eminent domain, such as the ACLU, the Diabetes Foundation or the Institute for Justice. But this statement goes too far. In many ways the NLDC is subject to the political process and the control of its activities by city and state. The court will first discuss the ways that the statutory framework of Chapter 132 enmesh the NLDC in the political process of the city council and how it is subject to the control of that municipal legislative body. Obviously New London's city council is popularly elected and is that city's legislative body for Chapter 132 purposes. Section 8-188 provides that the legislative body can vote to designate a nonprofit development corporation as its development agency and the municipality through such agency can exercise the powers granted the city by Chapter 132. In May 1998, the city council so designated the NLDC and authorized it to prepare a development plan for the Fort Trumbull area. None of the actions taken by the NLDC, whether affecting the plaintiff or others, none of its work in formulating the MDP or choosing a developer would have taken place



without this designation by the defendant city's legislative body in the first instance. Under § 8-191, the NLDC as the city's designated development agency adopts a development plan – here the MDP. That is the whole basis and source of activity as regards the Fort Trumbull area. One of the things necessary to the adoption of a development plan under this statute is a finding by the city planning commission "that the plan is in accord with the plan of development for the municipality."[4]

Once the development agency (NLDC) adopts the development plan "the agency *shall* submit such plan to the legislative body which *shall vote to approve or disapprove*" the plan under § 8-191 of Chapter 132. It is only then, under the statute, that the plan is submitted to the State Commission of Economic Development. It is only after the commissioner gives his or her approval to the development plan that the commissioner can give development grants (*see* § 8-195). Without such grants from the state, nothing could have gone forward or will go forward with regard to this plan. But the predicate for MDP approval by the commissioner is the prior approval by the popularly elected legislative body, i.e. the city council (*see* § 8-191 again).[5] In fact, the mechanism for the NLDC to

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[4] The plan of development is itself formulated by the municipal planning commission (§ 8-23) which is created by the political entity (i.e. the municipality) by ordinance and the five members of the commission have their terms of office method of election or appointment fixed in the municipal ordinance. The city's chief executive officer – elected or appointed by elected officials – is a non-voting member of the planning commission. (§ 8-19)

[5] This is different from the MDP approval stage where the commissioner is authorized to make planning grants for the purpose of preparing the MDP. (*See* § 8-190 – there is no requirement of city council action prior to such a grant being given; but of course no

(Continued on following page)

apply for these development grants appears to be the prior application by the city council to request that the commissioner grant funds to the NLDC to carry out the development plan (*see* city council resolution, 5/21/01).

Bond issues may be necessary to advance development projects of this type. It is unclear from the record whether the city has actually issued bonds but the ability to do so in conjunction with a development plan remains an option under the statutory scheme. Section 8-192 states that: "For the purpose of carrying out or administering a development plan or other function authorized under (Chapter 132), a municipality, acting by and through its development agency is authorized . . . [to issue bonds]." But such a bond issue must be authorized by the municipality's legislative body. The Connecticut Development Authority may issue and administer bonds for the purpose of carrying out or administering a specified development plan authorized under this chapter" (i.e. Chapter 132) but only after the project is "adopted by the legislative body of the municipality." *See* § 8-192(d).

And the "political process" as reflected in the ability of the legislative body of the municipality to control or affect the operations of this private non-stock corporation makes itself felt in other ways than purely financial mechanisms and makes it difficult to analogize the operations of the NLDC even vis a vis the City of New London as similar to the independent activity of purely private charitable or

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planning grant could be forthcoming unless the city council had designated the NLDC as its development agency and authorized it to prepare a development plan.)



public service corporations like the ACLU or the Institute for Justice.

In its harshest exercise of power – eminent domain – it is true that the NLDC chooses the particular property that is to be taken and the timing of the taking.

But the fact remains that for the power of eminent domain to be exercised at all the NLDC needs "the approval of the legislative body," *see* § 8-193(a), which was given in this case, when the MDP was approved – a project plan which envisaged the taking of property. *Avalonbay Communities, Inc. v. Town of Orange,* 256 Conn. 557, 775 A.2d 284 (2001), was a case arising under Chapter 132. Referring to the statutory framework and the need for legislative approval of the project plan, the court at 256 Conn. at 572-73 said:

> This statutory frame work contemplates and serves to effectuate the acquisition or real property, by eminent domain if necessary, in order to foster industrial and business development. In essence, under this framework, without the acquisition of the subject property the project plan would not accomplish its intended legal purpose. *Indeed, it is only after approval of the (project) plan as provided in (Chapter 132) that the development agency may proceed with the acquisition of real property within the project area.* C.G.S. § 8-193 (emphasis added).

Commenting at 256 Conn. at 575 on the distinction between a town plan which is merely advisory, the court speaking of a Chapter 132 project plan said that the distinction between the two types of plans illuminates one of the significant, if not the primary, legal functions that a

project plan is designed to serve, namely, to effectuate the municipal acquisition of property.

The argument that the NLDC was not truly an agent of the city and/or that its seizure of *particular* pieces of property under a grant to do so that was only general does not ipso facto make the delegation inappropriate or unconstitutional.

It has been held that no question of improper delegation of the power of eminent domain arises where the legislature does not specify the particular property which is to be taken for the defined public purpose. Under a general grant of power to take any property necessary for the public purpose, the legislature can delegate the determination of necessity to an independent board or tribunal or even a corporation or person empowered by the legislature to condemn. *Water Commissioners v. Johnson,* 86 Conn. 151, 157, 84 A. 727 (1912). Similarly confining the analysis to the delegation issue, under Chapter 130 the determination of what particular property in a redevelopment area is to be taken to effectuate the public purpose is a matter for the legislature and when the legislature delegates the power of the determination to another agency, such as the Redevelopment Agency, "the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable, or in bad faith or was an abuse of the power conferred." *Gohld Realty Co. v. Hartford,* 141 Conn. 135, 146, 104 A.2d 365 (1954). This language was quoted favorably in a Chapter 132 case. *Bugryn v. City of Bristol,* 63 Conn. App. 98, 107, 774 A.2d 1042 (2001).

Here, the NLDC's decision to condemn the plaintiff's property was in conformity with the MDP, which does not



provide for single-family detached residences. That decision was not based on some private whim of a private agency.

Also, the structure known as Building 2 and 194 Howard Street were originally to be removed in the MDP as was the Italian Dramatic Club (IDC). Now they are to be retained. But the first two mentioned structures are office buildings to be located in a parcel scheduled for office buildings. There are concerns raised by the plaintiffs as to how and why the IDC was allowed to remain, but there is not any claim that the IDC and the type of use it represents conflicts with any use set forth in the MDP and no evidence was presented to that effect.

It is the court's understanding that the plaintiffs are not claiming any changes to particular aspects of the MDP which the NLDC decided were "minor," were not "minor" but major or substantial, thus requiring the NLDC to have gone back to the municipal legislative body for approval. *See* § 8-200(a). The problem they raise is rather that the discretion exercised under the major-minor rubric is so broad that it belies any notion of a true agency relationship and represents an unconstitutional delegation of power. But the NLDC made its minor-major determination with the template of the MDP as a guide and a common sense reading of subsection (a) of § 8-200 is that it is left to the determination of the development agency as to whether a change is minor or substantial. The NLDC reported all changes to the city council which it determined to be minor. As the defendants point out, nothing in the statutory scheme suggests or perhaps could constitutionally permit a situation where the municipality acting through its city council could not terminate its relationship to the NLDC.

For the foregoing reasons, and from the perspective of political control over the NLDC by the city's legislative body, it can hardly be said that the NLDC vis-a-vis that entity is some free-wheeling, private body attendant to its own affairs and acting as only it sees fit.

But the problem of delegation cannot be viewed only from that perspective. The municipality and its legislative body is not the only governmental entity that factors in Chapter 132. At one point, Admiral Goebel, the executive director of the NLDC, suggested that the NLDC is more of an agent of the state than the city. That is an interesting observation, but the plaintiffs, analytically at least, seem to put it aside and, as indicated, concentrate on their argument that the delegation problem centers on the fact that the NLDC is not the city's agent in any realistic sense, and while the delegation of eminent domain power to the city is not being challenged, public use decisions should be made by the city council and not delegated to a private entity like the NLDC.

What the plaintiffs have largely done is set up an analytical strawman then, because they are very able lawyers, proceeded to demolish it. As to control of the development process, which includes the exercise of eminent domain, they propose a dichotomy between state power and the delegation of that power to the municipality. They argue that delegation in this instance will not pass muster since the agency that will exercise the powers envisaged under Chapter 132 acts independently of and not truly as the agent of the delegatee – the municipality. What is ignored is the state's retention of certain aspects



of the delegation of eminent domain power as an adjunct to fostering development projects under Chapter 132.[6]

It is no doubt true that the power of eminent domain emanates from the state legislature; the legislature can itself exercise that power or delegate it to another entity. *Northeastern Gas Transmission Co. v. Collins,* 138 Conn. 582, 586-87, 87 A.2d 139 (1952); *State v. McCook,* 109 Conn. 621, 628, 147 A. 126 (1929); *Clark v. Saybrook,* 21 Conn. 313, 324 (1851); *H.A. Bosworth & Son, Inc. v. Mitchell Tamiola,* 24 Conn. Supp. 328, 332, 190 A.2d 506 (1963); Nichols, *Law of Eminent Domain,* § 7.01(1), pp. 7-15; cf. *Farist Steel Co. v. City of Bridgeport,* 60 Conn. 278, 284, 22 A. 561 (1891).

A close reading of Chapter 132 indicates that what the legislature has chosen to do is to delegate eminent domain power to municipalities, but through state agencies retain substantial control over the financing and actual operation of development projects and thus in part over when and how the power of eminent domain is exercised by redevelopment or development agencies – agencies authorized to effect these projects by their municipalities.

The court fails to see what is improper with such a model. More to the point, when the operations of the NLDC are viewed in this statutory matrix of state agency control and municipal control by the legislative bodies of the cities, such development agencies certainly cannot be

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[6] In *Water Commissioners v. Johnson,* 86 Conn. 151, 165 (1912), the court talks of the power of the legislature to delegate the power of eminent domain. The court said, "Whether or not there shall be such delegation, *and the scope of* it, is a matter for the legislative decision." (Emphasis added by this court.) Cf. *Joslin Mfg. Co. v. Providence,* 262 U.S. 668, 674, 67 L. Ed. 1167, 43 S. Ct. 684 (1923).

characterized as purely private corporations acting for a public purpose but in a manner and on a schedule that is completely up to them. This is not the *Connecticut College v. Calvert,* 87 Conn. 421, 88 A. 633 (1913), case. The court has already reviewed in what way the genesis of NLDC operations regarding development of the Fort Trumbull area and the operations of the NLDC with regards to that project are brought about by, controlled, and influenced by the actions of the municipality and its legislative body.

Now the court will review state interaction with the NLDC as set forth in the statute and how the state agency monitors and controls NLDC actions. The court will then somewhat repetitively relate this to traditional agency law and finally discuss the claim of unconstitutional delegation of eminent domain power.

The court will now again refer to the statutory language of Chapter 132 for evidence of continued state involvement. Accomplishment of the development plan envisages the possible need to use eminent domain power. And any such plan under § 8-189 must be prepared in accordance with the regulations of the DECD commissioner who is authorized to make planning grants to help prepare the plan under § 8-190. The commissioner under the same statute "may consult with and advise any development agency in the preparation of a plan for a development project" – a process which occurred here. Under § 8-191, not only must the municipality's legislative body approve the final development plan, but so must the DECD commissioner. After the plan is so approved, the commissioner under § 8-195 is authorized to make development grants to effectuate the goals of the plan. In this case, the state has contributed the great bulk of the monies to accomplish the development plan which would



in itself give it a large measure of control through the DECD commissioner over NLDC operations. All aspects of this plan, including the exercise of eminent domain power, would not go forward at all without the provision and assurance of state funding.

In this regard, § 8-193(a) is worth attention, it underlines state agency control and explains, perhaps, why the city need not be a signatory to any final development agreement from a constitutional point of view. That statutory subsection reads: "The development agency may, with the approval of the legislative body, and of the commissioner, if any grants were made by the state under § 8-190 or § 8-195 for such development project, and in the name of such municipality transfer by sale or lease at fair market value, as the case may be, the whole or any part of the real property in the project area to any person, in accordance with the project plan and such disposition plans as may have been approved by the commissioner."

In any event, the commissioner is to be a signatory to the development agreement in this case, along with the developer and the NLDC. As signatory and primary funder of the project, it strains credulity to believe that the state acting through the DECD will not (1) have the wherewithal to control the activities of the NLDC to a sufficient degree so as not to allow that agency to be characterized as being able to act according to its own "will and caprice"; and will not (2) have the ability to ensure through the development agreement that the developer and the NLDC will seek to meet the goals and purposes of the MDP, which the commissioner had to approve in the first place

to get the project going.[7] The state's involvement in the statutory scheme and its formal and informal control of the operations of the NLDC is again revealed if we closely examine another of the plaintiffs' arguments meant to show that the NLDC acts on its own without any real control in important matters by the city council. Under § 8-200(a), the NLDC can modify the development plan, but where the modification "will substantially change the development plan as previously approved, the modification must be approved in the same manner as the development plan." The plaintiffs point out that in trying to make his determination on the issue of whether certain changes were substantial, the attorney for the NLDC did not go to the city, but contacted the DECD which sent him certain guidelines as to the major-minor change distinction. But why would he not logically contact the DECD for help on this question – the statutory scheme indicates the DECD might have some expertise in this area.[8] That is so because § 8-191 discusses the adoption of the development plan and says:

> In the event the commissioner requires a *substantial modification* of the project plan before giving approval, then upon the completion of

[7] An interesting provision in § 8-200(b) states that acting through its legislative body, a municipality may terminate a project plan if its development agency cannot transfer all or part of the real property it has acquired in the project area in accordance with the plan and if the DECD has not given grant money pursuant to § 8-195. The state's control over these projects if it has given grant money is obvious – it can even decide the project should not be terminated despite the municipality's wishes and despite the lapse of several years.

[8] The court is not treating the guidelines given to NLDC counsel as binding or even authoritative on the separate question of whether, in fact, the changes made were, in fact, minor or major, that is substantial.



> such modification such plan shall first have a public hearing and then be approved by the development agency and the legislative body (of the municipality).

(Emphasis added.)

To summarize the foregoing observations – the state legislature has enacted a statute authorizing municipalities to enact development plans. As part of the powers invested in the municipality to effectuate these plans, the state legislature has also given the municipalities the power to use eminent domain, and to effectuate these plans and exercise eminent domain power, the state legislature has decided under Chapter 132 that the municipality can appoint a development agency.

At the same time, however, the state legislature created a Department of Economic and Community Development headed by a duly-appointed commissioner, Chapter 578, §§ 32-1 et seq. In effect, the legislature has provided that its delegation of eminent domain power, along with the effectuation of development projects, is only to exist with the approval and supervision of the designated state agency.

Nothing in the law of eminent domain bars the creation of such a statutory scheme and the court could find no cases that say the contrary. It would be silly to say that the absolute power of eminent domain resides in the state legislature, the legislature can delegate the power to other entities but it cannot, through state agencies, retain some control over the delegation and whether and how it is exercised.

In a discussion that admittedly will be somewhat repetitive, the court will now try to fit its foregoing analysis within the confines of traditional law.

Nothing in the statutory scheme, as it has been discussed over these many pages, interferes with accepted concepts of agency law. It is black letter law that: "The rule which precludes one from acting as agent to both parties to a transaction is limited in its application to situations where loyalty to one involves a breach of duty to the other, and an agent may be allowed to serve both parties to a transaction if there is no necessary conflict in interest." Am. Jur. 2d, "Agency," § 244, p. 743.

This is a necessary implication of § 391 of the Restatement (Second) Agency.

What we have here is dual agency; the NLDC is the agent of both the city and the state acting through the DECD and it is subject to the control of one or the other depending on the activity at hand. There can be no conflict of interest between city and state since absolute power of eminent domain rests in the state and the city receives that delegation of the power that the state chooses to give.

Connecticut relies heavily on the Restatement (Second) Agency to define the creation and scope of agency law. *Beckenstein v. Potter & Carrier, Inc.*, 191 Conn. 120, 464 A.2d 6 (1983); *Town & Country v. House & Home Services, Inc.*, 150 Conn. 314, 189 A.2d 390 (1963). Section 14 of the Restatement says that "a principal has the right to control the conduct of the agent with respect to matters entrusted to [the agent]." Comment (a) says "the principal's right to control is continuous and continues as long as the agency relation exists, even though the principal agreed he (sic) would not exercise it. Thus, the agent is subject to a duty



not to act contrary to the principal's directions, although the principal has agreed not to give such directions." But, as noted, the NLDC did report to the city council concerning the changes it considered minor thus complying with its duty to give information to its principal, § 381 of Restatement. The council took no action but what is there to indicate it could not have disagreed with the NLDC determination and demanded compliance with the original approval process. Also, a development agreement is the lynchpin of this whole project – the DECD must sign off on such an agreement before an MDP can be effectuated. As previously noted, it strains credulity to think that the DECD would sign off on a development agreement where it determined the NLDC made substantial changes in a project it approved, by statute had to approve, and into which it has poured over seventy million dollars with more on the way.

Using an agency analysis, the plaintiffs point to the fact that the NLDC did not provide the city with drafts of the development agreement that it was preparing with the developer. Let us look at the duty of the agent to give information to its principal, certainly recognized in Connecticut law. *McKay v. Aetna Life Ins. Co.*, 118 Conn. 538, 554, 173 A. 783 (1934). The Restatement at § 381 says:

> Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give (the) principal information which is relevant to affairs entrusted to the (agent) and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty toward a third person.

The point of the matter is that the drafts of the development agreement went only toward preparation of

the final development agreement concerning which the city is not to be a signatory. The state, through the DECD, is to be a signatory. Again, we have dual agency, the DECD and the city have no conflicting interests as regards the accomplishment of the development plan. The state agency created by the state legislature which is the source of eminent domain power must decide to sign or not sign the agreement no matter what the position of the NLDC is regarding the matter, so it is difficult to see how the failure of the city to receive copies of drafts being developed towards completion of a final agreement it will not sign off on, violates any duty of the NLDC to disclose information to one of its principals.

The DECD, through its approval of the development agreement, will, in effect, guarantee that the delegation of eminent domain power to the NLDC is reflected in its agreed upon scope and operation in the development plan. Given these factual circumstances, it is an unacceptable leap to say that, despite the fact that a DECD sign off on the development agreement is required, the delegation of eminent domain power to the NLDC is improper or the NLDC acts at its own caprice.

But the plaintiffs do not rest their improper delegation argument merely on agency law. The plaintiffs have also argued that the delegation of eminent domain power to the NLDC is unconstitutional. The court has made some reference to this argument in its foregoing discussion, but will now focus its analysis on two older, but leading, Connecticut cases: *Connecticut College v. Calvert,* 87 Conn. 421, 427, 88 A. 633 (1913); and *Gohld Realty Co. v. Hartford,* 141 Conn. 135, 104 A.2d 365 (1954). With reference to those cases, the plaintiffs' unconstitutional delegation argument appears to be predicated on the proposition



"that the exercise of eminent domain power by the government itself or a public agency is different from its exercise by a private person to whom it has given that power." *Gohld* at 141 Conn. at 144 (which relied upon *Connecticut College,* 87 Conn. at 427 for this principle). The *Gohld* court went on to say that "when a private person is granted the power to appropriate property, it must be for a use to which "the public will have a common right upon equal terms independently of the will or caprice of the corporation." 141 Conn. at 144. The plaintiffs point to the fact that under the MDP, parcel 3 is designated for office buildings and a private developer will decide who the tenants are and the general public will not benefit from or have open access to these buildings. Let us examine the cases closely. *Connecticut College* and *Gohld* will be discussed.

In the *Connecticut College* case, the legislature, by special act, had given the college, then a women's college, the power to take real estate in New London and Waterford. The court, at 87 Conn. at 428, said, "We accept and endorse the legislative declaration that the higher education of women is in its nature a public use." In the *Gohld* case, a redevelopment agency intended to exercise the power of eminent domain under the state Redevelopment Act which authorizes such agencies to condemn property in areas which are "deteriorated, substandard or detrimental to the safety, health or welfare of the community." 141 Conn. at 142.

In *Gohld,* the court set up a *two-part consideration* on the issue of proper delegation which is somewhat confusing in its second part since it impinges analytically on the strict question of what is a "public use" (of which more later). As indicated, the court, as its first *consideration*

said the exercise of eminent domain by the government or a public agency is different from its exercise by a private person. *Gohld* said at 141 Conn. at 144 there is a distinction on this score between the Connecticut College Board of Trustees and the redevelopment agency. *Gohld* appeared to accept the fact then that a redevelopment agency is a "public agency" not a private entity or person. The implication of all this being that if the power of eminent domain is delegated to a public agency, there can be no problem with such a delegation. As to the College Board of Trustees, the court in *Connecticut College, id.* at 422, noted that: "The control and disposition of its property and the management of its affairs are vested in a board of trustees to be elected by the members of the corporation." A redevelopment agency under Chapter 130, § 8-126, like a development agency under Chapter 132, § 8-188, is designated by the legislative body of a municipality. By application of principles of analogy just stated, or by reference to the previous discussion on how and under what controlled and supervised circumstances the NLDC operates, the NLDC, like a redevelopment agency, is a public agency as *Gohld* envisaged the concept and, in any event, cannot be analogized to a private person or entity like the board of trustees of a private college not selected by government or subject to the type of supervision of its operations that a redevelopment agency under Chapters 130 and 132 is subjected to by government entities.

But *Gohld* does not end its discussion there. There is a second consideration. It goes on to say, let us assume the eminent domain power is granted to a private person or entity, it must be a use to which "the public will have a



common right upon equal terms, independently of the will or caprice of the corporation. 141 Conn. at 144.

The *Gohld* court was not saying a Redevelopment Agency is not a "public agency" despite what we just said three sentences ago. The court was concerned with the fact that the Redevelopment Agency – purportedly a public agency – entitled to resort to eminent domain in the first instance would be turning the slum-cleared land over to private developers. The court reasoned that was not a problem because "the prevention of recurrence of slum conditions (is) clearly (a use) for the benefit of, and to be enjoyed by the public at large without restriction. (This use) will continue in the public whether title to the land stays in the city or is transferred to private persons." 141 Conn. at 145.

In analyzing this second aspect of unconstitutional delegation of power, the plaintiffs refer to the *Connecticut College* case, but one cannot stop reading the *Connecticut College* case at 87 Conn. at 430 to analyze this problem. At 87 Conn. at 435, the court says:

> There is no allegation in the petition (of the college) that the public has or can acquire the right to enjoy the benefits of the land sought to be taken, no provision to that effect in the petitioner's charter, and the stated corporate purposes of the petitioner are not such as to impose upon it, as a necessary legal consequence of its corporate character, the obligation of admitting to its courses all qualified candidates, to the extent of its capacity, without religious, racial or social distinction.

Thus, the court was not saying every female member of the general public to apply had to be admitted or that a

lottery system had to be established for admission governed by pure change. Any candidate had to be "qualified," the school only had to admit applicants "to the extent of its capacity" and no invidious distinctions on the basis of religion, race or class distinctions could be used to bar certain sections of the public. If these requirements were to be made part of the charter or by-laws of the college, the implication is clearly that the delegation of eminent domain to the college would have been acceptable to the court since the public could be assured that the contemplated use would be open to the "public" in a manner acceptable to the court. This being so, even though the college board of trustees is purely private and not selected by government.

But this discussion of the second consideration in *Gohld* is not purely one of whether the delegation of eminent domain power to an entity, whether public or private, is appropriate or constitutional. It really involves the issue of whether and under what circumstances a use can continue to be public if private corporations or persons receive property that has been condemned. That issue would exist whether the legislature itself took the land from one private party and gave it to another, whether a "public agency" did, or whether a clearly private entity, like Connecticut College, was permitted to condemn the land for its own uses.

In this regard, let us look at the case of *Bugryn v. City of Bristol,* 63 Conn. App. 98, 774 A.2d 1042 (2001). That was a case where a development agency was a codefendant and eminent domain was to be used for pure economic development purposes – an industrial park was planned. To say the delegation problem does not arise in that case because, after all, the city was still to own the land on



which the private business establishments were to operate really is not quite satisfactory. Even if the city still owned the land, private businesses not open to the public on an equal basis but run in that regard subject to the "will or caprice" of private corporations were still being planned for the industrial park. In other words, if there is no "delegation" problem in *Bugryn* why should there be a "delegation" problem in a case where an agency, like the NLDC, engages a developer to build and lease office space? Suffice it to say that the court does not accept the plaintiffs' improper delegation argument and believes some of the concerns they raise and suggested by *Connecticut College* and *Gohld* are not really, strictly speaking, issues involving improper delegation of eminent domain power as such, but are best addressed in the discussion as to whether the uses contemplated for parcel 3 and parcel 4a of the Fort Trumbull area can properly be characterized as public uses especially in light of whether there are appropriate guarantees that such uses will remain in effect and whether the latter concern is affected by the fact that the seized land will be devoted to economic development.

City Charter

The court will now discuss another matter which it believes is conceptually separate from other arguments the plaintiffs have made challenging the taking of the property. In other words, even if the takings here were for a valid public use and it was necessary to acquire these properties, the plaintiffs maintain that the takings cannot stand because they were effectuated in violation of the city charter.

New London's City Charter sets out certain steps that are to be followed upon the taking of property for a public use. *See* §§ 96 through 102. The city manager testified that the requirements of the charter were not followed. He further testified that the NLDC was the entity that exercised the power of eminent domain. But the NLDC even under state statute can only acquire property "with the approval of the legislative body" (here the New London City Council). *See* § 8-193. To the plaintiffs' claim that the takings were illegal because the charter provisions were not followed, the defendants answer that the takings were effectuated pursuant to Chapter 132 which does not require the same steps and procedure set forth in the city charter and that the city charter allowed the takings to proceed pursuant to state statute, here Chapter 132.

The court will first set forth its understanding of the city charter provisions.

The relevant sections of the charter are set forth in Article XIV of that document. Section 96 sets up a board of compensation whose function is to review value placed on seized property and later recommend to the city council what the board feels is fair compensation. (Section 99.) Section 97 without referencing the board does say that before any property is taken, a resolution has to be passed by the city council to do so and a report must be prepared by the city manager indicating the value of the properties seized. This report is to be placed on file for public inspection. Section 98 requires notice be given to affected parties and these people have a right to appear before the board of compensation to advance their views on the value of their property. Section 99 then states the board shall file a report with the city council as to the value of each piece of property to be taken. Section 101 says the council can



accept, modify or reject the board's report. If the council decides to proceed with the takings after receiving any report, it shall pass an ordinance authorizing "the action, work or improvement" apparently referring to the exercise of eminent domain power. Section 102 requires that the city clerk file notice of the property that "may have been taken" and the amount to be paid for the land.

The plaintiffs cite well-established law in quoting a case like *Fennell v. Hartford,* 238 Conn. 809, 813, 681 A.2d 934 (1996), which stand for the general proposition that the city charter is "the fountainhead of municipal powers" and thus it follows "that agents of the city have no source of authority beyond the charter." *See* also *Alexander v. Retirement Board of Waterbury,* 57 Conn. App. 751, 758, 750 A.2d 1139 (2000).

In *Testa v. Waterbury,* 55 Conn. App. 264, 270, 738 A.2d 740 (1999), the court said: "To determine the intent of the charter, the enactment must be examined in its entirety and its parts reconciled and made operative so far as possible." In *Fennell,* the court held that "in arriving at the intention of the framers of the charter, the whole and every part of the instrument must be taken and compared together." In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and related laws. 238 Conn. 826.

First, the court will discuss whether the provisions of the city charter were violated, assuming that the provisions of the charter were controlling. As *Fennell* and *Testa* indicate, the charter must be read as a whole. Article 1, § 3 of that document says: "The City of New London shall have the power to acquire real . . . property . . . in furtherance of any power granted by this charter or the laws of

the State . . . by condemnation." Section 4 of Article I is entitled "Enumeration of Powers, not in limitation thereof" and reads:

> The enumeration of powers by this act shall not be held or deemed to be exclusive but, in addition to the powers enumerated herein, implied thereby and appropriate to the exercise thereof, the City of New London shall have and may exercise all powers that now are or hereafter may be granted to cities and towns by the constitution and laws of Connecticut.

It would appear then that the provisions of the charter §§ 96-102 do not preclude these takings even though the requirements of those sections were not followed since the takings were done and in effect could appropriately be done by the city charter's own terms pursuant to state statute, here, Chapter 132. Unless this were the result, §§ 3 and 4 of the charter would be inexplicable appendages.

But the plaintiffs cite several cases to support their position that the takings were illegal because the city charter provisions were not followed. As the defendant city points out, however, some of those cases do not seem on point since they simply involved the issue of the obligation of a city to follow its charter provisions and not the issue here. Here, the issue is whether a municipality can proceed under a state statute where its charter gives it the flexibility to do so even though the charter has different requirements than the state statute. Cases cited by plaintiffs and distinguished by defendants on the foregoing grounds are *Fennell v. Hartford, supra; Alexander v. Retirement Board of Waterbury, supra; New Haven v. Local*



*884,* 44 Conn. App. 764, 694 A.2d 417 (1997); *Bredice v. Norwalk,* 152 Conn. 287, 206 A.2d 433 (1964).

However, the plaintiffs do not rely on only the just-mentioned cases. They also point to the case of *Berne v. Stratford,* 23 Conn. App. 554, 583 A.2d 136 (1990). In that case, the Town of Stratford condemned a portion of the plaintiff's land. No formal notice or hearing was given prior to the taking. The court reasoned that that in itself presented no problem since "Under state eminent domain proceedings, no such notice or hearing is required. Connecticut General Statutes §§ 48-6, 48-12 and 8-130 through 8-133. Where the takings are for public use, the due process clause of the Fourteenth Amendment to the United States Constitution does not require that the taking be determined upon notice and hearing. *Id.* at 556. However, a provision of the town charter required a public hearing prior to the commencement of condemnation hearings. Therefore, the court held Strafford's [sic] actions were illegal since "it did not follow its own charter provisions when it indicated the taking." *Id.* at 559.

Furthermore, the plaintiffs note that the Stratford charter had a "non-exclusivity" clause which they regard as similar to New London's, but that did not prevent the *Berne* court from reaching the result that it did. The plaintiffs want the court to take judicial notice of the Stratford non-exclusivity clause; it will, but should note that the hearing of the clause on the question before it did not come up in *Berne.* In any event, § 1.1 of the Stratford Charter says:

> In addition to the powers hereinafter specifically set forth, the council shall have all the powers granted to municipal corporations by the Constitution and General Statutes of the State of Connecticut, and all implied powers necessary to

> carry into execution the powers hereinafter set forth and the powers granted to municipal corporations by the Constitution and General Statutes of the State of Connecticut, *subject only to the limitation imposed by this charter and by the Constitution and General Statutes of the State of Connecticut.*

Stratford Charter at § 1.1 (1992) (emphasis added).

The court is not aware of any language in the New London City Charter similar to the underlined language in § 1.1 of Stratford's charter. But it is clear that the underlined language serves as a limitation on Stratford's ability to resort to state statutes which do not have provisions or requirements set forth in the city charter.

Two other cases cited by the plaintiffs also do not seem helpful to their position. In *Miller v. Eighth Utilities District,* 179 Conn. 589, 427 A.2d 425 (1980), there was an attempt to consolidate the utilities district and the Town of Manchester. The issue before the court was whether citizens who brought the action for consolidation had to follow procedures set forth in state statutes (Home Rule Act § 7-195 et seq.) or the procedures set forth in the town charter. The court held the town charter provisions had to be complied with; specific local procedures must be followed unless a general law exists showing an "intent to repeal or alter" the specific local statute. *Id.* at 593. But the citation to *Miller* misses the point. The answer to the plaintiffs' argument that is being offered is not – we do not have to follow the city charter, we can ignore it and rely on state statutes regulating eminent domain. What is being said is that we are in effect following the provisions of our charter which explicitly permits us to use the eminent domain procedure set forth in the state statutory scheme



for eminent domain. *See* § 8-193 which refers to procedure set forth in the Redevelopment Act at §§ 8-128 to 8-133.

Furthermore, *Miller* made a point of saying that the state statutory scheme of the Home Rule Act in § 7-192 explicitly "provides that the charter provisions prevail over the provisions in the Home Rule Act relating to the consolidation so that the district, under the foregoing provisions, would be authorized to consolidate with the town in accordance with the charter procedure." *Id.* at 595. (*See* earlier discussion at 179 Conn. at 593-94 of § 7-192.) There is no similar language in Chapter 132; at § 8-193 the legislature simply said for taking procedure, the development agency will rely on § 8-128 through § 8-133 of the General Statutes.

Also, *Keeney v. Old Saybrook,* 237 Conn. 135, 676 A.2d 795 (1996), is not of any help to the plaintiffs' position. One of the issues before the court was the validity of Old Saybrook's agreement to a modified order of the Department of Environmental Protection. The state statute before the court, § 22a-436, did not indicate the manner in which a municipality had to manifest its agreement to such a modified order whereas the city charter did. Under the terms of the state statute itself, the validity of the order, however, depended on a finding of agreement to it. Not surprisingly, the court held that, in the absence of a state statutory mandate, the validity of the town's agreement to the order depended on compliance with statutory and town charter provisions. Because the town charter had not been complied with as to the mode of agreement the court found that "Old Saybrook never agreed to the modified order . . . " *Id.* at 155. Again, New London, because of its non-exclusivity clause is, in fact, following its city charter so *Keeney* for that reason alone is not on

point. Also, as noted, § 8-193, which provides for use of eminent domain power by a development agency, simply refers that agency to sections of chapter 130 (§§ 8-128 through 8-133) which simply do not provide for notice and hearing to determine appropriate compensation – something the plaintiffs are not interested in, in any event. Also, as in *Keeney,* the city charter provisions do not fill in some requirement necessitated by the state statute to validate the taking procedure – as *Berne* says notice and hearing are not required in taking cases statutorily or constitutionally. 23 Conn. App. at 556.

But the issue before the court goes beyond the straightforward issue of the non-exclusivity clause in New London's City Charter and whether its existence therein means that in fact the city was complying with and acting under its charter in following state statutory procedure for taking property by eminent domain. That is, not only must the charter provisions be read as a whole, giving effect to all its clauses but also, since municipalities are creatures of the state municipal statutes must be read in the context of the applicable state statutory scheme. *Bredice v. City of Norwalk.* 152 Conn. 287, 292, 206 A.2d 433 (1964); and the *Miller* court at 179 Conn. 593, made a pertinent observation:

> In determining whether the provisions of a general statute or those of a special law prevail, the general rule is that a special and local statute, providing for a particular case or class of cases, is not affected by a statute general in its terms, broad enough to include cases embraced in a special law, unless the intent to repeal or alter is manifest.



It does not seem appropriate that when exercising eminent domain power through state statute a city can impose on the instrumentality it chose to exercise that power procedural requirements that state statutes do not require and which differ from the procedure set forth in the state statute. Referring to *Miller* and the just-referenced quotation, the procedure for taking referred to in §§ 8-128 to 8-133 is not "general" and "broad" – it provides a procedure for exercising the details of taking and compensation in a way completely different from the New London City Charter.

The court would make one final observation. Section 48-6(a) of the General Statutes permits a municipality "in accordance with its charter or general statutes" to acquire property by eminent domain. Section 8-193(a) provides a mechanism to do that pursuant to Chapter 132. It is clear that under that chapter any development agency "shall exercise its powers in the name of the municipality" and title to land or property taken under a development plan "shall be solely in the name of the municipality." § 8-199. But it is evident that under § 8-193 that the development agency, although it must get the general approval to use the power of eminent domain actually is the entity that does the taking – the statute says: "The development agency may . . . acquire by eminent domain real property located within the project area."

In effect, then the sections of the city charter §§ 96-102 do not even apply to a Chapter 132 taking since § 97 envisages a taking by the city itself, not some delegated entity. Section 97 says "before proceeding to take any land the city council shall declare its intention to do so" and then goes into other steps required for an appropriate taking procedure by the council under the section. These

takings, although in the city's name and with its general approval to so act, are takings by the NLDC.

In any event, for all the foregoing reasons, the court does not accept the plaintiffs' argument under the city charter.

Public Use

Having tried to address these preliminary matters, the court will now address the central issue in this litigation.

At the heart of this case is the question of whether it can be said that the plaintiffs' properties have been taken for a so-called public use. Both the state and federal constitution demand that the power of eminent domain be exercised only for a public use. If the taking is not for a public use, then the question of appropriate compensation does not arise since no amount of compensation can be a constitutional substitute for the right of the citizen to remain in his or her home or business free of government trespass on that right.

A.

The problem historically has been in defining the term "public use." Nichols is a leading authority in this area and he says:

> Two opposing views have emerged, each of which has its ardent supporters among legal scholars and courts. The supporters of one school insists that "public use" means "use by the public." This means that to make a use public that the property acquired by eminent domain must actually



> be used by the public or that the public must have the opportunity to use the property taken.

*Law of Eminent Domain,* Nichols, § 7.02(2), p. 7-26.

This view is the so-called narrow view. At p. 7-29 Nichols sets forth the so-called broad view.

Many courts are inclined to sustain the broadest construction of public rights over private property and contend that "public use" means "public advantage." Any eminent domain action which tends to enlarge resources, increase industrial energies or promote the productive power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and property of the whole community and thus constitutes a valid public use.

For similar definitions of the two views in the case law, *see* 26 Am. Jur. 2d, § 50, p. 494 of article on "Eminent Domain." A more concise definition is provided in a 1999 North Dakota Law Review article entitled "The Use of Eminent Domain for Economic Development" where at [75 North Dakota Law Review 783] p. 785 of the article the author Klemestrud says, "The public use doctrine is defined as either 'use by the public' or 'use for public advantage.' The former interpretation includes any actual use by the public or opportunity for the use by the public. The latter details any use which tends to enlarge resources, increase industrial energies or promote the productive power of any considerable number of habitants of a community."

Trying to determine if a particular use is a public use, however, cannot depend on a linguistic analysis. As Nichols says at § 7.02(7), p. 7-37:

> Efforts at providing a precise definition of public use are doomed to fail, and many courts have recognized this and have repudiated efforts to lay down hard and fast rules freezing the definition of this phrase. Overall, the law governing the meaning of "public use" is the product of tradition, precedent and judicial employment of both the narrow and broad construction of "public use."

As said by the court in *Barnes v. New Haven,* 140 Conn. 8, 15, 98 A.2d 523 (1953):

> A public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences changing conceptions of the scope and functions of government and other differing circumstances brought about by an increase in population and new modes of communication and transportation.

Deciding whether a particular use is a public use can be difficult for a variety of reasons, one of which is a disturbing aspect of cases of this type. Despite the many shared values of people and parties on both sides of the question in a particular case, these values are often forgotten in the heat of courtroom and public argument. A temptation arises to demonize the opposing side. But a court has to be aware of the fact that there are dangers to the public welfare and to the rights of individuals presented by both the "broad" and "narrow" view of public use.

If the broad definition is applied and it is accepted that any public benefit or advantage created by a taking for economic development is a public use then an observation in the Am. Jur. 2d article at § 51, pp. 496-97, is worth noting:



> Earlier cases pointed out that almost any legitimate business enterprise, indirectly to some extent, may be regarded as of benefit to the public and that an indefinite field is opened up when the doctrine is accepted that public benefit alone is sufficient to make the use a public one, warranting the exercise of eminent domain power.

In other words, the danger presented is that the Eminent Domain Clauses of the state and federal constitutions could be rendered meaningless and that private values of home and property would be obliterated by allowing free rein to expanding capital markets.

But if a narrow view is adopted and a taking for economic development is not permissible under any circumstances since such a use would not provide for actual use by the public, then the observations of an ancient case quoting an even older one must be attended to.

> The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most it is a forced sale to satisfy the pressing wants of the public. Now this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises if it were otherwise.

*Olmstead v. Camp,* 33 Conn. 532, 547 (1866).

If this narrow view had prevailed in our history, it could be said that we might all still be huddled along the eastern seaboard or presently our central cities would be

severely handicapped in trying to recover from the mailing [sic] of our state.

B.

Our Appellate Courts seem to have consistently articulated an acceptance of the broad view of what is a public use at least in the context of the cases which they were deciding.

In *Olmstead v. Camp, supra,* 33 Conn. at 546, the court said:

> "Public Use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community is a taking for public use.

Cf. *Barnes v. New Haven* 140 Conn. 8, 15, 98 A.2d 523 (1953), referred to with approval in *Katz v. Brandon,* 156 Conn. 521, 532, 245 A.2d 579 (1968). In upholding the Redevelopment Act as an appropriate exercise of seizing property for a public use, the court in *Gohld Realty Co. v.. Hartford,* 141 Conn. 135, 141, 104 A.2d 365 (1954), referred to the above-quoted language from *Olmstead* and cited other cases. *Todd v. Austin,* 34 Conn. 78 (1867); *Water Commissioners v. Manchester,* 87 Conn. 193, 204, 87 A. 870 (1913).

When the power of eminent domain is exercised pursuant to legislation the problem of defining whether the purpose of a particular taking is a public use is at least more focused. Here, the plaintiffs' property has been taken pursuant to Chapter 132 of the General Statutes with the



actual taking authorized by § 8-193. That chapter is labeled "Municipal Development Projects" and its purpose is set forth in "Section 8-186 Declaration of Policy"

> Sec. 8-186. Declaration of policy. It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Our legislature has clearly stated that economic development pursuant to Chapter 132 which authorizes the use of the eminent domain power is a public use. Nichols at § 7.03(11)(b) states that: "The presumption is that a use is public when the legislature has declared it to be. Legislative decisions must be treated with the consideration due to a coordinate department of the government of the state." At § 61 of the Am. Jur. 2d article on "Eminent

Domain" it also says: "Primarily, the right to declare what shall be deemed a public use is vested in the legislature. Consequently, when the public nature of a use for which a taking has been authorized by law is disputed, the question as it presents itself to the courts is not whether the use is public, but whether the exercise of eminent domain power is rationally related to a conceivable public purpose, whether the legislature might reasonably have considered the use public or whether the use is clearly private in nature," p. 503.

On the deference due legislative pronouncements our courts have said the following:

> That the uses to be furthered are public, is a question the decision of which by the legislative department, while not absolutely conclusive upon the judicial department, on a proceeding like the present, is entitled to very great weight.

*New York N.H. & H.R.R. Co. v. Offield,* 77 Conn. 417, 421, 59 A. 510 (1904). Cf. *Northeastern Gas Transmission Co. v. Collins,* 138 Conn. 582, 588, 87 A.2d 139 (1952); *Gohld Realty Co. v. Hartford, supra,* 141 Conn. at 141, where the court said that legislation must be given "great weight" but "whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is in the end, a judicial question"; on deference to legislature also *see Barnes v. New Haven,* 140 Conn. 8, 15, 98 A.2d 523 (1953), where the court said legislative "determination should not be reversed by the court unless it is manifestly and palpably incorrect"; also *see City of New Haven v. Town of East Haven,* 35 Conn. Supp. 157, 165, 402 A.2d 345 (1977). But broad statements on public use and deference to the legislature must be qualified.



Thus, the Connecticut courts really ascribe to the statement in Nichols to the effect that: "if after giving due respect to a legislative declaration, the court considers the purpose not to be reasonable or connected to a valid public use, it is the duty of the court to declare the act authorizing the taking as unconstitutional." § 7.03(11)(b) at pp. 7-77 to 7-78; cf. *Reter v. Davenport R.I.&N.W. Ry. Co.,* 243 Iowa 1112, 54 N.W.2d 863, 867 (Iowa 1952); *Burnham v. Mayor and Aldermen of Beverly,* 309 Mass. 388, 35 N.E.2d 242, 243 (Mass. 1941); *New York City Housing Authority v. Muller,* 270 N.Y. 333, 1 N.E.2d 153, 154 (N.Y. 1936); cf. *Mayor & City Council of Baltimore v. Chertkof,* 293 Md. 32, 441 A.2d 1044, 1051 (Md. 1982), where the court said "Whether the use for which private property is taken is public or private is a judicial question to be determined by the court; a legislative body cannot make a particular use either public or private by merely declaring it so. *Prince George's County v. Beard,* . . . 266 Md. 83, 291 A.2d 636 (1972) . . ."

There is also another consideration. A cursory reading of Chapter 132 indicates that the net results of its policy will be that the property of some people may have to be acquired by eminent domain while private businesses will receive a benefit by that acquisition and the work on infrastructure that the legislation envisages. It is certainly true that the legislature cannot authorize the taking of one person's property for the benefit of another private party, cf. *Bugryn v. City of Bristol,* 63 Conn. App. 98, 103, 774 A.2d 1042 (2001); *Farist Steel Co. v. City of Bridgeport,* 60 Conn. 278, 292, 22 A. 561 (1891), where the court said, "Private properties cannot be taken for other than public uses under the guise of taking it for public use." This is the general law. *N.C. State Highway Commission v. Asheville*

*School, Inc.*, 276 N.C. 556, 173 S.E.2d 909, 913 (N.C. 1970).

Section 55, p. 499 of 26 Am. Jur. 2d "Eminent Domain" sets forth the general rubric followed in our state:

> The general rule is settled that the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the power.

*See Katz v. Brandon*, 156 Conn. 521, 533, 245 A.2d 579 (1968); *Barnes v. New Haven*, 140 Conn. 8, 15, 98 A.2d 523 (1953); cf. *Water Commissioners v. Manchester*, 87 Conn. 193, 203 (1913).

But again, the corollary of this is that "It is a well-established principle that incidental benefits accruing to the public are not sufficient to make the purpose of an improvement or enterprise a public one." § 56 Am. Jur. 2d article at p. 500.

First, the court will examine the wording of Chapter 132. What is its primary purpose – what does the legislature define as the public use that the legislation hopes to achieve? Then the question must be asked whether, despite that statement of purpose, the structure and wording of the act make clear that the purported public purpose is only an incidental factor to the operation of the act with private business being the primary beneficiary of legislative activity.

The public use objectives of Chapter 132 and what the legislature hoped to achieve through the creation of municipal development plans which would sometime



require the use of eminent domain and lead to the placement and growth of private industry in project areas is set forth in § 8-186 of the chapter.

Section 8-186 indicates that the motivating force of the legislation lies in the recognition that the state's economic welfare "depends on the continued growth of industry and business within the state." It goes on to state that the acquisitions and improvements in project areas "often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost." The section then says permitting and assisting municipalities to acquire and improve (the areas subject to the act) . . . and in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public monies may be expended . . . " Under § 8-190 the DECD commissioner is authorized to make planning grants to assist municipalities in the planning of projects. If a municipality is designated a "distressed municipality" under § 32-9p of the General Statutes, these planning grants may be made up to one hundred percent of planning costs.

Section 8-195 talks of development grants that can be made by the commissioner once a plan is approved. Lower pay back to the state is provided for if the community is a "distressed municipality." Subsection (d) states that: "In allocating funds available for the making of development grants, said commissioner is authorized to establish priorities among municipalities, taking into account their relative needs for development projects, the effect of proposed projects on existing housing and the extent to

which particular projects are likely to advance the purposes of this chapter."

Is legislation designed to foster economic growth and development, especially in distressed cities, an expression of an appropriate public purpose when the public use envisaged as the end product of government activity will mean private property must be taken and other private parties will at least in part secure a benefit because their industrial and business activities are encouraged? Is this an appropriate public use that can be embodied in legislation that will pass muster under the state and federal taking clauses?

The answer federally[9] and under our state constitution appears to be yes. The plaintiffs seem to provide the answer in their own initial brief where at p. 33 they say: "Only one Connecticut appellate case upholds a condemnation for something approaching simple economic development – the creation of an industrial park in *Bugryn v. City of Bristol*, 63 Conn. App. 98, 774 A.2d 1042 (2001)." This court is only a trial court and would be bound by the rulings of the appellate court. But query whether the *Bugryn* court faced the issue of whether simple economic

[9] Even commentators opposed to the broad view of the federal government's right to use the power of eminent domain recognize that *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and *Hawaii v. Midkiff*, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), would validate pure economic development as a public use. *See* 50 Syracuse Law Review 285:

> "Trumping Eminent Domain Law," 68 UMK CLR 49: "Public use or Public Abuse;" cf. 36 Natural Resources J. 59: "Eminent Domain, 'Public Use' and the Conundrum of Original Domain;" also *see* 2000 L. Rev. M.S.U.-DCL 639, "Rolling the Dice."



development is a public use. At one point, the court said the question was not "disputed" by the parties, *id.* at 104, although earlier it did say one of its tasks was to determine whether the trial court was clearly erroneous in its "factual finding that the industrial park constitutes a public use," *id.* at 103, and it is interesting to note that in *Bugryn* the industrial park project plan would have necessitated the acquisition of residential property. 63 Conn. App. at pp. 103 and 109.

In any event, Supreme Court cases under Chapter 130, our Redevelopment Act, indicate that that court is likely to conclude that condemnation for simple economic development will be upheld. Two cases after *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 104 A.2d 365 (1954), go beyond the reasoning of *Gohld* in judging the propriety of municipal action under the Redevelopment Act. *Gohld* merely said slum clearance is a public benefit in and of itself and locating private industry in a redevelopment area is also a benefit because it will prevent the recurrence of slums. In *Graham v. Houlihan*, 147 Conn. 321, 160 A.2d 745 (1960), the court pointed out that the Redevelopment Act reads in the disjunctive. The declaration of public policy in the statute is a broad one – it refers to the fact that a redevelopment area is an area within the state which is deteriorated, substandard *or* detrimental to the safety, health, morals or welfare of the community. *Id.* at 327, 329.

At 147 Conn. at 329, it notes that, "The conditions in the definition of a redevelopment area are stated disjunctively. The agency could establish a redevelopment area if one or more of the conditions are met." Then it goes on to interestingly say in referring to the neighborhood before the court:

> While not a slum, it nevertheless has a large proportion of substandard wooden structures located on small lots and is bordering on a complexity of poorly arranged streets.

And (perhaps even more interestingly,) the court goes on to say:

> In these days of advanced city planning and urban improvement, the city authorities could properly conclude that 'here was a probability of greater benefit to the whole community if the land in the area could be put to better use.

*Id.* at 329.

The language in *Katz v. Brandon,* 156 Conn. 521, 245 A.2d 579 (1968), which, as will be discussed is relevant to another issue to be addressed in this opinion, also is on point on the present issue of whether condemnation for simple economic development can be a public use. It cited *Gohld* and its slum clearance language, but also like *Graham,* waxed expansive first describing an area that hardly sounds like a classic slum then offering a reason for exercise of the eminent domain power:

> The Underwood location was under study as a possible redevelopment area from 1950 until 1961 prior to its being declared a renewal area. Factors which brought the Underwood redevelopment to the fore in 1961 were its mixed uses and housing close to factories, periodic flooding of the area, and the east-west highway. Because of these conditions, it was a natural renewal area to develop. In this day of keen competition, to attract industry and business to a state or to a particular locality, public officials are expected to cooperate in helping an industry to locate in their



> community. They must be at all times alert in providing for future as well as present needs.[10]

From reading many of these cases, one gets the feeling that in the eminent domain area each state court seems to operate in its own little universe. But in ascertaining the proper parameters of a state taking clause and the use of eminent domain power thereunder it is not unhelpful to look at how the states in general approach a problem. It is done when trying to define due process standards, why not when examining an eminent domain clause in a state constitution?

Generally speaking, and moving outside of Connecticut, many states support the view that pure economic development is an appropriate public use justifying exercise of the power of eminent domain; that is certainly the federal view as discussed in a previous footnote. The articles cited in that footnote indicate this appears to be the prevailing view among the states. Nichols at § 7.07(1) states that: "In general, eminent domain may be used to

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[10] Insofar as Chapter 132 makes special provisions for so-called "distressed municipalities" even a strict application of the reasoning of *Gohld Realty Co. v. Hartford, supra* – slum clearance and prevention of slum recurrence is a public use even where the later object is effected by allowing private developers into a project area – would seem to validate "pure" economic development of such municipalities as a public use. New London has been designated a "distressed municipality" by the state Office of Planning and Development. The bleak economic conditions that earn that designation under § 32-9p(b) of the General Statutes are conditions just as worthy of attention and dangerous to the economic and moral health of the state as slum or blighted areas under Chapter 130. And economic development schemes which permit industries and businesses to occupy project areas are aimed at preventing such municipalities from deteriorating again to the "distressed municipality" designation.

help a private enterprise if the primary goal of the taking leads to a project that will eventually promote the public welfare or advantage." Economic development will certainly do that and is especially needed in economically distressed areas which are, because of that very condition, less likely to attract development money from capital markets without government assistance. *Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981), is a leading case in validating use of eminent domain power for economic development purposes in a particular project area. Other leading cases are *City of Jamestown v. Leevers Supermarket, Inc.,* 552 N.W.2d 365, 369 (N.D. 1996); *City of Duluth v. State,* 390 N.W.2d 757, 763 (Minn. 1986); *In the Matter of Northeast Parent & Child Society, Inc. v. Schenectady,* 114 A.D.2d 741, 494 N.Y.S.2d 503 (N.Y. 1985).[11] There are certainly cases taking an opposite view; *see,* for example, the powerful dissents in *Poletown* itself by Justices Fitzgerald and Ryan; also *see Opinion of Justices,* 152 Me. 440, 131 A.2d 904, 907 (Me. 1957); *Hogue v. Port of Seattle,* 54 Wash. 2d 799, 341 P.2d 171, 187 (Wash. 1959); cf. *Sweetwater Valley Civic Assoc., Inc. v. City of National City,* 18 Cal. 3d 270, 555 P.2d 1099, 133 Cal. Rptr. 859, 863 (Cal. 1976); *Williamington Parking Auth. v. Land with Improvements,* 551 A.2d 227 (Del. 1987). These latter cases appear to be in the minority and at least some of them, like *Opinion of Justices, supra,* and *Hogue v. Port of Seattle,* suffer from a valid criticism in Nichols at § 7.02(2), p. 7-28: "The cases which lend support to the narrow

[11] Cases taking this view often point to the fact that a development plan is meant to help an economically distressed area. *See City of Duluth v. State,* 390 N.W.2d at 763; *City of Jamestown v. Leevers,* 552 N.W.2d at 369. *See* comment of *Bugryn* at 63 Conn. App. at 107.



reading of public use are numerous, but the force of many of these decisions is weakened by an erroneous belief that 'public use' determinations are solely the province of the judiciary without regard to legislative pronouncements on the issue." In any event, nothing in the state of the law throughout the states would lead this court to believe the legislative purpose expressed in Chapter 132 violates the general sense of what is an appropriate public use justifying in some circumstances use of the eminent domain power.

The court finds the statement of purpose in § 8-186 constitutionally acceptable despite the fact that the power of eminent domain is authorized as a mechanism to effectuate projects under Chapter 132, which will encourage private development. Economic growth and its encouragement, especially in "distressed municipalities" is a valid public use because it obviously confers a benefit to all members of the public.

The next question to be examined in what might be called a facial examination of the act is whether there is any other language in Chapter 132 apart from its statement of purpose in § 8-186, which indicates that its primary purpose is not the acceptable ones stated therein but a mechanism to primarily private business with only incidental benefit to the public. Just the contrary is indicated. The court has earlier discussed the various provisions of the act and will now re-emphasize those that belie any notion that it was meant to be a boondoggle to business. Why would special favor be given to "distressed municipalities" – there is no reason to think business would be more desirous in taking a chance in such project areas as opposed to more economically viable areas of the state. Section 8-195 requires the project plan to contain a

statement on the number of jobs that will be developed by any project under the act and the housing situation in the community. There must be a finding that any plan comports with local, state and regional development plans and "that the project will contribute to the economic welfare of the municipality and the state." As noted, "distressed municipalities" are given special preference with regard to planning and development grants without regard to how this will affect business interest. And § 8-195(d) indicates the DECD commissioner can allocate funds under a prioritization system that can take into account the municipalities' relative needs for development projects – not the needs of businesses already within project areas or desirous of moving in or near them.

In conclusion, the court finds nothing in the language of Chapter 132 authorizing use of eminent domain power for the purpose of accomplishing economic development in designated project areas violative of the federal or state Eminent Domain clauses of their respective constitutions.[12]

[12] In deciding whether a use can be characterized as a public use resourceful plaintiffs' counsel suggest a distinction should be made between industrial development in a project area as opposed to the erection of office buildings. Office buildings are the proposed development goal in parcel 3 where the property of some of the plaintiffs is located. This is a distinction not noted in the case law. Also our legislature paid it no mind. In § 8-186, it said our state's economic welfare "depends on the continued growth of industry and business." In common parlance, industry usually operates out of factories, businesses when set against industry runs [sic] from offices. The court does not claim to be an economic sophisticate, but it is generally thought that the most productive sectors of our economy will increasingly not be located inside factory walls but in offices whose employees provide various services to

(Continued on following page)



C.

Because Chapter 132 on its face and as regards its indicated mode of operation does not raise constitutional concerns that does not mean that in its application there might not be sufficient reason to enjoin a taking pursuant to a project plan created under its auspices. Even the majority in *Poletown* had the following to say:

> Our determination that this project falls within the public purpose, as stated by the legislature, does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base . . . The power of eminent domain is restricted to furthering public uses and is not to be exercised without *substantial proof that the public is primarily to be benefited.* Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that *the public interest is the predominant interest being advanced.*

304 N.W.2d at 459-60 (emphasis added by this court).

The article on eminent domain in Am. Jur. 2d underlines the deference courts give to that body's declaration that a use is public. But after that deference is given "inquiries for judicial review are whether the expressed use is a public one, and whether the condemnation results from bad faith or arbitrary and capricious motives." 26 Am. Jur. 2d at p. 503.

the public and other businesses. Such businesses certainly contribute to economic growth.

In *Gohld,* the court said:

> It is, of course, conceivable that the power of eminent domain granted by the act may be abused in isolated instances. There may be attempts to use it for some ulterior purpose not contemplated by the act. *See Farist Steel Co. v. Bridgeport,* 60 Conn. 278, 292, 22 A. 561 . . . Such a possibility does not militate against the constitutionality of the act, which very clearly delimits the purposes for which property may be condemned. When taken for those purposes, property will be subject to the public use. There is nothing in the stipulation of facts in the present case to indicate that the Hartford Redevelopment Agency will condemn land in the Front-Market area for any ulterior purpose. If, in some other case, it should be urged that a proposed taking is not in reality for a public purpose, we will have to consider that claim when it is made.

141 Conn. at 145.

*Barnes,* discussing the exercise of eminent domain power, said the primary question despite the fact that certain individuals may be benefited by a project is the "question whether it primarily serves, in a reasonable manner, to promote the public welfare." 140 Conn. at 14-15.

Discussing the Redevelopment Act, the court in *Graham* said: "The determination of what constitutes a Redevelopment area and what property is to be taken is primarily a matter for the redevelopment agency, and its decision is open to judicial review only to discover whether it has acted unreasonably or in bad faith, or has exceeded its powers." 147 Conn. at p. 328. For this proposition, *see* also *Water Commissioners v. Johnson,* 86 Conn. 151, 159;



*Bahr v. O'Brion Corp.,* 146 Conn. 237, 250, 149 A.2d 691; *CL&P v. Huschke,* 35 Conn. Supp. 303, 306 (1979). *See Broadriver, Inc.* where the court used the same test to determine whether Stamford Redevelopment Agency was unreasonable and acted in bad faith because in part the plaintiff's property was taken for a private purpose favoring preselected developers. 158 Conn. 522, 531, 265 A.2d 75.

Many of the plaintiffs' objections to these takings can be discussed within the framework of these cases and principles – that is, were the takings unreasonable and done in bad faith or were they capricious and arbitrary?

1.

One of the main issues raised by the plaintiffs is that the Fort Trumbull project has been controlled by Pfizer and major decisions on its progress have been made to satisfy Pfizer demands and interests.

(a)

A related concern is whether, in fact, the development plan is of primary benefit to Corcoran Jennison, the developer, and private businesses which may eventually locate in the plan area, and in that regard, only of incidental benefit to the city. The court will first discuss Pfizer.

This particular issue raised by the plaintiffs is related to a broader complaint that they have with the use of eminent domain power for what the plaintiffs characterize as "pure economic development." Such a use would not be a "public use" because then, nothing would then be a private use. Every residence would be subject to condemnation

because it does not generate jobs or taxes as a business does. In other words, the plaintiffs argue "'Public Use' must have some meaning or it would not appear in the constitution. It cannot encompass all private commercial endeavors." P. 31 of first plaintiffs' brief. In other words, if pure economic development is permitted, there is a complete lack of criteria for determining whether the economic development in a particular case benefits the public or in reality is of primary benefit to private interests with the public benefit being merely incidental.

From that perspective the alleged Pfizer control and running diktat [sic] over this project is just an extreme example of the problems created when eminent domain is used to foster economic development by private businesses. The plaintiffs, as they have throughout these proceedings, raise valid concerns, but the argument goes too far. There are, in fact, limits on the constitutional propriety of using the power of eminent domain for what the plaintiffs have called "pure economic development" and there are limits and criteria to determine whether in a particular instance a company like Pfizer has so directed the formulation and operation of a development project as to make such a plan of paramount benefit to that private interest.

In fact, insofar as there are such limits "public use" does have a meaning. One such limit adopted in the case law is the so-called "heightened scrutiny" test to determine the validity of a taking where eminent domain power benefits specific private interests. The *Poletown* court suggested such a test is appropriate in a case where economic development was the justification for condemnation which would benefit a large corporation. 340 N.W.2d at 459. In *Bugryn,* our Appellate Court held that it need not apply such a test and said "our Supreme Court has not



applied a heightened standard of review in previous disputes about the nature of a taking." 63 Conn. App. at 102 at footnote 7. But where private interests will be benefited by condemnation it would appear that our courts look closely at the taking to see if it passes constitutional muster. *See Connecticut College v. Calvert, supra,* 87 Conn. 421, 428 (1913). Such close examination is peculiarly appropriate in fact when the taking is for the stated purpose of economic development because the danger is presented that powerful business groups or companies will exercise their influence to gain their ends with the prospect of little corresponding benefit to the public. The slum clearance cases are "easier" in the sense that even if private developers move into cleared land, the area that has been cleared was in fact a slum or blighted and its removal is of obvious benefit to the public.

Where the purpose, however, is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose – economic advantage to a city sorely in need of it – is only incidental to the benefits that will be confined on private parties of a development plan. As said in 26 Am. Jur. 2d, § 56, p. 501, "Eminent Domain," "The controlling question is whether the paramount reason for the taking of the land, to which objection is made is the public interest, to which private benefits are merely incidental, or whether the private interests are paramount and the public benefits are merely incidental."

What considerations do the courts take into account in deciding this issue? Only two Connecticut cases touch on the problem directly. *Katz v. Brandon,* 156 Conn. 521, 245 A.2d 579 (1968); and *Bugryn v. City of Bristol,* 63 Conn.

App. 98, 774 A.2d 1042 (2001). *Katz* arose under the Redevelopment Act. Plaintiff homeowners claimed the initial purpose of the redevelopment project was not to benefit the general public but to provide a large Hartford corporation with a private parking lot at a price much lower than it would have to pay in the open market. The court first found that the area to be condemned met the criteria of the act for redevelopment. 156 Conn. at 527, and rejected the plaintiff's argument that there was a bad faith reason for the exercise of eminent domain power. The court said: "There is nothing in the record to indicate that any conveyance of land has been made to Olivetti or that any agreement or understanding exists which would provide it with any advantage which is not available to others as redevelopers." 156 Conn. at 534.

In *Bugryn,* the plaintiff claimed the underlying purpose of the condemnation was to retain a particular manufacturer, Yarde Metals, within the city. The court rejected the claim by adopting the trial court's finding that: "Although the city had numerous discussions with and made plans to have Yarde Metals as an anchor tenant in the proposed industrial park no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows (that) the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant." The court went on to conclude that even if Yarde Metals were later on to become a tenant, "a consequence that would be neither undesirable to the defendants nor adverse to the goals the park plan seeks to achieve, that fact would not support the plaintiffs' claim in light of the ample evidence in the record concerning the plan as a whole. 'Where the public use which justifies the taking of the area in the first instance



exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to private persons.'" 63 Conn. at 103-04.

In other jurisdictions the court has found two cases that offer interesting tests to determine whether the purpose of a taking was *primarily* to benefit the public and, therefore, constitutionally acceptable. In *Wilmington Parking Authority v. Land with Improvements,* 521 A.2d 227 (Del. 1986). There, at 521 A.2d at 232, the court said, referring first to two of its earlier decisions:

> Taken together, the *Ranken* and *Randolph* decisions indicate that a primary purpose determination in a constitutional context will normally turn upon the "consequence and effects" of a proposed project. However, those decisions also suggest that a reviewing court may consider evidence concerning the "underlying purpose" of a public authority in proposing a project. A recent Florida case, decided on constitutional grounds, also supports the position that evidence concerning the views of persons intimately involved with the initiation of a project is relevant to determining the "true purpose" of a taking. *See Baycol, Inc. v. Downtown Development Authority,* 315 So. 2d 451 (Fla. 1975). In rejecting the alleged public purpose of a taking, the *Baycol* court found "interesting" the testimony of a witness for the authority which suggested that he was unfamiliar with the public parking aspect of a multi-purpose project. *Id.* at 458.

In the *Wilmington Parking Authority* case, the court upheld the trial court's finding that the taking was improper. The primary purpose was not to provide parking

for the city; the record made clear that the primary purpose of the project was to benefit the city by retaining a specific corporation as a corporate citizen and the primary beneficiary of the project would be that corporation which has a need for parking.

In *Merrill v. City of Manchester,* 127 N.H. 234, 499 A.2d 216 (N.H. 1985), at p. 217, the court said:

> In determining whether the purpose for which property is being condemned is a public use, we must accordingly consider the extent to which the proposed project will benefit the public . . . The net benefit to the public will consist of the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form. If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use. In such a case, the true benefits of the project will accrue only to its private sponsors and participants, and the use of the power of eminent domain will violate the public use requirement of part I, article 12 of the State Constitution.

*Katz* and *Bugryn* in a rough way adopt the motivational test and weighing of benefits test used in these out of state cases.

The court has reviewed the record and will discuss the Pfizer involvement in the project first. Was benefit to the public the paramount object or was any public benefit merely incidental to benefiting Pfizer?

In this case, the record is a mixed one if not rather confusing. The general counsel for Pfizer testified. He said



Pfizer made a decision to build its global research facility in New London at the end of 1997 and made an announcement to this effect in February 1998. Pfizer only had three conditions for locating in the city – that the sewer treatment facility be renovated, that the park be restored and that the city leverage the coming of Pfizer to its own advantage. Pfizer never made demands as to the location or formulation of potential uses according to this witness, not even as to a hotel and conference center. On the other hand, certain Pfizer functions would benefit or create opportunities for the city – high level employees would want upscale residences and various guests would come to Pfizer for business purposes. The latter factor might indicate extended stay facilities or a hotel would be a feasible prospect for the city. Pfizer itself could live without the prospect of a hotel and never took a position on use of the eminent domain power according to this witness.

On the other hand, the executive director of NLDC wrote Dr. Milne, president of research at Pfizer, on December 15, 1997 and mentioned commitments the NLDC was prepared to make to Pfizer. She said the commitments are "to enable you to decide to construct a Pfizer Research facility in New London." The "development of mixed retail and residential space" was talked about in the letter. Based on commitments from the state "residential and commercial properties will be acquired." No mention is made of a hotel or office buildings, however, or any direct link between new residential construction and any need by Pfizer executives for upscale housing. Ms. Gaudiani's letter did conclude with the following, however: "Thank you very much for your consideration of this proposal. We will work with you to refine this proposal to meet Pfizer's

requirements." Apparently at about the same time New London's city manager wrote to Dr. Milne; the subject of this letter was "Commitments of the City of New London." The letter talked of transferring to Pfizer the land area on which their facility would be built – the land is not included in the MDP. Zoning regulations would be changed and Mr. Brown said New London would prepare a Redevelopment Plan for the Fort Trumbull area. Transfer of naval property to the city was discussed and enterprise zone tax benefits for Pfizer. No mention was made of a hotel office space or upscale housing.

In July 1998, the NLDC hired a planning consulting team for a final environmental assessment under our Environment Protection Act. They worked on the preparation of an environmental impact statement which led at the same time to the creation of the Municipal Development Plan.

Mr. Mahoney was the former director of the NLDC from April 1992 to November 1998. He was asked if representatives of Pfizer were involved in the formulation of or discussion of development plans for the Fort Trumbull area. He said during his time there were such discussions. Pfizer representatives were involved in the initial stages including the drafting of the environmental impact statement. From Mr. Mahoney's perspective, Pfizer had already committed to come to New London; the discussions being referenced here occurred after that Pfizer announcement in February 1998. Mr. Mahoney said the NLDC was attempting a market analysis of the most profitable uses for the development area so that was a reason to learn of Pfizer's uses and requirements. He denied that Pfizer made demands as such but Pfizer did say they had a need for a hotel and conference center. The



company also said that they had relationships with other companies that might support a need for biotech office space.

Mr. Hicks also testified he was a part of the planning and consulting team that worked on the environmental impact statement and prepared the MDP. He said Pfizer's coming was a unique chance for New London – companies like that usually go to the suburbs not "brown sites" like New London. Two factors drove the planning, Pfizer's coming and the availability of the Naval Undersea Warfare Center (NUWC). The big goal was to take advantage of Pfizer's arrival; a company like that attracts other users, people who provide services to the Pfizer operation. Hicks turned to the Pfizer site to see what its needs were. Pfizer did say they wanted a four-star hotel and conference center. Hicks also noted that New London's housing stock did not include much in the way of upscale housing. Pfizer created a need for more diversified housing which under the plan eventually adopted translated into expensive attached housing to be built on one of the MDP parcels.

During the course of the preparation of the MDP, James Serbia, a Pfizer employee, sent a communication to Pfizer's Milne. Serbia was apparently a contact person between Pfizer and the NLDC and the group formulating the MDP. The e-mail or letter says "Importance: 'High.'" Mr. Serbia tells Milne that he left three drawings that depict the NLDC's latest concept plans. It goes on to say "There seems to be some confusion regarding the expectation that Pfizer (you in particular) has regarding the development of the peninsula" (i.e. the Fort Trumbull area). Serbia says the NLDC indicates an original conceptual plan was used at two key meetings – one involving

Milne, the state and the city – and this plan indicates the commitments to Pfizer. It then goes on to say

> I think what it boils down to is whether or not Pfizer is flexible regarding the development plans – I believe the answer is yes per all our previous discussions on this – as long as some key components are included:
>
> – a residential component which would be attractive to professionals.
>
> – a hotel/conference component.
>
> – treatment plant upgrades/state park/ etc. and commercial or retail development to make the area an attractive place to visit/work.

The communication indicates the state has difficulty supporting upscale residential developments in a flood plain area and having such a development replace existing businesses and residences. Serbia then asks Mr. Milne to "clarify the following" – would 70-80 high end residential units "fit with your expectation; is the plan for a hotel with 250 units, currently shown on the plans, 'high, low or ok?'" In fact, the final MDP and current plans for the area do include a "high end" residential area with the approximate number of units referred to by Serbia and with a hotel with the approximate number of rooms indicated in his communication to Milne. It should be noted that there is no mention in the Serbia communication of the need, for example, to clear the entire Fort Trumbull area of residences and no reference to the need to erect office buildings – those buildings which according to the MDP would require the removal of those properties of the plaintiffs' located on parcel 3.



The hotel under the MDP is to be located in parcel 1, the residential units in parcel 2; Serbia does not mention parcel 3 where the office buildings are to be under the MDP nor does Serbia refer to parcel 4A. In fact, nothing in the record by way of communications to Pfizer or by Pfizer or by testimony by witnesses who refer to or represent Pfizer mentions directly parcel 3 or 4A except, perhaps, the Gaudiani letter which is somewhat vague.

It should also be noted that the team appointed by the NLDC and working on the environmental impact study which led to the MDP while Serbia was communicating with Milne did consider six possible development alternatives. One proposed no changes to the Fort Trumbull area except the development of the park – under this proposal no property would be taken by eminent domain. Two other alternatives considered permitted retention of a portion of the residential and commercial property. The writers of the MDP felt it necessary to include a fairly detailed discussion as to why they chose an alternative or actually an alternative representing a combination of proposals that contemplated the acquisition of all residential properties within the Fort Trumbull area and there was no reference to Pfizer or its needs or desires in this regard.

But in considering this issue, the court will not only rely on tidbits of information to try to guess motives or purposes. It would be entirely one sided to go through the record and catalogue contacts and communications between the private party, here Pfizer, and the public officials formulating a development plan. Evaluation of the goals, motives and interests of public officials regarding such a plan must also take into account the social and economic realities facing them as they embarked on a project under Chapter 132. To do this properly, the Fort

Trumbull area cannot be considered in isolation but must be viewed in the context of the community in which it is located – that community is the City of New London.

What is New London's situation? New London has been designated a "distressed municipality" by the state Office of Planning and Management. Since 1970 the population of New London has been declining. It has a higher rate of unemployment than the region where it is located and than the state. The Naval Undersea Warfare Center has closed down along with two other uses supported by NUWC, which delivered a substantial blow to the city's economy. Housing starts are almost nonexistent and there has been little reinvestment in the city. The housing stock itself is largely lower cost housing and Mr. Hicks testified that there is a need to diversify the housing stock to include higher income housing. Mr. Hyde who is director of real estate for the city testified that the "distressed municipality" classification takes into account all these just mentioned factors – age of the housing stock, lack of economic growth, and population growth, a high percentage of poverty and of subsidized housing. New London is a small city with relatively little open land to develop. It also has a high degree of non-taxable property – 56 percent.

The people preparing the MDP had available to them information in several reports corroborating the foregoing bleak picture. The Environmental Impact Evaluation (EIE) completed in November 1998, reported the city's population had not been lower since 1930. Its unemployment was 7.6 percent, whereas Norwich was at 6.3 percent, Groton at 4.7 percent, and the state at 4 percent. Over the past twenty years, the city's economy has been outperformed by the region and the state. The regional



labor market was up 45 percent, the state 40 percent and New London 17 percent. Sixty-one percent of the city's housing was built before 1950 with a high percentage of vacant housing. Six alternatives for the area were examined – the EIE estimated the impact on job production and housing of each alternative in some detail. As regards the Fort Trumbull area itself, there was an 82 percent vacancy rate for non-residential buildings and a 20 percent rate for noncommercial property. The tax revenue for this entire 90-acre area is only $325,000, which is considered low. A building inventory dated December 11, 1998, indicates that 50 percent of the construction in the Fort Trumbull area was pre-1950. Non-residential buildings were in poor shape with only two ranked high in long-range market potential. Less than 12 percent of residential buildings were on average or better condition in December 1998. Since 1990, the report says existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect. This certainly cannot be said of any of the plaintiffs' properties, however. They all seem to be in fine condition and many of these plaintiffs have spent considerable time and resources in maintaining their property and the court so finds. But this latter observation does not detract from the general picture of the condition of the Fort Trumbull area at the end of 1998 which was illustrated by the previous discussion.

Given all of these factors and returning to the earlier discussion of the *Katz, Bugryn, Wilmington Parking Authority* and *Merill* cases, how should the court decide the issue of whether the primary purpose of this project was to benefit Pfizer or at least whether that will be the predicted result? What are the benefits to the city? What

are the benefits to Pfizer? How should these matters be weighed?

As just indicated, Pfizer made clear that it wanted upscale residential housing and the MDP did provide for such housing in one of the parcels. Pfizer also wanted a four star hotel with conference facilities and an athletic club, all of which were included in the MDP. On the other hand, even Professor Mullin, the plaintiffs' expert and a man of impeccable credentials, testified that he liked the idea of a hotel – New London has a need for a high end hotel. A hotel would be very appropriate for New London given Pfizer's growth and its desire to have that use. He also noted that the hotel would be on the water – a tourism factor, and Pfizer was, in fact, backing the hotel – Pfizer agreed to in effect subsidize a large number of rooms. Professor Mullin's testimony just states the obvious. In the communications with Milne from the city manager and the director of the NLDC prior to Pfizer's announcement of its development plans there is no commitment to build a hotel. Pfizer made the specific demand after it had already decided to come to New London so it is hard to make a quid pro quo deduction – Pfizer's general counsel said if there were to be no hotel Pfizer visitors could use other hotels in the area. Also, it would appear that for the hotel to be built Pfizer had to agree with the developer that it would subsidize the occupancy of up to 100 rooms in the projected 200-room facility. That appears to be an odd twist – New London could use a fine hotel, New London will not get such a hotel unless the big corporation subsidizes its operation to a certain extent – who is doing the favors for whom? In any event, hotel construction will create construction jobs. The operation of a hotel will ensure the employment of many people in



various positions from unskilled workers to management personnel. Insofar as a four star waterfront hotel will draw in tourists, this will foster the city's goal of tying in the Fort Trumbull area development with attempts to rejuvenate downtown.

What are the prospective benefits to Pfizer or the city with regards to so-called high end housing? The record is mixed on this question. High end residential housing was not specifically alluded to in the city manager and Gaudiani, December 1997 communications prior to Pfizer's decision to come to the city, but it is certainly true that Pfizer appears to have strongly advocated for their construction, even requesting a certain number which reflected Pfizer's needs. There was testimony that the nature of New London's housing stock was generally not good in the sense that there was little in the way of high end housing. But there was little elucidation as to why 70, 80 or 90 high end attached residences would have a significant effect on the housing picture and why that is so important, and how it could be so important when all this high end housing is concentrated in one small area of the city as opposed to being distributed throughout the city – where is the multiplier effect and without that the only consequence of such construction will be an increased tax base.

Who benefits from the plans for parcel 3 or parcel 4A? The plaintiffs' properties are located in parcel 3 and parcel 4A. In parcel 3, office buildings are planned. As previously discussed, in no communication or testimony that the court is aware of did Pfizer express a demand for office space nor was Pfizer promised anything in that regard. Pfizer indicated that biotech companies that dealt with it might be interested in office space, but there was no

indication that this was an interest Pfizer had. It seemed to the court that it was presented as a suggestion by Pfizer that could assist the NLDC or developer in deciding on the feasibility of having such a use or perhaps the extent of such a use. As to parcel 4A, Pfizer expressed no interest or desires as to its potential use and there is nothing on the record as to how any proposed use of this parcel will benefit Pfizer, especially in light of the vague nature of the suggested use at least as set forth in the MDP.

Given the fact that Pfizer was not involved in any ascertainable way in pushing for office buildings on parcel 3 and will only tangentially benefit from such a use, if at all, since the developer determines tenants for the offices, not Pfizer, given the just mentioned total lack of involvement of Pfizer in anything to do with parcel 4A, and added to the fact that the hotel use will benefit Pfizer but also has the substantial possibility of benefiting the city, the court cannot conclude that the primary motivation or effect of this development plan as regards parcel 3 and 4a was to benefit this private entity. It would seem to the court that the primary motivation for the city and the NLDC was to take advantage of Pfizer's presence. Also turning to the economic realities of the situation, this project could not to the present have gone forward nor will it advance in the future unless the state funds it. The state has already contributed over $70 million to the project. What possible motive would the state have in catering to Pfizer and being primarily concerned with that company's interests as opposed to New London. There is no indication, for example, that Pfizer was entertaining the idea of building its research facility out of state, let alone that if it could not count on the fact that the Fort Trumbull area would be developed some other state would get the facility.



Under § 8-195(d), the state, acting through the DECD, can set priorities in awarding development grants to our cities and one of the considerations is the development needs of a city. There is nothing to indicate the DECD had anything else in mind than helping this "distressed municipality" when it approved the MDP and bankrolled it. Not a surprising conclusion, given the city's distressed condition as previously discussed.

It is certainly true that at least the city and the NLDC made great efforts to attract Pfizer to New London and accommodate its needs in ways that also benefited the City of New London apart from Pfizer. But as said over thirty years ago in *Katz v. Brandon, supra,* quoting from an earlier case:

> In this day of keen competition to attract industry and business to a state or to a particular locality, public officials are expected to cooperate in helping an industry to locate in their community. They must be at all times alert in providing for future as well as present needs.

156 Conn. at p. 533.

This observation is especially to the point when those public officials represent a "distressed municipality" with the economic problems and limited development opportunities of a city like New London.

(b)

What about the other aspect of the private-public benefit issue in this case as to who is the primary beneficiary of the development project? That is, is there indication here that, overall, especially as it relates to parcel 3 and

office building construction, the project will primarily benefit the developer and the businesses who might be induced to locate in this area and only benefit the public incidentally?

There is nothing in the record to indicate that as regards this project as a whole or considering parcel 3 and its planned office building separately that the city or the NLDC were motivated by a desire to aid particular private entities. The developer was chosen from a group of applicants. Space in the projected office buildings has not been rented yet. There is indication that there will be an attempt to link this development project to rejuvenation of the downtown area. The state has poured money into this project being aware of all of these factors. Also, *Gohld Realty Co.* had no problem with the fact that after the exercise of eminent domain resulted in the clearing of a slum area, the area could be turned over to private persons – this will prevent the project area from reverting to its slum status. 141 Conn. at p. 143. The court fails to see a relevant constitutional distinction between redevelopment cases and a situation such as this where the very fact of permitting economic development by private entities permits an economically struggling city to attempt to rejuvenate its downtown area, increase its job market, improve its housing stock and give it sufficient tax money to meet its needs.

All of this is not to say that implementation of the MDP will not entail a heavy social cost. An old New London neighborhood with all its memories, in effect, has been destroyed. People, like the plaintiffs, have been or might yet be removed from homes they love and in some cases from homes where their families have lived for generations. On the other hand, considering this against



the economic benefit to the city that it is hoped will be effectuated by this plan, a benefit all the plaintiffs say they are in support of, it is also true that the Fort Trumbull area had a high residential and business vacancy rate. The prospect of economic development in the Fort Trumbull area, as it existed prior to the MDP, would not have appeared to have been great and really no direct evidence was presented on that point.[13]

In any event, the court concludes that the Pfizer connection to this plan or the fact of a private developer involvement or future private business occupation of the site does not dictate a conclusion that the condemning authority acted in bad faith or unreasonably or that therefore in this particular case the taking was not for a public use.

2.

The plaintiffs also argue that the takings here were arbitrary and unreasonable and therefore not reflective of seizure for public use for another reason related to the

[13] What might be considered at this point in the discussion are arguments made by the plaintiffs to the effect that the purported economic benefits that will result from the implementation of the MDP are speculative – more to the point, there is no realistic prospect that, for example, office buildings will be erected given market conditions. This is certainly a valid position that the court must consider in determining whether the taking here was capricious and unreasonable. But the court will discuss this subject at a later point. Although it touches directly on the "benefit" factor in deciding which use is paramount in a plan, the public or private one, it is also true that the criticism that a plan is too speculative would arise even if the city were to nominate itself as the developer and build the buildings, rent office space or run the hotel and own the property directly with everything on it.

unbridled power of the NLDC in administering this plan. The plaintiffs point to the fact that changes were made to the MDP without city approval. The plaintiffs focus on the fact that the city council has apparently left it up to the NLDC to decide what changes to the plan are minor and what changes are substantial or major. If a change is substantial under § 8-200(a), the development agency cannot modify the plan but the "modification must be approved in the same manner as the development plan." Insofar as some of the objections raised by the plaintiffs are dealt with in the earlier discussion on delegation to the NLDC, the court would refer to that discussion. The main thrust of the plaintiffs' argument in this section can be summed up in a statement in their brief to the effect that "minor changes are the ones the NLDC wants to make and major changes are the ones it does not. The possible effect on public use simply is not part of the calculus." But what relevance, strictly speaking, all of this has to the "public use" question is unclear to the court. If the NLDC made a change to the plan which was, in fact, "substantial" and not minor in violation of § 8-200(a) that does not mean ipso facto that the plan no longer expresses a public use or indeed that the particular modification is not itself a public use or in any way contradicts the purposes of the already approved MDP. The plaintiffs refer to a variety of changes in the MDP – various uses were shifted from parcel to parcel, buildings were allowed to remain that were not scheduled to do so in the MDP, effect on intensity of use was not taken into consideration, road alignments were changed. But not addressed is how all of this affects whether the MDP as modified does not comport with the requirements of a public use. If a use is intensified, for example, does that make it no longer a public use?



Is the plaintiffs' position rather something to the effect that if § 8-200(a) is not complied with procedurally the whole MDP and attempts to act under it are invalidated? If a change has been made by the NLDC that it regards as "minor," but the change in fact is "substantial" or major does that invalidate the whole MDP or more exactly condemnations under the MDP that have nothing to do with that change? The MDP has a saving clause to the effect that if any portion of it is held to be invalid that will not invalidate other aspects of the project. In other words, office buildings under the MDP have been planned for parcel 3, that is still the plan.

None of the changes to the MDP made by the NLDC, whether characterized as major or minor, affect the planned upon use for parcel 3, i.e. office buildings. And it is this use which the defendants claim requires the takings. If the premise is accepted that pure economic development can provide a basis for exercising eminent domain power, especially given the circumstances this city finds itself in economically and with respect to the need for development and if the erection of office buildings is an appropriate mechanism to help achieve such development, then NLDC decisions as to minor versus major changes to the plan or aspects of the plan unrelated to these buildings or the purposes for which they are to be built have nothing to do with the "public use" question regarding these office buildings.

The plaintiffs also point to the fact that the attorney for the NLDC in trying to decide if a change were minor or major did not turn to the city council but contacted the DECD who sent him a document defining those terms which he used as a guideline. This document was not a regulation or an official DECD publication. In several

pages of their brief, the plaintiffs go on to say that even if this DECD document is used as a reference, the suggestions in it were not even followed by the NLDC attorney in making his ultimate decisions as to modifications.

This is an interesting observation, in part, dealt with in the court's earlier discussion on delegation of power to the NLDC, but the point remains: what does the major-minor distinction and the way it was arrived at by counsel for the NLDC have to do with the separate analytical question of whether, in fact, the original MDP reflected a public use or whether the plan with the NLDC modifications still reflects a public use or if the modifications themselves can be defined as a public use. The point being that the major-minor decision procedure may present a problem regarding the issue of procedural compliance with the act and the issue of delegation with the act, but it is not directly related to the analytically separate issue of whether a modification will result in a use that is not public, even as regards the modification, let alone invalidating the public use characterization of the plan as a whole with the modification.

On this whole issue of approval of changes to a development plan by a development agency, instead of a city council, the court could find only one case that has any bearing, *Tierney v. Planned Industrial Expansion Authority,* 742 S.W.2d 146 (Mo. 1987). In that case, the Tierneys, called the relators under Missouri procedure, owned land in downtown Kansas City which contained a structurally sound and usable building. The Planning Industrial Expansion Authority (PIEA) of the city instituted condemnation proceedings in accordance with Chapter 100, [Mo. Rev. Stat.] of the state statutes, the Planned Industrial Expansion Act. The act provided for the establishment of



an agency, such as the PIEA "having the authority to acquire land in 'blighted,' 'insanitary,' or 'undeveloped industrial' areas." The owners filed suit against the authority and others seeking a declaratory judgment that the condemnation proceedings were invalid and also damages on account of "condemnation blight." *Id.* at 148-49. One aspect of the suit was the modification of the plan by the PIEA and the Tierneys, 'that is, the relators,' claim that this was improper. At p. 154, the court said the following:

Modification of the Plan

Relators complain that, even if the PIEA plan approved by the council complies with the statutory requirements, that plan was substantially modified by the proposals of the private contractor ultimately adopted by the PIEA. The proposal changed the configuration of several streets and called for an office building on relator's property rather than a hotel as originally contemplated. The argument fails to take account of the time sequence established by the statute. The city council approval of September 28, 1982, furnished the jurisdictional basis for acquisition of the property in the blighted area. This came before the plan was made available to developers for bidding. Jurisdiction is not lost because of what PIEA and the developers may later agree upon. Nor are the owners specially aggrieved by changes made after their property has become subject to condemnation.

It could hardly be expected that all details for the planned development could be spelled out at the time of council approval, or even at the time the initial contract is agreed to. There is no way to determine which potential

developers might show interest, or what kind of development they might consider economic. Changes may be necessary to meet changing economic conditions, if uses contemplated in the initial plan are adequately provided by other new construction. We will not read the statutes in such a way as to frustrate their effectiveness, especially in view of the legislative command that they be construed "liberally to effectuate the purposes." [Mo. Rev. Stat.] Section 100.610. We are not persuaded that the modifications relied on by the owners represent a significant departure from the plan approved by the council. A "substantial modification" as described by [Mo. Rev. Stat.] Section 100.400.1(10), such as to require council approval, should be read as to referring to a modification which would substantially alter the nature of the contemplated development. We find nothing of this sort in the record.

The city council retains ultimate control over the plan and any modifications. Section 100.400(10). The circumstances relied on by the owners do not divest the circuit court of jurisdiction over the eminent domain proceedings.

What the Missouri Supreme Court said about the modifications in that case can be said of the modifications here. They simply do not "substantially alter the nature of the contemplated development" let alone invalidate the public use for the development plan as a whole or as considered in themselves. The plaintiffs will surely note that the Missouri court said under their act the city council retains ultimate control over the plan and any modifications. As noted in the delegation discussion, although here the city is not a signatory on the development agreement, the state acting through the DECD is a signatory and through that status and their ongoing funding of the plan can monitor NLDC actions or failures



to act. The DECD is one of the entities the NLDC would have to go to under § 8-200(a) to seek approval of a modification if it were substantial.

Also, the modifications were filed with the city council. If the council does not approve of NLDC's actions, it can terminate its relationship with that agency at any time – the ultimate control mechanism. In fact, what was to prevent the city council being made aware of the modifications from disagreeing with the NLDC's characterizations of the modifications as not minor but substantial and in effect initiating the approval process envisaged in § 8-200(a) – nothing in the MDP, the city charter or Chapter 132 that the court is aware of at this point.

Suffice it to say that the court does not adopt the plaintiffs' position that the changes to the MDP by the NLDC somehow affects the public use characterization of the plan or in some way forestalls the exercise by the NLDC of any powers under the act, including eminent domain, on aspects of the plan having nothing to do with the modifications and their effect.

3.

The plaintiffs discuss two issues regarding the future use of this property both of which are related to the question of public use. On the one hand, the plaintiffs argue that restrictions on future use are not enforced by the city. They also argue the unrelated proposition that the condemnations lack necessary assurances of future public use.

(1)

The court will first discuss the claim that the restrictions on future use are not enforced by the city. The basic thrust of the argument is that "decisions about compliance with the MDP are decidedly *not* made by the city council, the body from whom the power of eminent domain flows . . . only the city council can decide if a use is public." Pp. 26-27 of first brief.

To support this argument, at one point the plaintiffs say: "The developer is supposed to abide by the purposes of the MDP, but the decision about whether those purposes are, in fact, being followed is made by a private property – the NLDC. The process for ensuring future conformity with the MDP is through 'design review' . . . A committee, including one representative from the city's planning and zoning department, makes a recommendation . . . that recommendation then goes to the NLDC and the DECD, the state agency funding the project; they make the final decision." At a later point, the state is left out but the same theme continues: "As it stands, however, the NLDC and the developer decide future uses, even though they cannot make the decision that those future uses are public ones.

In answer to the plaintiffs' position, the court does not agree that the City of New London or its city council is the source of eminent domain power – that power does not "flow" from the city council. Nor does the city council decide, except in an implementary sense, if a use is public. The state acting through the legislature is the source of eminent domain power and the state can and has defined in § 8-186 of Chapter 132 the "public use" at issue in this case. Referring to the state legislature, our court said:



> Under our form of government the sovereign people act, in determining the existence and extent of the public need (for the taking of property), through the legislative department, which . . . may act directly or through the medium of delegated power. Whether or not there shall be such delegation, and the scope of it, is a matter for legislative decision.

*Water Commissioners v. Johnson,* 86 Conn. 151, 165 (1912).

Likewise, in *Gohld,* where the Redevelopment Act delegated eminent domain power to the local agency of a city, the court said:

> The determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive . . .

141 Conn. at 146.

The *Bugryn* court quoted this language and said the principle is "well settled." 63 Conn. App. at p. 107. This seems to be the law generally, 26 Am. Jur. 2d, "Eminent Domain" at §§ 17 and 19. Also *see Northeastern Gas Transmission Co. v. Collins,* 138 Conn. 582, 586-87, 87 A.2d 139 (1952); cf. *City of San Francisco v. Ross,* 44 Cal. 2d 52, 279 P.2d 529, 531 (Cal. 1955).

As mentioned in the *Johnson* case, the state can determine the scope of eminent domain power given to a municipality and as stated in the Am. Jur. 2d article: "In delegating the power of eminent domain, the state may

exercise a certain control . . . " § 19, p. 464; cf. *Joslin Mfg. Co. v. Providence,* 262 U.S. 668, 674, 67 L. Ed. 1167, 43 S. Ct. 684 (1923). The point is that under our statutory scheme, the state has retained for itself powers to ensure compliance with the MDP which the state *and* the city must approve before any development goes forward and there is nothing constitutionally wrong with that.

Here, the DECD must sign the development agreement which is the mechanism by which the MDP and its goals are accomplished, the state provides the funding without which nothing goes forward. "Design review" is the control mechanism which ensures compliance with the MDP which the city council had to approve in the first place. The court will not repeat the observations it made in the delegation section discussing the innumerable ways that city and state control the NLDC and the whole MDP process. Furthermore, as indicated in that section, the NLDC is not some independent "private" entity in the sense that the plaintiffs use that term.

Also, as pointed out by the defendant city in its brief, there are "definitive assurances of future public use" in accordance with the MDP which the city had to approve for it to be operational. The MDP states:

> The MDP and/or any modification hereof shall be in full force and effect for a period of thirty years from the date of first approval of this MDP by the City Council of the City of New London.

Exhibit 38, MDP Section 12.0.

There are also "restrictions on the use of each parcel" as the defendant points out. Each redeveloper has to agree for itself and any successor in interest that any conveyance deed contain a covenant that:



> The Parcel shall be devoted principally to the uses contemplated by the Plan, and shall not be used or devoted for any other purpose, or contrary to any of the limitations or requirements of said Plan. All improvements made pursuant to the Plan and this Agreement shall be used in accordance with the Plan . . .

The Parcel shall not be sold, leased, or otherwise disposed of for the purposes of speculation . . .

> Redeveloper shall not sell, lease or otherwise convey any interest in, or permit use or occupancy of, the Parcel unless the transferee agrees to bind itself to the Redeveloper's obligations under this paragraph.

Exhibit 38 MDP Section 6.2.1.

If a developer or assignee of a developer were to violate the terms of its agreement, the NLDC could turn to the courts for relief and perhaps the city could also do so or terminate the NLDC that refuses to take such action and appoint a new development agency. In any event, what was said in the *Northeastern Gas Transmission Co.* case applies here where there were also concerns about ensuring future use of seized property as a public use. The court, at 138 Conn. 589, said:

> Any legal obligation may, of course, be dishonored. That is one reason why courts exist. Should the plaintiff breach its duty in the manner suggested, there is ample judicial machinery available to the defendants to rectify the wrong. A claim of the nature under discussion can be made in almost every condemnation case. It amounts to nothing more than a legal bugaboo. By exercising the power of eminent domain granted by the

act, the plaintiff becomes bound to devote the property acquired to the purpose for which the legislature has authorized the taking, namely, the transmission of natural gas for sale as specified.

(2)

The plaintiffs have a more general concern regarding assurance of public use beyond what entity can or will ensure that use. They say when property that is taken "will be owned by a private party, courts require that there be assurances of future public use. Although lack of assurance of public use is a subset of lack of public use, it can be a separate legal basis for rejecting a condemnation." The Connecticut formula is easier to understand in this regard; that is, in a particular case does the lack of necessary assurance of future public use make the condemnation unreasonable, capricious, and in bad faith.

The plaintiffs cite several cases for the proposition that "property cannot be condemned without advance assurances that it will be employed only for specified public uses." But the argument is confusing because the cases involve situations where there was no plan for public use set forth to justify the taking or the taking was clearly done to benefit a private interest. Thus, *Cincinnati v.. Vester,* 281 U.S. 439, 74 L. Ed. 950, 50 S. Ct. 360 (1930), involved a situation where the Ohio constitution gave municipalities the power to condemn land in excess of that necessary for a public use if such excess condemnation was "in furtherance of such public use." A state statute said that the municipality must define the purpose of the condemnation. The court did not reach the constitutional issues presented but observed that the municipality



provided no reason for the condemnation which was therefore not compliant with statutory authority. *Id.* at 441, 447-48. As the court said, "property could not be taken for some independent and undisclosed public use." *Id.* at 448. *State ex rel Sharp v. 0.62033 Acres of Land,* 49 Del. 90, 110 A.2d 1 (Del. 1954), is somewhat similar to *Vester,* at least in its particular application to the facts before it. This trial court cited the well-accepted principle that eminent domain power "shall not be exercised unless the property taken is to be devoted to a public use within a reasonable time after taking." 110 A.2d at 6. This was a highway condemnation case and as to a certain parcel of property the court held eminent domain power could not be used because the highway "Department had no present plans for utilizing most of the land and is unable to state positively that it will ever use the land for the purpose for which it is sought." 110 A.2d at 7. That is, no real reason was given for the need to take the property. *Krauter v. Lower Big Blue Nat. Res. Dist.,* 199 Neb. 431, 259 N.W.2d 472 (Neb. 1977), is like *Vester.* It involved an excess condemnation issue. The Natural Resource District wanted to condemn land in excess of that actually needed. It argued it could condemn land if there is only a probability or even if there is only a possibility that it might be needed for a public purpose in the future. Technically, the court did not reach the propriety of that argument but referred to limiting statutory language. It said: "The Legislature has clearly limited the exercise of the power of eminent domain by a natural resources district to situations in which the condemning agency has a present plan and a present public purpose for the use of the property to be acquired." 259 N.W.2d at 475. In *Mayor of Vicksburg v. Thomas,* 645 So. 2d 940 (Miss. 1994), the court upheld the property owner's objection to the taking in a situation where the

property was going to be turned over to a private party. The court characterized the situation before it to the taking of land not for a public use but to benefit a private party. The competitive bidding statutes required by state law in awarding the property to this private party were not followed. He was free to develop the property or not develop it as he saw fit. There were no covenants, restrictions or conditions in the contract between the city and this private party. *Id.* at 943. *Alsip Park Dist. v. D&M Partnership,* 252 Ill. App. 3d 277, 625 N.E.2d 40, 192 Ill. Dec. 80 (Ill. 1993), is much like the *Sharp* case in its statement of the law: a party opposing a taking should prevail if the condemning authority has "no ascertainable public need or plan, current or future, for the land." 625 N.E.2d at 45. *CRDA v. Banin,* 320 N.J. Super. 342, 727 A.2d 102 (N.J. 1998), is a trial court opinion. There, the court dismissed a petition to condemn people's property brought by a state casino development authority. Trump was to be the beneficiary of the condemnation. "*When, how* and *if* the property is developed in the future will be outside the control of [the authority] except for the fact that Trump, a casino hotel operator, will have to develop and use the property consistent with the business in which it is already engaged." 727 A.2d at 110-11 (emphasis added by this court). The court at 727 A.2d at 111 went on to note that when a public agency acquires property to turn it over to a private developer "absent appropriate restrictions in the agreement between the public agency and the private developer, there are no assurances that the public interest will be protected." *City of San Francisco v. Ross,* 44 Cal. 2d 52, 279 P.2d 529 (Cal. 1955), was a case where the court held the taking by the city of property for a private party to run a parking facility was merely a private exercise for someone's private gain. The city chose not to proceed



under various special acts that might have been used to acquire property that could then be leased to a private party. The city just purported to act "under its general power of eminent domain." 279 P.2d at 531. The city admitted it would not control rates at the facility or its method of operation. The statutes the city could have used, but did not, indicate "a clear legislative policy requiring government control of rates and charges to assure fulfillment of a public need." 279 P.2d at 532. The court was also concerned about the fact that although the city had said the facility was needed to relieve congestion and facilitate traffic, a portion of the seized property was to be used for retail stores; that in itself would not invalidate the whole plan but "it aids in characterizing the whole operation as a private one for private gain." 279 P.2d at 533.

The plaintiffs also cite *In re New Haven Water Co. v. Russell,* 86 Conn. 361, 85 A. 636 (1912). In that case, the water company was authorized to take water from a stream so far as it was necessary. The defendants objected. The plaintiffs cite the case in their brief for the proposition that, like the foregoing cases, they referred to, this state "also holds that the use of condemned property must be known prior to condemnation [which] suggests the necessity of assurances of future public use." P. 36 of first brief of plaintiffs. A close reading of the case does not support such a rigid interpretation, however. At 86 Conn. at 369, the court says: "A private corporation engaged in furnishing a water supply to a community owes it the duty of providing an adequate supply of water at all times." The court then goes on to discuss the various contingencies which would have a bearing on any prediction as to future water use. The court at 86 Conn. at 370 then says:

> It cannot be foretold when the contingencies of which we have spoken may be expected, nor can the future requirements and prospective needs within a reasonable time be estimated with exactitude; it is necessarily a matter of judgment based upon knowledge of the present and experience of the past. The reasonableness of the necessity must be ascertained from the facts of each case; and a reasonable discretion in reaching this conclusion will not be interfered with.

Like the Connecticut case just discussed, the other cases just referred to are really not applicable to the present set of circumstances and not supportive of the plaintiffs' argument.

*Vester, State ex rel Sharp, Mayor of Vicksburg, Alsip* and *Banin* all involved situations where the condemning authority had no plans or even set requirement that the seized property be used for any particular purpose, including a public purpose, and this was true of cases where the property was to be turned over to a private developer. *Krauter* involved an interpretation of a particular statutory requirement, as did in part the *City of San Francisco* case. The latter case was also concerned in part that part of the use – retail shops – was not a use which in any way could be characterized as a public use which motivated the taking.

Here, as said numerous times before, the public use as dictated by the statement of purpose statute (§ 8-186) of Chapter 132 was economic development. The MDP and the development agreement being worked on by NLDC and the developer to carry out the MDP and the millions poured in by the state to carry out the MDP, which both state and city council approved, had as their goal the



economic development envisaged by Chapter 132. The vehicle of this economic development, under the MDP, was to be the erection of office buildings. As also said before, economic development authorized by legislation can be a public purpose especially if the object of the development is a disadvantaged community. Like seized land in a slum area can, under *Gohld,* be turned over to developers to prevent the recurrence of slum conditions, why cannot such land be utilized for that development which attempts to lift a city out of its economically disadvantaged condition and keep it at that plateau? This is especially so when it is clear, as here, that the area where eminent domain is to operate cannot and will not serve that development function.

Can situations arise where that plan can still be speculative? Certainly, and the court will discuss that shortly. But so can any development plan be speculative even if its object a la *Gohld* is to prevent the recurrence of a slum.

A plan can be speculative if there is little or no prospect for its realization or if there is no real development plan at all. Speculative taking issues as to parcels 3 and 4A are better analyzed under the test of whether there is a necessity to take particular land to accomplish a public purpose and the court will try to address that problem in the next part of this decision.

4.

The most telling argument, at least for the court, is raised by the plaintiffs' claim that there is no necessity to take their property. The court will discuss the takings on

parcel 3 in this portion of the decision. Parcel 4A will be treated separately in section 5.

As to parcel 3, two positions are set forth: (1) the MDP and its goals can be accomplished as to this parcel without tearing down their houses; (2) if the court were to decide the planned use for parcel 3 were a public use despite private involvement, the takings would be unreasonable because the development planned is entirely speculative with no reasonable assurance that it will be accomplished.

The cases often treat the question of whether the planned exercise of eminent domain power is a public use as a separate question from whether the taking of particular land is necessary to accomplish the public use. The position is often framed in the terms set forth in *Gohld.* There, the court said:

> Whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . but in resolving it great weight must be given to the determination of the legislature.

141 Conn. at p. 141. Then at 141 Conn. at p. 146 the court said:

> The determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred.



Cf. *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 248 N.W.2d 885, 894 (Wis. 1977); cf. *Nelson Drainage District v. Filippis,* 174 Mich. App. 400, 436 N.W.2d 682 (Mich. 1989), where the court of appeals said: "In reviewing whether a taking is necessary, the consideration is not the advantage to the public, but whether the project needs the property involved." 436 N.W.2d at 685.

But the dichotomy between the public use determination and the necessity question cannot be pressed too far – for one thing judicial intervention at some level is involved in deciding both issues. Also on the necessity question the nature of the public use is directly related to whether a particular taking is necessary. Or to put it another way, if it is not necessary to take particular property under the guise of accomplishing a public purpose, the taking in any real sense cannot be for a public use.

Some cases seem to recognize this: thus, in *State Highway Commission v. Curtis,* 359 Mo. 402, 222 S.W.2d 64 (Mo. 1949), in an excess condemnation case, the state Supreme Court said: "Even in the absence of actual fraud, a taking of property in the ostensible behalf of a public improvement in excess of what by any possibility could ever serve any public purpose would to that extent be a taking for a non-public use . . . " To the same effect is *Woolard v. State Highway Comm.,* 220 Ark. 731, 249 S.W.2d 564, 566 (Ark. 1952).

In any event the court will, of course, as it must, pursue its discussion along the lines suggested in *Gohld* to decide the necessity questions raised by the plaintiffs. First, the court will discuss parcel 3 and the takings in that parcel.

(a)

(1)

As noted, one of the positions the plaintiffs advance is that there is no need to condemn their property since the goals of the MDP can be accomplished in general and the development specifically planned for parcel 3 can go forward as planned even if the homes of the plaintiffs on parcel 3 are allowed to remain.

The testimony of Professor Mullin was presented by the plaintiffs. He teaches at the University of Massachusetts in the planning department; his areas of teaching are economic development, industrial development and planning history and theory. Professor Mullin is a highly qualified and obviously knowledgeable individual. He testified that it is uncommon for land to be entirely cleared for new development and it is not reasonably necessary to take the four homes in parcel 3 to accomplish the goals of the MDP in that parcel. In fact, it really was a "no-brainer" to him, especially in light of the fact that the homes occupy a minuscule proportion of the area of the parcel. Retention of the Italian Dramatic Club (IDC) is a good example of how an existing structure can be retained on a parcel without being detrimental to the whole project. Professor Mullin noted that the four units are reasonably clustered – three of them are lined up in a row and one is located next to the IDC. It is not desirable to have residential units standing alone but to have them remain in clusters if they are to be retained. Professor Mullin testified about an alternative that he prepared with office buildings and parking; the IDC and the four homes were to remain standing under his alternative.



On cross examination, it was brought out that his alternative would place a projected office building overlooking a sewer treatment plant. Ideally, the professor admitted it would be more desirable to put parking areas next to such a plant, but "methods" can be devised to make it perfectly acceptable to locate a building near such a plant. Such uses can be mixed.

In general, Professor Mullin thought the MDP was fine with the exception of the housing issue. In fact, this was the position of the plaintiffs who own homes in parcel 3.

The defendants presented much in the way of testimony and exhibits on this aspect of the necessity issue. The court will now try to discuss that evidence. The decision to prepare a development plan under Chapter 132 required the preparation of an environmental impact study.

Jimmy Hicks testified for the defendants. He is an executive vice president and principal in RKG Associates; this firm is an economic development consulting firm that involves itself also in real estate planning. The firm has offices in New Hampshire and Virginia. Mr. Hicks says his firm does a lot of planning related to communities; they have done much work in upstate New York and Maine. Mr. Hicks has been involved in land use development for almost thirty years. He was hired by the NLDC to be part of the team entrusted with preparing the MDP. Initially, the contract between the NLDC and RKG focused on real estate and economic and financial planning. As part of the effort to prepare an MDP and contributing to the formulation of that plan, the NLDC team also prepared a statutorily required economic development plan. In preparing

that plan, six alternatives were considered for the development of the Fort Trumbull area. In choosing the final alternative that was embodied in the MDP much was received in the way of public comment. Also, the primary consideration was the desire by the team preparing the MDP to take advantage of Pfizer's decision to come to New London. This was a unique opportunity for a city with New London's economic, housing and development problems which Mr. Hicks alluded to in his testimony and generally reflects the court's previous observations concerning those factors.

In weighing the six alternatives, the team, as to each, examined the environmental impact and the job and general economic impact. The goal of all this was, as said, to help New London to take advantage of Pfizer's arrival on the scene by increasing the city's tax base and employment prospects.

At least two of the alternatives provided that single-family houses would be retained and the team even considered the rehabilitation of existing housing. Mr. Hicks had a problem with this solution because he believes it is hard to turn residential space into office space, economic development being the goal of the plan.

Mr. Hicks spoke of the need to clear the whole Fort Trumbull area of private detached housing which was the solution incorporated into the MDP. He gave the reasoning behind that solution and the implications of choosing a private developer to carry out the project, which the court will now set forth.

What they finally adopted was they would get a private sector developer to come in. What that basically means is a common redevelopment approach as you



prepare the site. You give them raw land with the necessary infrastructure, and the developer makes an investment. This site, though, has a lot of risk. It's got hazardous waste. It's got constrainment. It's got a lot of regulations dealing with it, and it's in an urban setting. That's not the most attractive for investment, and that's the reality you have to face. There's not a lot of people coming and investing in New London. So if you're gonna attract a private developer to this type of site setting, you've got to try to minimize as much uncertainty as much as possible. Most developers are good at understanding risks, but not uncertainty. If you said we'll give you something that looks like a spotted leopard

Q. What's the spotted leopard?

A. It's where a leopard has spots, spots are things that stay the same and you've got to work around them. Spotted leopard is just a way to refer at the configuration of land uses. If you're gonna attract developers, if you're gonna put out what you call requests for proposals and get them interested in the site, and after they overcome all the inherent problems with redevelopment, say to them also, well, you've got to work around this contingency, you greatly diminish your ability to finding competent capable people to come in. You take things that would possibly risk and turn them into uncertainty. Developers operate with very short time frame financial conditions, and it was our recommendation that because the housing wasn't adaptable and a long-term use to the office related things, and that three, four kinds of the hodgepodge of certain things that we recommended, that most of those facilities be demolished.

These remarks indicate the reasoning behind the MDP decision to remove all residences at a time all were still in place and the MDP had not yet been approved.

But what about the necessity to condemn the plaintiffs' properties in parcel 3 at the present time, apart from what was envisaged in the MDP, as necessary months before the actual taking?

The court will discuss this more fully, but it is said in the cases that: "The necessity of taking property for public purposes in eminent domain proceedings must be determined by the conditions existing at the time of taking." *Luccock v. City of Norman,* 578 P.2d 1204, 1206 (Okla. Sup. Ct. 1978).[14] Accepting that proposition, Mr. Hicks also felt that Professor Mullin's plan providing for retention of these homes at the present time was not compatible with the goals of the MDP. He said the planning team was trying to create a "housing village" in an urban context (referring apparently to the new housing planned for parcel 2 and the associated retail and hotel development in parcel 1). Single family housing defeats that purpose and diminishes the atmosphere sought to be created by the MDP.

Perhaps more to the point, Hicks said although retention of the present private housing in parcel 3 was

[14] This statement is unequivocally true in cases where specific uses are planned – taking land for school facility. Cf. *West Hartford v. Talcott,* 138 Conn. 82, 82 A.2d 351 (1951), need for power company for 150 foot easement, *Conn. Light & Power Co. v. Huschke,* 35 Conn. Supp. 303, 409 A.2d 153 (1979). The bald statement is somewhat more subject to examination if not question when an area development is at issue such as in redevelopment cases. *See Gohld* at 141 Conn. at 146; *Graham,* 147 Conn. at 328.



compatible conceptually with having an office building use, it presents problems in the real world when you are trying to foster private development. It is not worth the risk that would have to be run. Retention of these homes could, in fact, make private development more problematical. Hicks said in response to questioning:

> Q. – is if a directive came down from wherever and said these properties that these people own that are marked in red on that map have to stay, would it be feasible to go forward with this plan? Could it be done?
>
> A. (Hicks) And your question to me is: Could you make it happen?
>
> Q. I'm asking you, could it be done? –
>
> A. It would be much more difficult. Probably what would happen, because once again you've got the private sector firm, is that developer would come in and renegotiate the deal and cherry pick the good sites out. And by that I mean we'll take this portion and this portion and the sites – it's more difficult to develop, the more uncertainty about, we'll let you keep those. What happens in that cherry picking process, the site gets broken up. Some gets developed; some doesn't get developed. That's a real problem when you're trying to change things. And then the developer comes along and you're left with things that are more difficult to develop. They stagnate. It just makes it a harder process.
>
> Q. But at the end of the day, you just don't know whether it would still be feasible, do you?
>
> A. My professional opinion based on my experience, it would make it much, much more difficult

> for NLDC and probably would lead to a situation that certain parts of the site would probably have a much higher degree of difficulty in being developed.

Finally, Mr. Hicks said there is much more flexibility before a development plan, such as the MDP here, is adopted. Changing the plan now to allow single-family houses would be a major change requiring the amendment of the environmental impact study, the MDP, and a possible change in the city's land use ordinances which were modified to accommodate the MDP.

Admiral Goebel also testified on this subject. He said allowing the plaintiffs' properties to remain in parcel 3 did not fit in with the MDP. Retention of single-family structures was not envisaged as part of the MDP so that if they were to be kept onsite, it would be necessary to go back to square one in the planning process. He also referred to the fact that several alternatives were considered prior to the adoption of the MDP. Eventually one plan was selected after public comment which tried to incorporate suggestions that were made and certain aspects of several of the alternatives considered into the final MDP.

A portion of the deposition testimony of Marty Jones was presented. He is the president of the private developer selected by the NLDC to develop the site under the MDP. The following testimony was elicited from Mr. Jones concerning this issue.

> Q. In order to market this property is it – would that job be made harder or easier if the plaintiffs were to win their lawsuit and their properties were to remain where they are presently situated?



> A. It would be more difficult.
>
> Q. Why?
>
> A In order to attract commercial tenants to, and again, for this discussion I'm presuming we're talking about properties that are on parcel 3, it would be difficult to attract a commercial tenant to these commercial office buildings without a full site available for the development of an office building and the associated parking.
>
> Q. Why is having a full site important?
>
> A. First of all, to be able to develop the amount of parking needed for economic feasibility, and also to have a site that – that the grading issues in parcel 3 – the grading issues in parcel 3 are very complicated and the retention of isolated properties within that area could make it very difficult to develop this sort of property.
>
> Q. In order to do adequate grading do you need to have access to the entire parcel 3 to properly grade it?
>
> A. Yes.

Given these facts, let us in more detail return to what our cases say as to this aspect of the necessity issue. The previously quoted test set forth in *Gohld* is straightforward:

> The determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter of the legislative power. When the legislature delegates the making of that determination to another agency (in *Gohld* a redevelopment agency), the decision of the agency is conclusive; it is open

> to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred.

141 Conn. at p. 146; *see* often cited *Water Commissioners v. Johnson,* 86 Conn. 151, 160-61 (1912).[15]

As noted in *West Hartford v. Talcott,* 138 Conn. 82, 82 A.2d 351 (1951): "'Necessary' in legislative acts, according to the right of eminent domain, does not mean an absolute or indispensable necessity but only that the taking provided for is reasonably necessary." *Id.* at 91.

The latest pronouncement of an appellate court in our state on the appropriate test is *Bugryn v. City of Bristol,* 63 Conn. App. 98, 774 A.2d 1042 (2001), which repeats the *Gohld* test, cites *Talcott* for its application and cites and quotes from *Graham v. Houlihan,* 147 Conn. 321, 160 A.2d 745 (1960), for another variation on the theme being now discussed:

> While we recognize that the state should not condemn any more property than is necessary to satisfy the legislative mandate, courts are not well suited to second guess determinations of this nature. "Where it appears that an honest judgment has been reasonably and fairly exercised after a full hearing, courts should be cautious about disturbing the decision of the local authority" . . . *Graham v. Houlihan,* 147 Conn. 321, 160 A.2d 745.

[15] This statement is modified at least in redevelopment act cases by the recent decision in *Pequonnock Yacht Club v. City of Bridgeport,* 259 Conn. 592, 790 A.2d 1178 (2002). The court will discuss that case and its implications in a separate section.



Connecticut law on this subject seems to be substantially similar to the law in other jurisdictions: *City of Waukegan v. Stanczak,* 6 Ill. 2d 594, 129 N.E.2d 751, 756 (Ill. 1955); *Nelson Drainage District v. Filippis,* 174 Mich. App. 400, 436 N.W.2d 682, 684 (Mich. 1989); *Luccock v. City of Norman,* 578 P.2d 1204, 1206 (Okla. 1978); *also see Levitsky v. Prince George's County,* 50 Md. App. 484, 439 A.2d 600, 603 (Md. 1982).[16]

No Connecticut case speaks directly to this, but a necessary corollary of the cases we have been discussing would seem to be that this special deference should be given the agency when considering the necessity of a taking where it makes an honest choice among possible alternatives. In *Boswell v. Prince Georges County,* 273 Md. 522, 330 A.2d 663 (1975), the court succinctly said, "Landowners when faced with a proposed acquisition for their land for public improvements, whether by way of easement or in fee simple, have often suggested to the courts

[16] The Washington Supreme Court purports to follow a reasonable necessity rule but in contrast to what appears the general rule just discussed interprets it much more stringently against the condemning authority: "Washington appears to have announced a reasonable necessity rule that holds a taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or the cost is prohibitive." *Beeson v. Phillips,* 41 Wash. App. 183, 702 P.2d 1244, 1247 (Wash. 1985). It would seem that Washington's view is incompatible with economic development planning except in the most select cases.

As Mr. Hicks said, flexibility is needed in this type of planning. Market conditions change and sites are developed over decades not years. There must be an ability reserved to make alterations as market conditions change. Professor Mullin agrees; plans must be changed in accordance with what the market wants. How on earth could you have this flexibility under Washington's rule as to the property of seriatim takings?

that they saw a better way to do the improvement than that proposed by the condemning authority . . . They have been uniformly unsuccessful in this court." 330 A.2d at 664-65; *also see Levitsky v. Prince Georges County,* 439 A.2d at 603; cf. *City of Tacoma v. Welcker,* 65 Wash. 2d 677, 399 P.2d 330 (Wash. 1965), where the court says: "Action when exercised honestly, fairly and upon due consideration is not arbitrary or capricious, even though there be room for a difference of opinion upon the course to follow or a belief by the reviewing authority that an erroneous conclusion has been reached"; *also see Central Louisiana Electric Co. v. Brooks,* 201 So. 2d 679, 681 (La. 1967), where the principle was supported even where the condemnation was by a private company; *also see Transcontinental Gas Pipe Line Corp. v. Calco Enterprises,* 132 N.C. App. 237, 511 S.E.2d 671, 677 (N.C. 1999).

Keeping these principles in mind, the court cannot say that in light of this record there is no necessity for the taking of the plaintiffs' properties in parcel 3 based on an argument that the goals of the MDP can be accomplished even if their properties were not to be taken.

This argument, in effect, would permit the court to choose an alternative to development different from the alternative chosen by the agency appointed to prepare the MDP – an alternative substantially different from the plan approved by the city council and the state. And the change would be substantial by any definition since it would involve permitting a use in parcel 3 not authorized by the MDP – i.e., single-family residences.

This the court cannot do for a variety of reasons set forth in the case law. For one thing, there is no evidence, credible or otherwise, that the condemnations in parcel 3



as originally envisaged in the MDP or at the time of the taking were done in bad faith, or not with an honest motive, or based on pretext given any reasonable definition of the word. Much time and effort went into the choosing of the alternative that was to become the MDP. Several highly qualified people worked on the plan for several months. Alternatives were considered which would have allowed private residences to remain. Public comment was received. Study was even given to the possibility of moving some residences without having to condemn them. Marketability studies were made before the MDP choice was arrived at, as well as an environmental impact study. The court does not conclude there is an absolute necessity to take the property at the present time, but believes and, at the least, has no basis to doubt the reasonableness of the testimony of Mr. Hicks and Mr. Jones that development would be more difficult if these residences were allowed to remain. Professor Mullin is a highly qualified individual, but his study of the problem of alternative development choices cannot have been as thorough and intense as that of people like Mr. Hicks and the other members of the consulting team that spent months formulating the MDP; Hicks with that background credibly testified that even from the present perspective allowing these homes to remain would make development prospects more difficult. Furthermore, experts can differ, believing stoutly in the correctness of their respective positions, but as a separate ground for its conclusion the court notes Mr. Jones, the president of the private developer of this land area, including parcel 3, believes allowing these homes to remain would be detrimental. His perspective is as practical as can be since his company has a strong financial interest in development options and possibilities.

Certainly there are cases where courts have found no necessity for a taking. Two examples are *Alton v. Wabedo Township,* 524 N.W.2d 278, 282 (Minn. 1994) (taking based on road width greater than actual public use); *Nelson Drainage District v. Filippis, supra* (taking by way of easement for construction of "enclosed box drain" not necessary); cf. *Conn. Light & Power Co. v. Huschke,* 35 Conn. Supp. at p. 308. But this is not a situation where a discrete land use for a select well-defined purpose is involved. The decision on which the necessity for the takings as set forth in the MDP and the present need for the takings of these particular properties involve the weighing of factors for which courts are not well equipped and which reflect broad "legislative" type judgments which are best left to the appointed agencies of legislative bodies at state and local level and experienced state agencies all of which were involved and are involved in this taking process and the decisions which have led to it.

(2)

There is another aspect to this facet of the necessity issue as it affects parcel 3 that must be discussed which is not directly addressed in the case law. As the court just mentioned, the general rubric is that necessity is to be evaluated by the courts at the time of taking. This principle is easy to understand and apply for the courts when the question presented is whether, for example, a public utility should be allowed an easement over someone's property of 75 feet as opposed to 50 feet, whether a swath of 300 feet should be given to a highway department requiring the condemnation of particular property, or even where the need to plan for future water supply needs requires a taking.



The problem becomes more difficult after cases like *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), *Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616, 304 N.W.2d 455 (1974), and *Canata v. New York,* 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, app. dismissed, 371 U.S. 4, 9 L. Ed. 2d 48, 83 S. Ct. 28 (1962), permitted whole areas of cities to be cleared and set aside for future private development.

Chapter 132, "Municipal Development Projects" sets forth a "Declaration of Policy in § 8-186 and that section talks in terms of encouraging and assisting the development of "*unified land and water areas.*" Webster's Third New International Dictionary says "unified" is the "past of unify" and "unify" is declared to be a synonym – "integrate, consolidate, compact, concentrate, agree with unify in meaning to gather or combine parts or elements so as to form a close mass or coherent structure." Professor Mullin and Bruce Hyde, who is employed by the city and is its director of real estate and a certified planner, indicate also that the word unified land area is a word of art in their profession and indicates an assemblage of parcels into one land parcel.

In other words, the legislature envisaged under Chapter 32, that whole discrete areas would be developed and the courts have and must pay deference to that decision. But once unified areas are the subject of a project plan certain consequences follow and West Virginia's Supreme court had interesting things to say on that subject. In *Charleston Urban Renewal Authority v. The Courtland Company,* 203 W. Va. 528, 509 S.E.2d 569 (W. Va. 1998), the court said:

> By contrast, in the instant case Courtland is not challenging the validity of the initial determination of blight and slum conditions in the project area. Rather, Courtland is asking the circuit court to make a new factual determination, based on allegedly new and changed circumstances. Moreover, Courtland's request comes over a decade after the project area was properly designated as a slum and blighted area.

Courtland does not point us to any provision of law that authorizes a circuit court to make such a de novo determination. It appears to us that asking a circuit court to make such a determination under an appropriate standard of review, raises substantial issues of exhaustion of remedies, separation of powers, and similar concerns.

Additionally, as the Supreme Court held in *Berman, supra,* the viability of an incremental, multi-year, integrated plan for the overall redevelopment of a slum or blighted area would be fatally compromised if challenges to the continued need for and legitimacy of the plan based on allegedly changed circumstances were allowed as defenses to a condemnation petition – each time an urban renewal authority seeks to acquire property to accomplish the purposes of the plan. We are not directed to nor have we found any cases or statutes suggesting that such challenges are, have been or should be allowed.

Urban renewal plans and their long-term goals would be crippled in their intended purpose of economic revitalization, if they could be interrupted and short-circuited just when the conditions that gave rise to the plan have arguably begun to be abated. Again, we are not directed to any cases or statutory language suggesting that such interruption or short-circuiting has been or should be permitted.



As the Supreme Court stated in *Berman, supra*: "*Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*" 348 U.S. at 35-36, 75 S. Ct. at 104, 99 L. Ed. at 39 (emphasis added). Our approach to this question is further shaped by our understanding of the deference that our case law has stated must be afforded to legislative determinations of the need by a public body to exercise eminent domain for a public use, and the limited role of courts in reviewing such determinations. *See* discussion *infra* at III.B.

We conclude that absent extraordinary circumstances, the authority of an urban renewal authority acting under the provisions of W.Va. Code, 16-18-1 to -29 to implement an approved and ongoing redevelopment plan by using the power of eminent domain under W.Va. Code, 16-18-8 (1951) may not be challenged during the period of the plan simply on the basis that the slum or blighted conditions which provided the initial basis for the adoption of the plan no longer exist.

> Therefore, the circuit court did not err in denying Courtland's challenge to the condemnation petition based on Courtland's contention that there were no longer slum or blight conditions in the project area.

509 S.E.2d at 576; *see Apospros v. Urban Redevelopment Commission,* 259 Conn. 563, 790 A.2d 1167 (2002).

Similarly, the court in *State of Missouri ex rel U.S. Steel & Carnegie Pension Fund,* 811 S.W.2d 385 (Mo. 1991), said:

> It is apparent that the owner of each tract of land in a blighted area cannot be permitted to resist redevelopment programs on the ground that his property is not being taken for a public use. If each property owner were allowed to contest, as relator does here, that his property was being taken for a public use, redevelopment plans for blighted areas would be hopelessly bogged down in a marsh of litigation that could prolong the acquisition of property in the area so long that the redevelopment plan could become useless. This would obviously defeat the purpose of redeveloping blighted areas.

*Id.* at 389.[17] *See also W & G Company v. Redevelopment Agency of Salt Lake City,* 802 P.2d 755, 770 (Utah 1990); *City of Phoenix v. Superior Court,* 137 Ariz. 409, 671 P.2d 387, 393 (Ariz. 1983); cf. *Rosenthal v. Rosenthal, Inc., supra; also see Oliver v. City of Clairton,* 374 Pa. 333, 98 A.2d 47, 52 (Pa. 1953).

All of this is not to say that the necessity argument cannot be raised insofar as it says – you do not need to take my land to accomplish your public purpose. It does not say that when considering this argument, at least in cases of development schemes in unified project areas, the focus should be on what the necessities were when the development plan was first formulated or at least before

[17] The *Courtland Company* case and this Missouri case are decided under redevelopment acts. In *Pequonnock Yacht Club, supra,* the court qualified some of the general observations made in these cases – or at least it can be so argued – by reference to the particular language of our statute saying non-substandard buildings can only be taken if they are essential to the redevelopment plan. The court will discuss *Pequonnock* at a later point, but even under its test, "essentiality" must be determined in light of the need to develop a "unified area."



there was a substantial acquirement of properties in the project site.

In any event, for the reasons set forth above and in the immediately previous section, together and independent if considered, the court does not accept this aspect of the necessity argument as to parcel 3.

(b)

There is another argument as to necessity with regards to parcel 3. The plaintiffs argue that it is not necessary to take their property because the development plans are speculative, not definite, and there is little prospect they will be accomplished within a reasonable amount of time. Under circumstances such as this, it would be entirely unreasonable to take their property, argue the plaintiffs.

As is often the case, the language of an ALR article focuses on the problem presented and discusses many of the cases. In "Eminent Domain for Future Needs," 80 ALR 3d 1085, it states:

> Whether in the context of the "necessity" requisite, or in the context of a commonly recognized requirement that the taking have a public purpose, a number of courts have expressly or impliedly taken the position that a condemnation for a future use is permissible, where it otherwise satisfies applicable requirements, so long as the future use is planned to be made within a reasonable time. Separate from, although in the circumstances sometimes related to, the time factor, is the matter of the specificity or definiteness of the future plans. The absence of such plans has sometimes, but not inevitably, resulted in the

invalidation of appropriations of property for future uses.

Further on, the article says in opposing a development plan or any exercise of the power of eminent domain:

> . . . it would seem that counsel's chance for success is greatest where it can be shown that the intended use for the condemned property is so remote in time and speculative in nature as to render the condemnor's determination of necessity an abuse of discretion.

Conversely, counsel for the condemnor, in demonstrating that no fraud, bad faith, or abuse of discretion was involved in its determination of necessity, should show that there are definite plans to devote the property to a specific public use within a reasonable period of time. While what constitutes a reasonable period of time is obviously a question of fact and depends upon circumstances which differ from case to case, the shorter the anticipated period between appropriation and utilization, the greater the chance of it being found reasonable. Counsel may rely, with a relative assurance of success, on the argument that the condemnor's determination of necessity was made on the basis of fairly anticipated future needs.

As is true with many topics in eminent domain law, the problem with the article and with many of the cases brought to the court's attention on this particular issue is that a case, pro or con, can be found for any proposition or nuance of the law. What must be kept in mind when reviewing the morass of cases is that whether a particular project is speculative, requires fairly detailed plans, assured funding or is too remote to be reasonable in large



part depends on the nature of the project – easement for public utility versus highway construction needs, airport expansion versus expansion of school facilities or economic development in unified land area. And of course all of these matters must be decided in the context of the social and economic conditions of the community where the project is to be carried out, for example, a court may be willing to find a need for a taking for airport expansion where definite plans have not been worked out and the construction date is far from imminent when the facility is planned for a rapidly growing community where vacant land is rapidly disappearing to private development thus reducing the desirable locations for such expansion as opposed to a community in a slowly developing economic hinterland. Under these circumstances, cases do not helpfully cross reference each other because their results are based on particular needs and social and economic situations of separate communities and not on reasoned deductions from agreed upon legal principles.

So much for abstractions, now let us try to decipher the cases.

The court could not find any Connecticut appellate case discussing the exact question presented here – whether a particular taking can be found not to be necessary because done pursuant to a development plan that is too speculative and/or with no prospect of being accomplished within a reasonable time. Our courts have certainly held that there must be a necessity for the exercise of the power of eminent domain and have said: " 'Necessity' in legislative acts according the right of eminent domain does not mean an absolute or indispensable necessity, but only that the taking provided for is reasonably necessary." *West Hartford v. Talcott,* 138 Conn. 82, 91, 82 A.2d 351

(1951) (acquisition of land for school site). And this same general test has been adopted for economic development cases. *Bugryn v. City of Bristol,* 63 Conn. App. 98, 108, 774 A.2d 1042 (2001); cf. *New Haven v. East Haven,* 35 Conn. Supp. 157, 168, 402 A.2d 345 (1977) (airport); also *see Chicago Great Western Rr. Co. v. Jesse,* 249 Minn. 324, 82 N.W.2d 227, 231 (Minn. 1957); *City of Miami Beach v. Broida,* 362 So. 2d 19, 20 (Fla. 1978); *Alsip Park District v. D&M Partnership,* 252 Ill. App. 3d 277, 625 N.E.2d 40, 47, 192 Ill. Dec. 80 (Ill. 1993).

Other jurisdictions have dealt with the problem and certain general principles can be garnered from reading them.

Some cases have held that because reasonable necessity does not mean absolute necessity, a condemning authority need not, for example, "present evidence pinpointing the need for the specific property, rather, it is sufficient to show that the taking is necessary for the accomplishment of an overall plan of development ... Funds need not be on hand, nor do plans and specifications need be prepared for a condemnor to determine the necessity of a taking, in fact, it is the duty of public officials to look to the future and plan for the future ... There need not be an immediate need for the property sought to be taken." *Test v. Broward County,* 616 So. 2d 111, 113 (Fla. 1993) (airport expansion). *Test* relied on an earlier Florida case involved in the propriety of using eminent domain power for airport and port purposes. The court rejected the plaintiff's claim of fraud in that case. *Carlor Co. v. City of Miami,* 62 So. 2d 897 (1953), saying at p. 902:

> It is strongly urged by the appellant that fraud existed at the time of the adoption of the resolution because the development could not take



> place in the immediate future and the lapse of time, about seven years, had shown and demonstrated that the city officials did not intend to proceed with the project. This contention is without merit. It is not necessary that a political subdivision of the state have money on hand, plans and specifications prepared and all other preparations necessary for immediate construction before it can determine the necessity for taking private property for a public purpose.

Also *see City of Miami v. Broida, supra,* where the trial court's finding of lack of necessity was reversed concerning the taking of property for a civic convention center complex where the court said:

> The record discloses that the city does have a plan and that the plan has been partially completed. The Horowitz property lies within the boundaries of the plan. More than one use has been proposed for such property, but one of the city's witnesses explained that master planning is a process that evolves over time, and must be flexible and subject to change as conditions warrant. As stated in *Wright v. Dade County,* 216 So. 2d 494, 496 (Fla. 3d DCA 1968), "it is not necessary that the officials proceed to make immediate use of the property thus acquired or that they have' plans and specifications prepared and all other preparations necessary for immediate construction before it [the county] can determine the necessity for taking private property for a public purpose." *Carlor Co. v. City of Miami, Fla.* 62 So. 2d 897 (1953), 362 So. 2d at 20.

Other states have appeared to adopt the Florida view. *See Rueb v. Oklahoma City,* 435 P.2d 139, 141 (Okla. 1967)

(airport expansion); cf. *Alsip Park District v. D&M Partnership*, 625 N.E.2d at 47-48 (park); *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693, 694 (N.C. 1986) (park).

It could be argued that these just cited cases go too far in the sense that detailed plans being seriously discussed or ready to be put into effect are a good indication that a universally recognized aspect of the law in this area will be complied with.

> One of the fundamental principles of eminent domain is that it shall not be exercised unless the property taken is to be devoted to a public use within a reasonable time after taking.

*State ex rel. Sharp v. 0.62033 Acres*, 110 A.2d 1, 6 (Del. 1954).

As the Delaware court goes on to say, this reasonable time doctrine "prohibits the condemnor from speculating as to possible needs at some remote future time." *Id.*

Also, where private development is the goal of any plan requiring the use of eminent domain the reasonable time rule helps ensure appropriations are not made for speculative, monopolistic, or other improper purpose having nothing to do with the goals of the purported public use. *See Indiana v. Michigan Electric Co.*, 504 N.E.2d 301, 306 (Ind. 1987); *U.S. v. Certain Parcels of Land*, 215 F.2d 140, 148 (5th Cir. 1954).

Therefore, a required corollary of cases, like *Carlor Co.* and *Rueb* or *Broida*, should be that absent detailed plans ready to be put into effect immediately, there should be some indicia of a real intent to accomplish the decided upon public use – itself some assurance that the use will



be accomplished in reasonable time. Thus, in rejecting a condemnation, a Pennsylvania court said, "Of course the acquisition of land not presently needed cannot be for real estate speculation and future sale. Unless the property is acquired for an authorized public use and after a suitable investigation leading to an intelligent, informed judgment by the condemnor, the condemnation is invalid." *In re School District of Pittsburgh*, 430 Pa. 566, 244 A.2d 42, 46 (1968). If there is such an investigation and an informed judgment, even without a formal plan to be acted upon immediately, this should have a bearing on determining what is a reasonable time for accomplishing the public use and extend its running depending on the nature of that use. This would seem a logical implementation of the universally recognized principle that deference be given to the legislative authority and its designates on the issue of necessity. Cf. *Pidstowski v. South Whitehall Township*, 33 Pa. Commw. 162, 380 A.2d 1322, 1324 (Pa. 1977).

The problem in *In re School District of Pittsburgh* was that the school board moved to condemn property where there had been no plans for future buildings drawn up and the board had not formally authorized the drawing of such plans; "the plans for building expansion are unfounded and only in the conversational stage." 244 A.2d at 43.

Thus, there has to be some outer time limit on when the purported public purpose must be accomplished or some indication what that goal is. In *City of Phoenix v. McCullough*. 24 Ariz. App. 109, 536 P.2d 230 (Aug. 1975), the city was not allowed to condemn land for airport purposes; the court said at 536 P.2d at 237:

> We might hesitate to hold that 15 years in the future was not a reasonable time for future planning (however, we would have less hesitancy

> about 46 years), but coupled with the prospect that even this 15-year use may change, we are drawn to the conclusion that if the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative and remote as a matter of law and defeats the taking.

In *State ex rel. Sharp v. 0.62033 Acres of Land, supra,* the court rejected one seizure by the highway department saying: "A mere contemplation of a road improvement at some indefinite time within the next thirty years is too speculative and too remote to justify the exercise of the power of eminent domain;" 110 A.2d at p. 7; the decision was upheld at 49 Del. 174, 112 A.2d 857 (1955); cf. *Apospo-ros v. Urban Redevelopment Commission,* 259 Conn. 563, 790 A.2d 1167 (2002).

There is not necessarily a predictable pattern in the cases, however, even where the condemnation is for a particular type of use. Thus, the court in *In re the Matter of Condemnation of Real Property of King,* 124 Pa. Commw. 472, 556 A.2d 527 (Pa. 1989), barred condemnation by a school district that presently needed only 15 acres for athletic facilities but seized 102 acres of Mr. King's farm based on long-range enrollment projections showing a need for new school construction over the next five to twelve years. The projections were based on possible housing development and assumptions and possibilities in enrollment which were challenged.

On the other hand, in *Anaheim Union High School v. Viera,* 241 Cal. App. 2d 169, 51 Cal. Rptr. 94 (1966), the trial court was found to have erred in barring condemnation where the school district did not intend to begin construction for four years. These then are some of the



general principles used by the court to determine whether the accomplishment of the public use is too speculative or cannot be effectuated in a reasonable amount of time.

But it must be kept in mind that "There will always be some possibility that a planned improvement will not be completed and put to the use intended. The test cannot be whether it is possible, whether it is conceivable that the project would fail. The test must be whether there is a reasonable assurance that the intended use will be to pass." *Falkner v. Northern States Power Co.,* 75 Wis. 2d 116, 248 N.W.2d 885, 893 (Wis. 1977).

A "reasonable assurance that the public use will come to pass" test has its problems, however, since it is the very thing that has to be decided and this area of the law is confusing enough without having to ride subjective merry-go-rounds that pose as guidelines.

Perhaps more helpful is the observation that what is a reasonable time for the accomplishment of the public purpose, whether the effort is speculative in a particular case depends to a great extent on the nature of the public use involved; that is: "What is reasonably necessary to accommodate the future needs of the public use is also to be tested by the nature of the use." *New Haven v. East Haven,* 35 Conn. Supp. 157, 171, 402 A.2d 345 (1977).

The court will now discuss the facts of this case as they concern this issue.

If a taking is based on a public purpose or use which is speculative and cannot be accomplished in a reasonable time, there can be no necessity for the taking. The taking in such circumstance could have been made in bad faith or

it could simply be unreasonable, arbitrary or in excess of the condemnor's authority under the *Gohld* test.

There is no evidence in this record to indicate that any speculative aspects of the parcel 3 aspect of the project were the result of bad faith assessments. The MDP was months in the making, numerous consultants worked on it and at least one development alternative was considered that did not require the removal of all the buildings in parcel 3 or the erection of office buildings. Public meetings were held during this time and after the MDP was approved, the private developer had neighborhood meetings with people in the affected parcels. The NLDC director, Admiral Goebel, made himself available at biweekly city council sessions. Much of the plaintiffs' speculation claim is based on a report prepared by Jay Hooper for the private developer, Corcoran Jennison. Other information that could be used to support such a claim can be found in the MDP itself, a public document. The DECD had to approve the plan prepared by the NLDC consulting team as did the city council. The state Office of Policy Management and the Department of Environmental Protection reviewed it for their own purposes. The MDP was also approved by the Southeastern Connecticut Council of Governments. The MDP of course projected the erection of office buildings in parcel 3. Nothing in the foregoing recital provides any basis to conclude that the NLDC had some concealed bad faith motive in formulating the plan for the parcel 3 aspect of the project, which because it was based on such a motive, made the parcel 3 plans merely speculative. Too many entities would have to have been involved in the conspiracy to make it a rationally conceivable one.

Leaving aside "bad faith," what evidence is there in the record concerning the issue of whether the public use



here is speculative or cannot be accomplished within a "reasonable time"?

For one thing, there has been no development agreement signed between the private developer, NLDC and DECD, for parcels 1, 2 or 3. Such an agreement is a necessary engine to start any development project. Site plans are not working documents to initiate actual effectuation of a plan. However, it is true that the three interested parties have been working for many months to prepare a development agreement. Numerous site plans have been drawn up for the purposes of preparing the final agreement. Admiral Goebel testified at trial that he thought the preparation of the agreement was imminent. At his June 22, 2001 deposition, Mr. Jones, who is the president of Corcoran Jennison, said he could not predict when the development agreement would be completed, but he was optimistic that it would be soon. It is apparent that much time and effort has gone into this phase of the project; site plans have moved the location and size of the planned hotel in its parcel, the same is true of the projected office buildings in parcel 3. All of this does not appear to be makework activity. Rather, it seems to be motivated by a belief that office development in project 3 is a viable element in the overall plan for economic development.

Corcoran Jennison is motivated by the desire for profit from a project it believes can be successful – a necessary engine to produce profit. The court can take this into account in deciding the viability of plans for parcel 3. The court should also be able to take into account the fact that the city has spent thousands of dollars planning a new road infrastructure that in part will be required because of the prospective office construction in parcel 3 and the very

existence of which will make the site more attractive to prospective tenants. The state has fed over $70 million into the project, the NLDC spending $31.3 million from January 1988 to August 2001. All of these funds have not been directed toward parcel 3, but some have. Money has been spent to acquire most of the property east of the railroad tracks, acquired property had to be razed. Money had to be allocated for relocation expenses for the whole project area. The foregoing facts do not, of course, ipso facto establish that parcel 3 development is not speculative and can be accomplished in reasonable time. But they do represent a reason for the court to give some deference to the condemning authority on the question of necessity which the cases uniformly indicate is a prerequisite in these cases. *Pidstowski v. South Whitehall Township, supra; Alsip Park District v. D&M Partnership, supra; City of Charlotte v. Rousso, supra; U.S. v. Certain Parcels of Land, supra; City of Miami Beach v. Broida, supra.*

But the protections afforded by the eminent domain clauses of the federal and state constitutions would be hollow indeed if the analysis could stop with various layers of evidence to the effect that a taking is not speculative because the condemning authority and various supportive government agencies thought and acted as if it were not so.

The court must examine the underlying facts as presented in the record to see if it is practically and economically realistic to conclude that the development envisaged for parcel 3 under the MDP can take place in a reasonable amount of time. But these facts must be reviewed with the admonition set forth in *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 248 N.W.2d 885 (Wis. 1977), kept in mind. The *Falkner* court set forth



principles our court has agreed with. *See State v. McCook*, 109 Conn. 621, 147 A. 126 (1929). The Wisconsin court said:

> Notwithstanding its legislative character, the determination of necessity by the legislature by its delegate is not completely immune from review. There is a limit beyond which the legislature (or its delegate) cannot go, and the issue of necessity is one that the court can review in an owner's action under § 32.06(5), Stats. However, the scope of review is narrow. Our decisions establish that a court will not disturb a determination of necessity, the absence of fraud, bad faith or gross abuse of discretion; the determination of the necessity of taking will be upheld if there is reasonable ground to support it.

248 N.W.2d at p. 894.

Is office space for parcel 3 speculative? Can it be accomplished in a reasonable amount of time? These questions must be reviewed in the larger context of the public use this court has already found to be the goal of Chapter 132 and which in the appropriate case could justify the exercise of eminent domain power. That use and public purpose is the economic development of a distressed municipality struggling with a downtown in need of development, poor job creation performance, population decline, and a limited tax base. Office development would provide immediate economic stimulus through construction jobs, if ultimately successful would help employment and add to the tax base and be part of a development project which also aims to revitalize the downtown area.

What does the record say? The MDP itself says that as of the date of its preparation its studies show that rent levels at Class A office buildings have stabilized but are below the level needed to support new speculative construction. In fact, historical values of Class A office buildings have not recovered sufficiently to justify new construction except for end users. The MDP does say that the city is at the threshold of major economic revitalization and the key catalyst is the Pfizer research facility. The proposed office space for the MDP would thus be close to a globally significant research and development facility and the office space proposed could be available to high technology users. Based on projections available at the time the MDP was prepared, however, the MDP did predict a significant shortage of office space by 2010 and said land in the Fort Trumbull area should be reserved for future development of office buildings. Another Fort Trumbull area study was presented to the court. Mr. Jones, president of the private developer, presented a report to the officers of his firm. It was entitled "Commercial Office Study." It was prepared in January 2001 by Jay Hooper and discussed the feasibility of office building construction at that time. Mr. Hooper said New London is still recovering from the recession of the early 1990s and while rental rates and occupancy trends "have been positive for over the past few years, market values are still well below replacement cost and new construction is generally not feasible." Other testimony was received to the effect that the demand for Class A office space in New London at the present time is "soft" and he and others noted, for example, that the Shaw Cove office buildings have not been able to rent, in fact, they are considering ground floor rental due to greater demand for this type of commercial activity.



On the other hand, Hooper did note the Class A market is "quite healthy with only 4.6 percent not leased." He refers to an appraisal report indicating a positive demand for Class A and B office space over the last four years. Although Hooper said rental brokers noted only a few inquiries "from companies representative of Pfizer related demand," he did say "nonetheless, one source of future demand for commercial space may be the result of doing business with Pfizer that desire proximity to the new Global Development Facility." Hooper went on to say that the biotech-bioscience office market is in its infancy in our state and "at this time" it is difficult for New London to compete with New Haven, but it is not economically feasible to develop this type of office space "at this time without an end user in hand that will pay the rent to support the cost." Mr. Hooper focuses attention on Building 2 which can be used for office space and will not be condemned as initially planned. Talking of the projected office buildings on parcel 3, Hooper says: "Given the uncertainty regarding demand/feasibility of biotech-bioscience space, as well as the fact that any additional office development, in all likelihood, will be subsequent to completion of Building 2, any design should be kept flexible to accommodate various types of demand." Hooper generally concludes that "market conditions do not justify construction of new commercial space at Fort Trumbull on a speculative basis." He does go on to say that thought should be given to "the possibility of developing a small 'flex' building capable of being built out for office or biotech-bioscience space and capable of being expanded to accommodate future demand." Hooper talks about marketing strategies for Building 2. He does recommend the hiring of a brokerage firm and says: "Preliminary marketing materials, including conceptual schemes, should be

prepared for the future commercial development space in the event sufficient excess demand is generated that cannot be accommodated in Building 2, and/or an end user is identified for a building-to-suit development."

As noted, Mr. Jones testified for Corcoran Jennison and he said office buildings "will be developed as market conditions warrant," buildings are not built without tenants and as of June 2001, there were no tenant commitments as to Building 2 and the new proposed office buildings.

It is interesting to note that despite Hooper's internal report to Jones completed before trial, Corcoran Jennison spent several months thereafter working on site plans and with NLDC to formulate a development agreement that projected office buildings on parcel 3. Also, Hooper's report and many of the MDP observations are in-place studies focusing on conditions and projections made at the time they were prepared. The whole point of the MDP and the motivation for its preparation was to capitalize on the Pfizer decision to build a research facility; the MDP, for example, mentions the development of high technology office space as a goal. But Pfizer did not even start building its facility until April 1999 – several months after the MDP was prepared – and people did not even start moving into that Pfizer facility until the beginning of 2001 when Hooper had already prepared his report and it was being presented to the developer. In light of all that it is not surprising that to this point the developer or NLDC has not been inundated with requests for office space or that New London "at this time" cannot compete with New Haven for biotech or bioscience users. In fact, Bruce Hyde, New London's director of real estate, testified that since the Pfizer announcement there has been an added interest



in New London for development purposes. And it does not appear to be contested that Pfizer has business relationships that could represent a demand for biotech office space in the Fort Trumbull area. Mr. Hicks, who was on the consulting team that prepared the MDP, envisaged that office space would probably initially be occupied by firms who had business relationships with Pfizer.

Given all of these facts, the objection that here the type of economic development planned for parcel 3 is too speculative and cannot be accomplished within a reasonable time is in effect an argument that such development for distressed or economically suffering communities under Chapter 132 cannot be permitted. If a community is in fact not economically well off, with the higher than average unemployment, and an undiversified housing stock, a declining population and not much in the way of vacant land for development, it will of course be difficult to market a development site and develop it immediately or according to some accepted norm set down in school district expansion, utility line and water company pipe placement eminent domain cases. But it seems to the court at least that in selected cases cities like New London, given its economic situation, should be given time to develop a site which has built-in features that would be attractive to users – here, we have a city just beginning to come out of the economic doldrums, with a major international company alighting in its midst that has the ability to attract other businesses, developing an office site next to a planned four star hotel with the site located near a state park and enjoying a waterfront view.

Also, as noted, Mr. Hooper said the possibility should be considered of initially a smaller office building that can be expanded overtime. As Mr. Hicks said in his own way,

"master planning is a process that evolves over time and must be flexible and subject to change as conditions warrant." *City of Miami Beach v. Broida,* 362 So. 2d at p. 20, referring to *Carlor Co. v. City of Miami, supra.* The MDP itself said there will be a substantial demand for office space in 2010. Is that too far away even if that is the end point? We live in a capitalist economic order not a planned economy. Some commissioner of planning will not awake on January 1, 2010 and order that office buildings be built. Private businesses can avail themselves of economic forecasting just as do the preparers of development plans. Expanding economies drive the need for office space not vice versa as Mr. Jones implied; prospective users of this site will start planning to occupy new or additional office space long before the 2010 date for any projected utilization of the office space. In large development cases of this type, it is neither necessary nor possible in all circumstances that, as the court quoted previously, "a political subdivision of the state have money on hand, plans and specifications prepared, and all other preparations necessary for immediate construction before it can determine the necessity for taking private property for a public purpose," *Carlor Co.* at 62 So. 2d at 902.

The court cannot say that under the circumstances of this case that the planned development of parcel 3 is too speculative given the purpose of the MDP – economic development of an economically distressed community. Local and state authorities have contributed great amounts of time and monies to prepare this area, including parcel 3, as a springboard for economic activity. Section 8-186 of Chapter 132 contemplates government intervention where "improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive



rates of progress and economies of cost." The intent of Chapter 132 would be crippled if government intervention would only be feasible if immediate project development is possible – economically distressed communities are the very ones where, despite state intervention, project accomplishment might be difficult. Yet the case is most appealing for defining pure economic development as a public use when directed toward such communities.

In fact, the legislature was concerned with the time within which projects ought to be developed under project plans. Section 8-200(b) says:

> (b) If after three years from the date of approval of the development plan the development agency has been unable to transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property acquired in the project area to any person in accordance with the project plan, and no grant has been made for such project pursuant to section 8-195, the municipality may, by vote of its legislative body, abandon the project plan and such real property may be conveyed free of any restriction, obligation or procedure imposed by the plan but shall be subject to all other local and state laws, ordinances or regulations.

Section 8-195 refers to development grants from the DECD commissioner. Three years have not passed from the approval of the MDP; in any event, the municipality could not terminate the project even after three years due to the state grants made in this case. The legislature recognized then what is apparent economic reality that for economic development policy to be practical, years might have to pass before a project plan can be accomplished.

In any event, the court does not find the development plans for parcel 3 as speculative and therefore that the takings of the properties on that parcel are not necessary.[18]

(c)

A complete discussion of the necessity issue, especially as it relates to parcel 3, requires the court to discuss a case decided by our Supreme Court while this opinion was being written, *Pequonnock Yacht Club, Inc. v. City of Bridgeport,* 259 Conn. 592, 790 A.2d 1178 (2002).

In that case, the court affirmed the trial court's judgment that granted a mandatory injunction against the city, its redevelopment agency and port authority ordering the plaintiff's property to be reconveyed to it after it was taken.

The court based its decision on the "ground that the defendants' failure to consider integration of the plaintiff's property into the redevelopment plan was unreasonable and, therefore, the taking of the plaintiff's property by eminent domain was not necessary."

The predicate of the court's ultimate conclusion seems to be based on its reference to the specific language of the Redevelopment Act which the court will refer to shortly, but which must be set in context of general eminent domain law. The general rule in eminent domain cases has

[18] In light of the court's decision that apart from the planned work on the road infrastructure, the whole area must be cleared in parcel 3 to effectuate the development plan, the court will not address that aspect of the road widening argument of the plaintiffs to the effect that any work on the roads need not require the condemnation of the plaintiffs' homes in parcel 3.



been set forth in *West Hartford v. Talcott,* 138 Conn. 82, 91, 82 A.2d 351 (1951). That case involved a taking for a school site and the court said the "necessity" required for a taking "does not mean an absolute or indispensable necessity but only that the taking for is reasonably necessary." This is the law throughout the jurisdictions, *City of Waukegan v. Stanczak, supra; Nelson Drainage District v. Filippis, supra; Levitsky v. Prince Georges County, supra* (cited in § 4(a)(1) of decision); Washington is the only state that adopts a different view to the court's knowledge. *See Beeson v. Phillips, supra.*

But a peculiar problem exists when takings are done under the auspices of Redevelopment Acts like our own where the goal is to remove slums and blighted areas and permit redevelopment so those conditions will not recur.

Under such acts "unified areas" are designated as blighted, but the problem arises because within such an area fine homes in good condition may be located which are unfortunately surrounded by vacant or truly substandard buildings. Courts throughout the country have struggled with this problem as it relates to the question of the "necessity" to condemn good homes in one of these unified areas.

There is a certain incongruity in the notion of condemning a perfectly fine home just because it is in the midst of substandard ones when the ultimate object of a project under the Redevelopment Act is to make it possible at a later date for fine homes, or retail or industrial enterprises, to come into place.

Our legislature decided to deal with this problem by language in § 8-125(b) of the General Statutes, which on its face and according to *Pequonnock Yacht Club* stiffens

the necessity requirement as stated in the usual rubric set forth in *Talcott* – reasonable, not absolute necessity. The statute says a redevelopment area may include structures "not in themselves substandard or unsanitary which are found to be essential to complete an adequate unit of development." *Pequonnock* goes on to hold in interpreting this language that "property that is not substandard and that is the subject of a taking within a redevelopment area must be essential to the redevelopment plan in order for the agency to justify its taking." The court cites language from *Pet Care Products, Inc. v. Burnett,* 150 Conn. 42, 52, 184 A.2d 797 (1962), and deduces its operative principle therefrom.

> . . . we also have recognized that the agency must consider "whether [the property] could be successfully integrated into the overall plan for the area in order to achieve its objective. If [the property] could not be, then the acquisition of the property was essential to complete an adequate unit of development, even though the property was not, in itself, substandard." . . . Conversely, if the property can be integrated it is logical to conclude that the acquisition is not essential.

The case now before the court lies under Chapter 132, a municipal development act, not under Chapter 130, our Redevelopment Act, §§ 8-124-8-169. In Chapter 132, the statement of purpose section, § 8-186, and the definition section, § 8-187, do not contain any language to the effect that structures may be included in the development area which are not themselves substandard if they are "essential to complete an adequate unit of development (§ 8-125(b)). Section 8-187 of Chapter 132 just says, "real property . . . means structures." Structures are not further defined or qualified as in § 8-125(b). Why the difference?



In slum areas, for reasons already suggested, the legislature was concerned about destroying perfectly good homes when the object was eventually to allow that type of use when the slum was removed. Furthermore, the public could be benefited just by the removal of only actual slum properties even if redevelopment were not likely to occur in the very near future. Where an economically distressed city is involved, apparently the legislature did not believe those considerations should apply especially after the detailed investigation and approval process required by Chapter 132, a city and its development agency had concluded condemnation was reasonably necessary even if not absolutely necessary (or essential) to complete a development project. As a trial court, one feels a certain amount of reluctance to amend Chapter 132 by importing "essentiality" language from the Redevelopment Act into the chapter now before the court. And the court is aware of no case and none has been cited which mandates the "essential to the project test" as constitutionally required, *Pequonnock* certainly did not allude to that possibility.

Interestingly, even under the *Pequonnock* test, deference to the legislative decision is still recognized as operative under the Redevelopment Act. The court cites two cases. *Pet Care Products, Inc. v. Barnett, supra,* and *Broadriver, Inc. v. Stamford,* 158 Conn. 522, 265 A.2d 75 (1969). In *Pet Care* the court upheld the agency's finding that it was essential to take the plaintiffs' cinder block buildings – among other things street layouts, set back lines and the boundaries of the plaintiff's property with its block were pertinent problems facing the agency in its planned redevelopment of the area. 150 Conn. at p. 53. In *Broadriver,* the court said the agency had a "responsibility" to consider such matters as street layouts and the relation

and significance of the plaintiff's property to the entire area. Even if the *Pequonnock* standards were to apply to this case, the type of concerns referred to in *Pet Care* and *Broadriver* were considered by the city, the state and the NLDC and for reasons previously discussed those entities determined a clear site and the removal of residential properties were crucial for development. Mr. Hicks said retaining the plaintiffs' residences would make development "more problematical," it would be "much more difficult." "Probably" a developer would come along "renegotiate the deal and cherry pick the good sights out." In contrast, *Pequonnock* noted that "the agency provided no reasons to explain why the present condition and use of the plaintiff's property was detrimental to the development plan. The city provided no specific reasons other than to enhance the desirability of the area to investors, as to why the plaintiff's property, which both parties stipulated to be in good condition, is essential to the accomplishment of the redevelopment plan."

It is important to understand the background to these comments by the *Pequonnock* court. In *Pequonnock,* the original plan was adopted in 1970, thirty years before the trial court hearing, and had been revised seven times. The original plan did not even call for the condemnation of the plaintiff's property. A developer, Conroy, who joined the project around 1988 decided the plaintiff's property should be taken. After testimony in front of the trial court, but before a decision, the court learned the city had dismissed Conroy and might abandon the whole project. A post-trial hearing was held and the defendants presented one witness, the city's redevelopment director. He said the project was not being abandoned and said Conroy had withdrawn from the project (after twelve years trying)



because it was difficult to obtain investors. Therefore, the city would make the development commercial rather than retail. *Pequonnock* is not this case, it is not *Pet Care,* it is not *Broadriver, Inc.* In *Pequonnock,* or even of a plan actively being worked on, there was no worked-out plan, no specific reasons therefore could be offered why condemnation was necessary to accomplish a plan that had lingered thirty years and had a change of purpose at the last minute. There was just some vague thought that taking the plaintiff's property would "enhance the desirability of the area to investors."

*Pequonnock* imports another refinement into its analysis. It cites *New York N.H. & H.R.R. Co. v. Long,* 69 Conn. 424, 438, 37 A. 1070 (1897), and *West Hartford v. Talcott, supra,* 138 Conn. at p. 89, for the proposition that: "It is incumbent upon the condemnor to exhaust 'all reasonable efforts to obtain the land it desires by agreement.'" It is difficult to ascertain whether this requirement is now to be made applicable to all takings under eminent domain law or is to be confined to takings under the Redevelopment Act or other takings defined by statutes, which specifically require negotiation. In the *Long* case cited as authority by the court, a railroad wanted to take land and the specific statute authorizing this § 3464 of the General Statutes explicitly said:

> . . . when any railroad company shall have the right to take real estate for railroad purposes, *and cannot obtain it by agreement* with the parties interested therein, it may apply to any judge of the Superior Court for the appointment of appraisers to estimate all damages, etc.

*See Long* at 69 Conn. p. 434 (emphasis by this court).

Similarly, *Talcott* which involved a taking for school purposes, was concerned with a statute, § 7181, which "by its express terms applies only 'in case those desiring to take such property cannot agree with the owner upon the amount to be paid him (sic) for any property thus taken.'" 138 Conn. at p. 89.

There is nothing in the Redevelopment Act requiring negotiation, but the language of the court suggests it was applying the negotiation concept to takings under that act. It cited *Pet Care* and *Broadriver, Inc.* for the principle it adopted and said in those cases:

> . . . we also established that a redevelopment agency must make reasonable efforts to negotiate and consider the integration of the property *that is not substandard* into the overall redevelopment plan.

(Emphasis by this court.)

This reflects the same concern with the destruction of non-standard property that lies behind the legislative determination that to condemn such property it must be found that the taking is "essential" to the overall development plan. It leads this court to believe the *Pequonnock* negotiation requirements are directed only to takings under the redevelopment act or takings under statutes specifically requiring negotiation.

But even if this reading is too narrow, let us consider the facts of *Pequonnock* that led to the court's conclusion and compare the facts in this case to see if, in any event, the *Pequonnock* purposes regarding attempts to negotiate or reach agreement have been met.



In *Pequonnock* the trial court found that the

> . . . plaintiff had made numerous efforts to discuss with the defendants the integration of its property into the Steel Point redevelopment plan. The plaintiff had clearly indicated that it was willing to invest in its property and work with the developer to assimilate the property into the overall plan. The city routinely and consistently rejected the plaintiff's efforts to negotiate and maintain that it needed to take the plaintiff's property.

At a later point, the court notes:

> Further, the plaintiff had communicated on multiple occasions its desire and willingness to make changes to its property in order to have the property incorporated into the final redevelopment plan. Indeed, in order to have the property integrated properly the plaintiff was amenable to building whatever was necessary on its property and to opening its waterfront areas for public access.

At the post-trial hearing, previously mentioned, the redevelopment director indicated that "the defendants had not considered allowing the plaintiff to remain on its property or assimilating the property into whatever proposal might be approved."

That is not what happened here. A plan, the MDP, has been approved. The process to create that plan commenced in May 1998 and was finished in December of 1998. A team appointed by the development agency considered various development proposals all of which did not require the removal of all residences in the Fort Trumbull area. During this initial period, public comment was received

and seven public meetings were held, and Mr. Hicks, who was on the team, said the final plan incorporated some of the public concerns. After the plan was approved, a further forty-five-day public examination period ensued. The final plan was not voted on by the NLDC until January 2000 and was approved by the city council in the same month. Public comment opposing the plan and its aim to remove private residences was received at the public hearing statutorily required before the NLDC could approve that plan. At that hearing, Admiral Goebel said it was unlikely that the plan could be modified to save buildings, but it was something that could be considered. At a public meeting in April 2000, the president of the developer and the president of the NLDC referred to that agency the question of whether residences could be retained in the development area. As late as possibly 2001, although he could not remember if it was 2000, Mr. Jones, the president of the developer, was asked by the NLDC if retaining buildings besides the IDC could be accomplished without endangering the plan. The NLDC looked into the possibility of physically moving residences and had cost estimates done.

Public meetings throughout the Fort Trumbull area were held after the MDP was adopted concerning its terms. Mr. Hemmerdinger, an NLDC official, said he had met with the plaintiffs who had raised their issues concerning the MDP.

Each of the plaintiffs testified they were not opposed to development and the court believes these assertions because they are highly credible people. They just want the development to go forward without taking their homes. The plan they offer to accomplish this end was presented by the plaintiffs' witness, Professor Mullin, a highly-qualified



expert in the development field. But there is no evidence his plan was presented to the defendants over a period of time and not considered or summarily rejected. Most of the houses in the area have been demolished, a development agreement was about to be signed at the time of trial, twenty months passed between the inception of the process that led to the formulation and approval of the MDP, the time of trial is too late to present negotiating alternatives even if the *Pequonnock* requirements as to negotiation and consideration of alternatives were held to apply to Chapter 132 development projects.

5.

The court will treat the exercise of the power of eminent domain as to the properties on parcel 4A separately.

First, the court will discuss whether the condemnation of the parcel 4A properties are necessary to accomplish a public use set forth in the MDP. Then the court will discuss whether the condemnations are independently justified in order to complete road infrastructure work that the MDP requires.

(a)

First, it should be noted that there is no evidence in this record that to develop parcel 3 as envisaged in the MDP and its modifications the power of eminent domain must be directed against the plaintiffs' properties on parcel 4A. There is, for example, no testimony from Mr. Hicks, the Corcoran Jennison president, Jones or Professor Mullin that the clear site requirements for parcel 3 development have anything to do with parcel 4A, that is,

that allowing the plaintiffs' properties to remain on that parcel will have anything to do with the attractiveness of parcel 3 for developers. Thus, any attempt to justify the takings on parcel 4A based on the development requirements of parcel 3 would clearly be a case of excess condemnation. Cf. *Conn. Light & Power Co. v. Huschke,* 35 Conn. Supp. 303, 308-09, 409 A.2d 153 (1979); *State ex rel. Sharp v. 0.62033 Acres of Land,* 112 A.2d at 860; *In re Matter of Condemnation of King,* 124 Pa. Commw. 472, 556 A.2d 527, 529, 531 (Pa. 1989); *State ex rel Highway Commission v. Curtis,* 359 Mo. 402, 222 S.W.2d 64, 68-69 (Mo. 1949); *Alton v. Wabedo Township,* 524 N.W.2d 278, 282 (Minn. 1994); *Nelson Drainage District v. Filippis,* 174 Mich. App. 400, 436 N.W.2d 682, 685-86 (Mich. 1989).

Whether the takings on parcel 4A are for a public purpose and/or are necessary to achieve that purpose must be addressed on its own merits. It is so elemental that a host of cases need not be cited that despite the deference owed to the decision of the legislature or its duly delegated authority (1) "Whether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . "; *Gohld,* at 141 Conn. p. 141; and (2) "The determination (of necessity for a particular taking) is conclusive unless and until it is successfully attacked for unreasonableness, bad faith or abuse of power . . . ," *McCook* at 109 Conn. at p. 628 – the forum of attack being the courts. These are constitutional predicates to the government's power to exercise the right of eminent domain. If the taking clause of the state or federal constitution are to have continuing viability, the court must be offered some intelligible information on which to base a decision as to public use and necessity for a particular



taking. The court here does not believe it can fairly perform that function which the plaintiff citizens who own property on parcel 4A have a constitutional right not only to expect but to demand.

The language of the MDP is itself confusing at least to the court. At one point it says: "A portion of parcel 4A will be redeveloped for uses that support the state park such as parking or for uses such as retail that will serve park visitors and members of the community." At another point it says: "Parcel 4A is intended to accommodate the development of support facilities for a marina, or a marina training facility, to be developed south on parcel 4B and the Fort Trumbull State Park to the east. Any development of ancillary buildings that may be located on these two parcels shall be orientated to help define their edges, in particular those of Walbach and East Street. Surface parking developed on either of these parcels shall be appropriately screened."

As to parcel 4B, the MDP says that it "is intended to accommodate a mix of water-dependent uses centered around the rehabilitated Fort Trumbull Marina, which will provide boat slips and upland support. The Marina may be developed as a working marina training center, with facilities designed in conjunction with improvements made to parcel 4A." This latter language is a study in circularity. Besides, what on earth is a "marina training facility" and is this marina intended to be open to the public, rented to private parties or to parties already having privileges at the current unrehabilitated marina and will parcel 4A have anything to do with "marina support" in any event and what does that mean and why is the marina not even mentioned in the first described use for parcel 4A set forth in the MDP and quoted above? And

what does "park support" mean? Professor Mullin, certainly a man of great experience in this area, "never heard the term before." He said he gathered it meant "parking, storage warehousing," but where he garnered the information as to storage and warehousing is a mystery to the court, does not otherwise appear in the record and, in any event, what is being stored and warehoused? Mr. Hemmerdinger also testified. He is a part-time consultant to the NLDC, but has been a full-time consultant and in the latter role served as the director of real estate development for the NLDC.

"Park support" was not a statutory term that he was aware of; when asked whether it was intentionally a broad term, he said that he did not author the term and does not "know what was being thought about." Claire Gaudiani, president of the NLDC, also had no notion of what park support meant.

Parking is mentioned as a use for parcel 4A – it is also true that the state park and a marina will generate a need for parking. But as Professor Mullin said on the parking issue as it relates to parcel 4A: "How much and for what use? It . . . simply stood there as a big nothing." There is no indication how much other parking was reserved for these uses. Besides, on this parcel the plaintiffs' property only constitutes .76 acres out of a total of 2.4 acres. Under these circumstances, how can the court perform its function of determining the necessity for the taking or whether there is a problem of excess condemnation even if a portion of the parcel is to be used for parking?

But the notion that the parcel is being actually considered for parking is further belied by the fact that the more recent notion advanced as a hopefully possible use



for this parcel is a Coast Guard museum. Then what about the parking which the court was to somehow guess would be needed for park visitors and users of the marina on parcel 4B?

The problem presented here is not that faced by the court when discussing parcel 3. The very nature of economic development type projects is such that their accomplishments are based on financial predictions and possibilities that cannot be certain and dependent on equally uncertain competitive factors. Because of this, because of the deference owed to the legislature and its selected agencies, if economic development programs are to be at all permitted and encouraged, the courts must recognize the constitutional propriety of allowing development agencies flexibility even as to the completion time of such projects.

But there is a point beyond which the court cannot go. The Florida courts have gone quite far on the matter of deference to legislative authority where economic development schemes are involved. The court has referred to the *Carlor Co.* case and the *Broida* case. *Wright v. Dade County* 216 So. 2d 494, 496 (Fla. 1968), succinctly stated the view of those courts:

> . . . it is not necessary that the officials proceed to make *immediate* use of the property thus acquired or that they have "plans and specifications prepared and all other preparations necessary for *immediate* construction before it (the county) can determine the necessity for taking private property for a public purpose."

(Emphasis added by this court.)

But *Broida* (civic convention center complex) which relied on *Wright* noted that in the case before it, "The city does have a plan and that the plan has been partially completed. The (condemnees' property) lies within the boundaries of the plan." Here, Corcoran Jennison has not been selected for anything to do with regards to parcel 4A; they are just trying to develop parcel 3. Admiral Goebel testified that there is of yet no development plan for this parcel, no site plans are being prepared, no development agreement is being negotiated, no developer has been designated to work on any plan for this site. The MDP statements regarding the use for parcel 4A are too vague and uncertain to allow the court to conclude the takings here are necessary and would not be unreasonable.

More recently, there has been some optimism that the Coast Guard would place a museum on the parcel. Admiral Goebel expressed only an optimistic hope. Claire Gaudiani said the Coast Guard was "extremely interested" in the parcel. But then Gaudiani said the people she met with are moving down an "appropriate pathway . . . toward an ultimate site decision."

No criticism is meant of the NLDC or its officers in their efforts to get the museum to locate in the city – they only can be commended for that. But the hopes they have in this regard are too speculative to justify these condemnations. Beyond that elemental consideration it is also true that with regards to any museum on this parcel there are, because there cannot now be, any site plans being worked on or development agreements in place or anything known even about the nature of this museum relative to size and location that would permit the court to determine whether if the museum is a possibility on this site its location thereon would necessitate the condemnations. Even if the



court were prepared to give the legislative agency all the deference in the world under these circumstances, it cannot perform what is a constitutionally mandated function. In other words, this is not a case where if we are going to have an airport, it has been decided we need plaintiffs' land (*Carlor Co.*); or if we are going to build a convention center, the condemnors' land must be taken (*Broida*); or if GM is going to build its assembly line, its width and length required the seizure of a whole neighborhood (*Poletown*); or the pipeline has to go through Mrs. Jones' house if we are going to access reservoir water; or the highway expansion means we need to take the nice house in the valley – this is a case where the court just cannot make the requisite constitutionally required necessity determination based on the information before it.[19]

The court could find no case directly on point, but the uses here are so vague, shifting and noncommittal that the general language of *Krauter v. Big Blue Natural Resources*

[19] All of the foregoing is not meant to imply that the exercise of eminent domain power is not directed toward a public use when property is taken for a park, a museum or parking. The opposite is the case: park is public use, *Borough of Essex Falls v. Kessler Institute*, 289 N.J. Super. 329, 673 A.2d 856 (N.J. 1995); *In re Condemnation*, 107 Pa. Commw. 235, 528 A.2d 663 (Pa. 1985); *City of Charlotte v. Rousso, supra*, Nichols, *Law of Eminent Domain*, § 7.06(16), p. 7-150; museum is public use, *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308 (1964); Nichols at § 7.06(35), p. 7-183; parking can be public use where open to public, *O.H. Florence as Judge v. Williams*, 439 So. 2d 83 (Ala. 1983); *Katz v. Brandon*, 156 Conn. 521, 245 A.2d 579 (1968); *Barnes v. New Haven*, 140 Conn. 8, 98 A.2d 523 (1953); Nichols § 706(12), p. 7-142. But the fact that such uses may be public does not insulate the taking in a particular case from being considered speculative, not based on the use (e.g. "park support"), or made without necessity.

*District,* 199 Neb. 431, 259 N.W.2d 472 (Neb. 1977), is of some interest. There, the court at p. 476 said: "The landowner's right to own, possess and enjoy his (sic) property free from an unlawful and unconstitutional exercise of the sovereign power of eminent domain may best be insured by requiring specific pleadings and proof. We hold that in a condemnation action under the power of eminent domain, the condemnor must allege the specific public purposes for which the condemnor seeks to acquire and use the property sought to be taken." In *State Hwy. Comm. v. Yost,* 384 P.2d 277, 282 (Mont. 1963), the court held that the condemning authority must in the first instance produce sufficient evidence to establish facts indicating the taking is necessary. There, the court found that the highway commissioner merely alleged the taking was necessary for a public use and produced no evidence to establish such necessity.

(b)

Independently of any purpose of carrying out the development goals for parcel 4A set out in the MDP or any accretions to it – whatever those might be – the NLDC argues that it has the right to exercise the power of eminent domain in order to carry out the road infrastructure improvements envisaged in the MDP.

The MDP did state as one of its purposes that improvements would be made to the roads involving widening them, providing for a planting strip and adequate sidewalks. The defendants maintain that the plans they have for the roads would bring them up to the regulations established by the city before the MDP was formulated. The defendants maintain that in order to establish an



appropriate turning radius at the intersection of Trumbull and Smith Streets with a 20-foot sight line for vehicles making a turn, it is necessary to use the power of eminent domain against the Kelo residence. On East Street, two bus pullovers are planned for which will require a widening of the road. The reasonableness of this does not seem to be questioned since bus pullovers will be necessary as an ancillary service to the planned upon state park. Also, Walbach Street is a so-called "collector" street – that is a designated wider street to accommodate traffic feeding into it from other site areas. The plaintiffs do not seem to contest the fact that Walbach is to be a collector street, one of their experts agreed with the designation. The road widening planned for Smith Street along with the other just mentioned plans would provide a basis for using eminent domain power to against [sic] the Dery house at the corner of Walbach and East Street and Guretsky homes in parcel 4A along Smith Street.

It should also be noted that Smith Street, as it runs along the side of parcel 4A, is bordered on the opposite side by a regional water pollution control facility.

By the time of trial, the city had spent a fairly large sum of money to develop working plans for these road improvements and a final plan had been submitted to the planning and zoning commission of the city, which must approve any such plan before work can begin on a road project.

The affected plaintiffs make a two-pronged attack on the use of the power of eminent domain against their properties based on the road infrastructure plans. They first argue that the city has no power to widen roads that are already established. And secondly, they maintain that

the city's objectives could be achieved "without encroaching on the plaintiffs' homes and buildings" so there is no need to condemn these homes. Even if the road widening plans were justified the city could only take limited easements over portions of the plaintiffs' properties to accomplish its goals and need not condemn the whole property.

The plaintiffs also appear to make an equal protection, due process and certainly a pretext argument. They say the street widening plan is full of "inconsistencies and anomalies." The defendants seek to condemn the plaintiffs' properties to comply with sight line and curb radius standards that are routinely ignored elsewhere in the city. The hyper-technical enforcement of sight lines, curb radii, sidewalk widths and other requirements under these circumstances is a "shabby, transparent pretext for the real goal of the defendants – emptying the Fort Trumbull area of existing residents to make room for new ones." Cf. *Avalonbay Communities, Inc. v. Town of Orange,* 256 Conn. 557, 775 A.2d 284 (2001). As will be seen shortly, the court is quite sympathetic to the first two arguments of the plaintiffs. But the last mentioned due process, equal protection and pretext arguments appear to be somewhat short on substance. For one thing, the MDP itself, which was formulated many months before the eminent domain power was authorized, envisaged much of the road widening and sidewalk work that is now pointed out as pretextual. Page 5-55 of the MDP planned for "widening and improvement, including larger curb radii at intersections, as necessary . . . ," including Walbach, Smith, Trumbull and East Streets. Sidewalks and street scape amenities were planned also, p. 5-56. It is somewhat of a stretch to argue that all of these road widening plans and other infrastructure work was meant to be a preemptive strike



based on the possibility that these plaintiffs or any other property owners eventually would oppose the exercise of eminent domain power.

Also the fact that other areas of New London are not made to comply with city requirements as to curb radii, etc., only underlines the fact that these requirements predate the MDP and any plan to condemn the plaintiffs' property. The MDP in § 5 shows an understandable preoccupation with the design of roads and sidewalks and the amenities to be associated with them in the project area. The whole point was to make the MDP an attractive place for the hoped for tourists visiting the site and businesses who might be induced thereby to locate in parcel 3. All of this provides motives for the city's actions which are not discriminatory or arbitrary. Furthermore, the court has some difficulty understanding the argument that all of these road plans were a shabby and transparent pretext to remove present residences of the Fort Trumbull area to make way for new residences. As to parcel 4A, the court has no firm idea of what is planned for parcel 4A, certainly not residences.

The plaintiffs do make substantial arguments concerning these road work plans which the court will now attempt to address.

The first question to be addressed is whether the defendants have the power to "widen, alter and/or reconfigure the roads" as they affect the properties in parcel 4A.

The defendants first argue and the court agrees that NLDC has that power under Chapter 132. Parcel 4A is within the project area and § 8-193(b) states "a development agency shall use all powers necessary or convenient

to undertake and carry out development plans and development projects including the power to . . . install, construct or reconstruct streets . . . necessary for carrying out the objectives of the development project." Section 8-189 requires the project plan to include "a description of the types and locations of present and proposed streets, sidewalks, . . . and the types and locations of other proposed site improvements." The project plan then must be approved by the city council and the DECD. And under Chapter 132, a municipality can issue bonds (§ 8-192) to advance the development project and toward that end also receive planning and development grants from the state (§ 8-190, § 8-195). The MDP as noted has always contained plans for widening and altering roads within the project area. As discussed in an earlier portion of this decision, the city, under its charter as presently worded, can proceed under state statute and rely on the eminent power granted in Chapter 132 to accomplish project goals including work on the road infrastructure for such a project.

Even apart from the MDP and Chapter 132, a town appears to have the power not merely to establish or lay out new roads (§ 13a-61), but can alter and thus widen existing roads (§ 13a-84). As said in *Woodbridge v. Merwin*, 27 Conn. Supp. 469, 473, 244 A.2d 57 (1968):

> The fact that § 13a-61 is interpreted not to include power to alter an existing highway does not militate against § 13a-84, which provides for the selectmen to appeal to the court to ascertain benefits and damages if the selectmen and any person interested in the "layout . . . or alteration of any highway" cannot agree as to the damages sustained. The authority of the latter statute to selectmen to pay damages in connection with an alteration of a highway could well contemplate



> that such an alteration was intended by the legislature to be authorized by town meeting action as distinguished from action solely by the selectmen.

Furthermore, § 13a-103 states that citizens may bring a complaint to superior court alleging that a town failed to maintain a highway. The court shall set a time where interested parties can be heard on the "propriety . . . of making such alterations and improvements. If the court finds in favor of the citizens on the issue of road alteration or improvement, it can order the selectmen or selectwomen to make such alterations and improvements.

Also, § 13a-63 where the town refuses to lay out or alter a highway an action can be brought to superior court which can appoint a committee to determine the merits and report its finding to the court. The committee itself can survey and lay out the alteration if it finds it would be a public convenience and estimate damages and benefits caused by its actions.

These statutes make no sense unless the municipality in the first instance does not have the power to not only lay out streets, but alter them and widen them. In fact, as the defendant city points out, § 7-148(c)(6)(C)(i) states that: "Any municipality shall have the power to do any of the following, in addition to all powers granted to municipalities . . . (i) Lay out, construct, reconstruct, alter, . . . streets, alleys, highways, boulevards . . . sidewalks, curbs, gutters, public walks and parkways."

No matter what the city charter says standing alone about the city's power or lack of power to alter and widen streets, given the court's previous analysis of the charter, the city can rely on Chapter 132 for a development project

coupled with the power given it by the state under § 7-148. There is certainly no need to go back to the city council seriatim for approval whenever work on the road infrastructure in a development project may dictate the need to exercise the power of eminent domain as the plaintiffs seem to suggest. Such a position would bar, for all practical purposes, economic development programs in developed area requiring site clearance since such programs often require work on road infrastructure.

But just because the city has the power to alter and widen streets and determine sidewalk widths, that does not in itself justify a particular taking to accomplish those purposes. The court must still decide whether the taking was necessary; as noted before, deference must be given to the legislative authority, acting through a designated agency, but its decision on such matters can be rejected by the court if it is arbitrary, unreasonable – in a word, clearly unnecessary.

First, certain basic principles must be reviewed. As to parcel 4A, the municipality claims it has the right and power to widen streets due in one case (Walbach) to the fact it will be handling more traffic under the MDP and to ensure that parking on the streets is provided for. Also, East Street is slated to have two bus pullovers which will enable the public to have easy access to the state park.[20]

[20] The court has not discussed the flood plain issue. It should be noted that much of the Fort Trumbull area is in a one hundred year flood plain so that certain areas will require filling. Filling at the Kelo residence in parcel 4A will be limited and impact the property, not the residence. None of the other parcel 4A properties are affected by these concerns.



As stated in Nichols, at § 7.06(4), p. 7-119:

> The taking of private property for a public highway has long been considered a valid public use. Long before the American Revolution, this was the only use authorized by eminent domain.

Also, it has been held that "parking is a proper use of the highway, and, if necessity therefor exists, the right of eminent domain may be exercised to establish or widen highways adequate for this purpose. The taking of land for highways is not limited to that necessary for actual travel." *City of Grand Rapids v. Barth,* 248 Mich. 13, 226 N.W. 690, 691 (Mich. 1929).

Furthermore, as mentioned in a previous footnote, establishment of public parks is recognized as a public purpose and providing convenient bus access to such parks certainly appears to be an ancillary public use.

To turn to the necessity requirement for taking a particular piece of property to accomplish the public purpose, another quote from Nichols is appropriate, especially as it relates to a condemnation for highway purposes.

At § 5.01(3), p. 5-14 of his third edition, the author notes:

> Although the public use requirement may have been eroded by recent judicial decisions . . . , it is still incumbent upon most potential condemnors to show that it is reasonably necessary to acquire both the estate in and *the amount of property sought* in order to accomplish the public purposes as justification for the taking.

(Emphasis by this writer.)

It is true that the necessity requirement does not mean absolute necessity, it means reasonable necessity. But in road infrastructure cases, as in other taking cases, there can be no finding of necessity if the taking is made in bad faith, or is arbitrary or unreasonable. *State ex rel Highway Commission v. Curtis,* 359 Mo. 402, 222 S.W.2d 64, 69 (Mo. 1949). Interestingly, there is not much Connecticut law on the necessity issue as it applies to takings for public highways. But our case law does seem to recognize that as a matter of practice, only an easement over a portion of property may be necessary as opposed to taking the whole property. In *Tyler v. Darien,* 115 Conn. 611, 613, 162 A. 837 (1932), the court said: "When a town lays out a highway, it takes an easement for public passage, leaving the fee in the person over whose land the highway is laid; but, except as modified by statute, the easement so taken includes the right to make any changes in the highway which the changing needs of traffic may thereafter render necessary, without compensation to the owner of the fee; thus, it may alter its grade or the location of the traveled portion or it may subject it to new and more burdensome uses, and may do any act necessary to accomplish these purposes." In *Kratochvil v. Cox* 129 Conn. 246, 249, 27 A.2d 382 (1942), the court said: "In the case of highways laid out by towns, all that is taken is an easement for highway purposes . . . This is a less estate than the fee obtained by warranty deed." In fact, one older Connecticut case, while of course recognizing that highways are a public use, showed a sensitivity to the rights of property owners whose land might have to be acquired. *Canastota Knife Co. v. Newington Tramway Co.,* 69 Conn. 146, 36 A. 1107 (1897), involved a situation where the owner of land demanded compensation because an electric railway was to be located in the public highway. The owner claimed



this was an additional service on its fee. The court rejected the claim, but at p. 156 said:

> The best definition of a public easement is often that given by public use. A highway is a way over which the public at large have a free right of passage. It is constructed and maintained in their interest. This liberty of passage may always be exercised in such a manner as may, at the time, be customary and reasonable, having in view both the convenience of the public and the proprietary rights of the owners of the soil. As to what is reasonable under these limitations, every age, speaking by its common law, must of necessity judge by its own standard.

On the easement issue, the court has found a case outside our state which, although not a highway case, had a bearing on the issue before the court. In *City of Charlotte v. Cook,* 348 N.C. 222, 498 S.E.2d 605 (N.C. 1998), the Supreme Court of that state held that a city could take a fee simple to the landowner's property thus not allowing him to conduct his business as a dairy farmer and was not required to only take an easement. The city acted so that a power company could construct a pipeline at the depth of forty feet. Frankly, the dissent in this case seems more convincing – it strongly argued no necessity was shown for the fee simple taking. But even at that, the majority in reaching its decision reviewed the evidence and did not merely rubber stamp the city's condemnation decision. It said the credibility of the expert the city relied on was for the city council and the trial judge to pass upon. The expert said, by way of affidavit, "that it was necessary to acquire a fee simple title to the property because of the depth at which the line would be laid, the facilities that will be constructed close to the line, and the need to have

effective control over all uses of the pipeline route. Mr. Vandeventer also said that [the power company] had experienced difficulties in other places where facilities were within easements rather than on property owned in fee." 498 S.E.2d at 608.

The court went on to hold that: "The city does not have to show it would be impossible to construct a line using an easement. If the city can show that it needs a fee simple to construct and operate the line under optimum conditions, that is proof of necessity (for the taking)." 498 S.E.2d at 608.

Similar in its reasoning is the case of *Woolard v. State Highway Commission,* 220 Ark. 731, 249 S.W.2d 564 (Ark. 1952). There, the court held that the condemnation of a right of way 250 feet wide was not arbitrary or capricious. The dissent believed a 200-foot right of way was all that was required, but the majority, after noting the deference that should be given to legislative judgment, pointed to the "testimony by experienced engineers that a 250-foot right of way is needed in this instance." 249 S.W.2d at 566. In *City of Charlotte* and *Woolard,* the deference to the political decision-making body seems to rest on the deference the respective courts gave to expert opinion in each case that the width of the particular easement or right of way would result in optimum use or was needed for the appropriate exercise of the particular public use.

Before turning to the specific facts of this case regarding the issue of the need to take the properties in parcel 4A for road infrastructure purposes, the court would make one observation. As noted previously, it is a mantra repeated in the commentators, out of state cases, and our cases that the need to take property for a particular public



use is a "legislative" prerogative. Great deference must be given to the decision of the legislature, its authorized agency or municipality. But room must be left for the viability of the taking clauses of the state and federal constitutions. It seems to the court that the degree of deference in part is defined and determined by the ability of the court as a court to appropriately and intelligently decide the necessity issue in a particular context as opposed to the legislative body or agency or municipality.

In deciding the necessity of condemning property under a statutory scheme, like Chapter 132, and whether a particular taking is necessarily broad and often complicated social and economic issues and predictors are involved requiring a certain amount of expertise and familiarity with local and regional conditions. The legislature acting through agencies or city councils familiar with their towns are often better able than judges to marshal the evidence and considerations necessary to make the appropriate decisions.

But in taking cases where the issue is whether a road need be so wide, or the turning radius at an intersection be so many feet, or whether a five or an eight-foot sidewalk or a one and one-half foot or five-foot planting strip is best – it seems, at least to this court, that judges are better equipped to pass on necessity issues in these type of situations. Judges make decisions like this in many situations involving, for example, suits for injunctive relief brought by private parties in land use disputes.

This is not to say deference must not be given to the legislative or political authority in making decisions on road taking matters, but it at least says that the courts

are better able to decide whether the decision of such authorities is arbitrary or unreasonable.

In deciding the issues now before the court, it will rely on the foregoing discussion.

Turning to the specific infrastructure plans as they affect the properties in parcel 4A, a very experienced expert testified for the defendant city, Mr. Mascia. He is a civil engineer and for the past two years has been developing plans to complete the infrastructure for the project area. He has worked closely with city officials in developing these plans. Mr. Mascia reviewed the MDP as a basis for completing these designs which include roadways, broadly defined, and utilities. Basically, he has been overseeing the design of construction documents that are used to solicit bids from contractors. The MDP, as noted, called for the widening and improvement of various streets and intersections and classified streets as to appropriate width. When asked how streets are put into the classification, Mr. Mascia said, "it would depend upon the proposed use of the land that the streets would be serving." Mr. Mascia consulted with city authorities and learned that the streets in the MDP had to be improved to minimum city standards – the MDP complies with those standards. When the final plans are submitted, the city planning and zoning commission must approve or can disapprove of them. The commission under statute, however, has an advisory role to the city council which has final say on road layouts. Two of Mascia's plans were withdrawn for insufficient detail, but during the trial, Mr. Mascia said he had submitted what he hoped would be the final construction documents to planning and zoning.



In parcel 4A, the plaintiffs' properties are located on Smith, Walbach, East and Trumbull Streets. Walbach under the MDP is designed as a collector street, while the other streets are local streets. The city's minimum standards for local streets provide for a 50-foot right of way with a paved curb-to-curb width of 34 feet. Eight feet would lie on either side with five feet as sidewalk and three feet of the eight-foot width designated as a planting strip. City standards also require a 25-foot turning radius at intersections so as to avoid cars hitting the curbs when they turn. Subdivision regulations also require a visual clearance of 20 feet from the intersections for sight lines. Mr. Mascia said this was a safety feature so that a driver can see other cars approaching the intersection at right angles to the driver. Safety is an important consideration because Mr. Mascia testified people would be attracted to the area who are not familiar with it.

The MDP also designates some streets as collector streets and Walbach has that designation. It currently has 34 feet of pavement, but three 12-foot travel lanes are planned. Under the MDP a collector street is to have a right of way of 56 to 68 feet – Mr. Mascia's plan calls for a right of way of 63 feet. A street is given collector street designation because local streets feed into it and it will thus have more intense use.

Mr. Mascia's plans would require the condemnation of each one of the plaintiffs' properties in parcel 4A. It would be necessary to take the Kelo residence at 8 East Street to provide for a 25-foot radius at the intersection of Trumbull and East Streets while maintaining plans for an appropriately wide sidewalk and a 20-foot sight line at that intersection. Mascia's plan would result in the roadway going through the Kelo home.

On East Street, two bus pullovers are planned – a reasonable accommodation for visitors to the state park. Mascia's plans for East Street would also require the taking of the Dery property at Walbach and East.

Road widening plans and an appropriate turning radius at the Smith Street and Walbach intersection would also justify the condemnation of the VonWinkle and Guretsky properties along Smith Street and at its intersection with Walbach.

Mr. Mascia is a highly qualified individual and, like the plaintiffs' expert, Mr. Aubrey, the court found them both to be very candid and straightforward witnesses. The problem the court has with much of the defendants' position on road infrastructure work in parcel 4A is oddly enough similar to the problem it had with the general "development plans," or lack thereof, as to this parcel. In other words, from the information provided, it is difficult for the court to decide the necessity question if due regard is to be paid to the rights of the plaintiffs. That is, the court understands it must defer to decisions of the legislative body on questions concerning road work and takings for such work. But land seizures for such purposes do not thereby fall into some special category of taking that allow municipalities or development agencies to take land by way of fiat. The party who is about to lose his or her property still has a right to claim the seizure is not necessary because it is arbitrary or unreasonable. Even cases like *City of Charlotte v. Cook, supra* (pipeline easement), and *Woolard v. State Highway Commission, supra,* which give great deference to legislative discretion make a point of relying on expert testimony presented by the condemning authority in finding the seizures were not arbitrary but necessary for the accomplishment of the public purpose.



The universe in which the reasonableness determination is made by the court of course requires deference to the original legislative determination on that score, but the court has to also make that determination with regard to the effect on people whose property is being taken – if not, why go through the exercise at all and what do the constitutional protections mean?

Mr. Mascia felt his task was to carry out the road infrastructure requirements of the MDP. There certainly is nothing wrong with that, but in doing so, he said that he took no account of the possibility of carrying out those plans in a satisfactory way without having to encroach on the residences of the plaintiffs. It is as if when preparing his designs, he was working on a clear field or lot without regard to the existing properties. The problem for the court arises because as to parcel 4A, the plaintiffs, through their expert, are saying that with only slight modifications of Mr. Mascia's plans, New London can accomplish its infrastructure goals without taking their property.

It is also true that the MDP itself, whose dictates Mr. Mascia says he is putting into effect, has not been interpreted by the defendants as requiring rigidity of application even as to road widths, the need for sidewalks, etc. To cite two examples, under the MDP collector streets as noted, can have a right of way between 56 and 68 feet. Nothing dictates the planned right of way of 63 feet for Walbach. Local streets are to have 34 feet of pavement to permit parking. But East Street, for good reason, at certain points will have 28 feet of pavement to accommodate two bus pullovers.

The court will move from the general to the specific and review the takings in parcel 4A. The Mascia plans call

for the taking of the Guretsky property at 21, 23 Smith Street, the VonWinkle property at 27, 31 Smith Street and the VonWinkle property at 33, 35 Smith Street, which is at the intersection of Smith and Walbach Streets.

As the plaintiffs point out, the existing right of way allows for the defendants' proposed 34-foot curb-to-curb pavement which would allow on-street parking with a 5-foot sidewalk on the east side of the street and a grass strip on the west side of Smith Street along the sewage treatment plant property. This all could be accomplished if the defendants' proposal to move the existing pavement line toward the plaintiffs' property is not put into effect, but the eastern edge of the pavement is kept where it is. Mr. Aubrey's testimony to this effect was not specifically rebutted and, if accepted, 21, 23, 27 and 31 Smith Street do not need to be taken. Insofar as the court can ascertain, Mascia's questioning of Aubrey's testimony centers on 33-35 Smith Street and the assumption that Walbach Street cannot be expanded to the north into parcel 2. If that supposition is correct, then the 25-foot turn radius with the 20-foot sight line cannot be accomplished and that would also affect the street alignment of Smith Street just to the south of the intersection and the right of way estimates made by Mr. Aubrey. If Walbach is expanded to the north and not as Mascia envisages to the north *and* south, the turning radius and sight line requirements in the MDP for intersections can be met without taking the VonWinkle property at Smith and Walbach or, in fact, the Dery property at Walbach and East Streets.

The court cannot ascertain why Walbach cannot be expanded north into parcel 2 to accommodate all of Mr. Mascia's proposals as to street and sidewalk width and amenities, thereby avoiding the need to take the VonWinkle



and Dery properties because of intersection requirements. Apparently, even Mr. Mascia's current plans require some encroachment into parcel 2. The parcel, owned by the Navy, has been leased to the NLDC presumably on a long-term basis. The NLDC has incorporated the parcel into the MDP to be used for so-called high end housing with the necessary road and utility infrastructure to accomplish that use.

It strains credulity to think that given the planned use of parcel 2 and the fact that some encroachment on it is already envisaged that there could be any practical or legally cognizable objection or problem with providing for Aubrey's suggested movement of Walbach Street, a matter of just several feet to the north. No suggestion has been made that Mr. Aubrey's plan would interfere with the contemplated use for parcel 2 or that any engineering problems would be presented. Also, it would be a peculiar position indeed for this court, having spent page after page on parcel 3 issues and rejecting therein the notion that the NLDC was some free wheeling private entity, to now say the prospective actions or failures to act by the NLDC regarding Walbach Street moving north into its parcel 2 area are not to be included in the calculus of deciding whether these takings are arbitrary or unreasonable actions by the city.

Walbach Street runs west to east on the northern run of parcel 4A. East Street, which will now be discussed by the court, runs perpendicularly into Walbach from north to south along the eastern side of parcel 4A, between that parcel and the state park.

Mr. Aubrey also testified that the existing space on East Street could incorporate all the amenities at both 28

East Street and 87 Walbach Street. The latter building is at the intersection of East and Walbach and the court has discussed how moving Walbach to the north would allow the intersection proposals at that intersection without encroaching on 87 Walbach for that purpose . . . This building also borders East Street, however, so that the proposal for that street must also be considered in deciding whether it is necessary for this property to be condemned.

Aubrey testified that the right of way between physical objects on East Street is 49.6 feet. The attorney for the city argued it may be two or three feet less than this. Mr. Aubrey did not concede this observation and the court has not been presented with enough information to resolve the point. If the right of way is 49.6 feet, or even two or three feet less, it is difficult, for this court at least, to understand why it is reasonable and not an arbitrary exercise of the eminent domain power to take these properties belonging to Mr. Dery. The amenities that would be compromised, while still maintaining road width, concern sidewalks and a planting strip.

As Nichols notes in his treatise on eminent domain at § 7.06(32), pp. 7-177 et seq., "Traditionally, eminent domain could not be used to secure aesthetic purposes. However, recent trends permit aesthetic considerations to factor into public use deliberations." Cf. *Parking Auth. of Georgia, Inc. v. City of Atlanta,* 450 S.E.2d 200 (1994). Also, as he notes, "Private property taken to develop scenic easements is a valid public use." *Id.* at 7-179. The only Connecticut case marginally on point is *Murphy v. Westport,* 131 Conn. 292, 40 A.2d 177 (1944) (exclusion of advertising signs). But neither side really briefed this issue and, although East Street does front the west side of



the state park, two bus pullovers are planned for a stretch of street less than 500 feet in length where it is hoped great numbers of tourists and school children will be dropped off during much of the year – aesthetic considerations do not seem controlling under these circumstances, even if this issue were adequately briefed.

Even if these observations are not valid, the court would note that the plaintiffs' observation that the defendants could, but have not, approached the state for a two- or three-foot easement onto the park property is worth taking note of. If the request were granted, then all the amenities planned for East Street could be accomplished. Certainly, the city cannot use the power of eminent domain against state land.

But it is also true that but for state involvement, the MDP could not be accomplished. A state agency, DECD, had to approve the MDP. Chapter 132 contemplates state involvement in numerous ways. Without state funding, the plan could not go forward; state funding is so central to the MDP that, as previously discussed, Admiral Goebel considered that the NLDC was an agent of the state. All this street widening results from an attempt to accomplish the purposes of the MDP as Mr. Mascia concedes. Even if it is true that the city, apart from the MDP, has a right to do all this infrastructure work, no one would suggest the city spent all the time and money it did on Mascia's plans on some lark to have Fort Trumbull streets comply with city regulations. The state approved and financed MDP is the engine that motivates the city to try to meet the regulations. Also, the street widths and amenities under the MDP were decided upon after a traffic analysis which indicated apparently that MDP use required the road infrastructure work. The MDP is clearly the driving force

behind the road infrastructure work on Smith, Walbach, Trumbull and East Streets.[21]

Under these circumstances, and given the state's involvement, can the state refuse to grant an easement of a few feet on state park land to save these homes on a street already scheduled for bus pullovers where aesthetics of the park cannot be a major concern? Can the state refuse such a request without having to show at least that it is reasonably necessary to use all of the land presently allocated to it for park purposes?

This issue has not been litigated or briefed and the court could find no case dealing with these precise questions which are raised in the context of a statute that gives eminent domain power to a municipality to be exercised by a public agency but where the state still retains controls, practically speaking, about when and whether that power is to be exercised.

The court will now discuss the 8 East Street property. It is at the southern end of East Street and lies at the intersection of that street with Trumbull Street.

This property is owned by Mrs. Kelo at 8 East Street. The existing 51-foot right of way permits a 34-foot curb-to-curb pavement and an 8-foot sidewalk on the south side of the street with a five-foot sidewalk on the north side. This would allow space for the city's minimum 1 1/2-foot planting strip and six-inch curbs on each side. Mr. Aubrey

[21] It is also more difficult for the city to rely on some abstract right or interest, apart from MDP needs, to do this road work so its regulations may be complied with when the unrebutted testimony is that many streets and intersections in non-MDP city areas do not meet city regulations on road width and intersection layout.



pointed out all of this could be accomplished without encroaching on the Kelo property. The only change from the Mascia plan would be a reduction in the defendant's proposed total width for sidewalk and planting strip on the north side of Trumbull Street from 10 feet to 6 1/2 feet.

The court believes it would be unreasonable and arbitrary to condemn this property for a 3 1/2-foot reduction in a sidewalk and planting strip where road widths can be maintained and in light of the fact that these amenities have been reduced in other MDP locations when it was deemed appropriate. This is not a case like *City of Charlotte* where an expert has come in and said that to optimally maintain our pipeline we need an easement of such and such a width, or a case like *Woolard* where highway engineers testify that in order to have the proposed and needed highway, a 250-foot easement is required. An eight-foot sidewalk would be retained on the south side of Trumbull Street which is the side closest to any water view if aesthetic considerations are a concern.

But apart from the issue of amenities along Trumbull Street, another matter must be discussed with regard to the Kelo property. This involves the question of intersection layout plans.

The 8 East Street property lies at the intersection of Trumbull and East Streets. Aubrey testified that the existing space allows for a 25-foot turning radius at the intersection, but not a 20-foot sight line. Under Aubrey's plan, there would not be a 20-foot sight line and the sidewalk on the north side of the intersection would have to be curtailed at the intersection to achieve a 25-foot turn

radius. But this curtailment[22] would not go past the actual intersection. Mr. Aubrey testified that the curtailment and the existence of a stop sign at the intersection would adequately lay to rest any safety concerns about not having a 20-foot sight line. He testified rather convincingly to the court that in any event a 20-foot sight line is not considered the minimum sight line necessary for safety; ten feet is the minimum based on the fact that a driver approaching an intersection obviously is placed somewhere near the middle of his or her vehicle. Mr. Mascia merely testified that a 20-foot sight line is a safety consideration without going into very much detail as to why that was so. Certainly, if one were to approach an intersection with a building on the corner that has no traffic control sight line, considerations are paramount and one could speculate that a 20-foot sight line, if not more, is needed to allow drivers to see cars approaching the intersection perpendicular to your car. But instead of removing the building, the rational answer might be to put in traffic controls.

Also as noted, the court, for reasons previously stated, does not accept the equal protection and due process arguments based on the following observation, but it is relevant for this immediate discussion, that in several

[22] If the sidewalk is reduced to 4 1/2 to 5 feet at the north side of the intersection with no planting strip, there would be no encroachment into 8 East Street, but a retaining wall on the property would have to be removed. Mrs. Kelo found no necessity for this wall. Based on the earlier discussion on easements and considerations that go into determining their reasonable widths and problems of excess condemnation if a width is beyond that which is necessary, it would not be reasonable to condemn the whole property to secure an easement over the area occupied by the retaining wall.



other New London (non-MDP areas) the 20-foot turning radius is not met. This makes it difficult for the court to accept by way of fiat 20-foot sight line as something needed for safety just because it is included in some city regulation and where the proposition is not supported by sufficiently detailed, let alone convincing expert testimony. Compare cases of *City of Charlotte* and *Woolard.*

In any event, based on the evidence presented, the court finds it would be unreasonable for the city and/or NLDC to take the plaintiffs' property in parcel 4A under the power of eminent domain as authorized by MDP and Chapter 132 or other state statutes.[23]

Equal Protection

In the final part of this decision, the court will discuss several constitutional arguments made by the plaintiffs. These arguments are not related directly to the arguments

[23] Query whether the court's prior conclusion that the takings in parcel 4A could not be justified as necessary for any cognizable public use would have an effect on the propriety of any road widening plans. In other words, how much did the use proposals in the MDP for parcel 4A affect determinations as to road widths and amenities in the MDP and Mascia's plans to effectuate the MDP's purposes? The parties necessarily did not address this issue since they could not predict the court's decision. Also it should be noted that under current city regulations, the only basis to require the Trumbull and East Street intersection to comply with city regulations as to radius and sight line would rest on the city and/or the NLDC "owning" the land. Since the court has decided the parcel 4A takings are not justified under the MDP because there is no cognizable or nonspeculative use proposed, the only apparent way the takings of East Street for work on the intersection could pass muster is if other uses of the MDP and/or the state park use required the work in any event. It could be argued that the record does not allow the court to find that that has been established.

raised under the taking clauses of the state and federal constitution and, if correct, provide added reason to support the court's decision to bar the takings in parcel 4A, but also would invalidate the court's conclusion that the takings in parcel 3 are permissible.

First, the court will discuss the argument the plaintiffs who have or occupy homes in parcel 3 make under the equal protection clause. This claim involves the treatment given to the Italian Dramatic Club (IDC) by the NLDC. The IDC is a long-standing social club in the Fort Trumbull area. Membership is limited to descendants of people who arrived here from a certain geographic area in Italy. Dinners are held at the club to which members can bring their guests. Originally the IDC was slated for demolition under the MDP, but in October 2000, the NLDC decided the club could remain in parcel 3. The plaintiffs in parcel 3 argue that: "By permitting the IDC to remain permanently in parcel 3, while denying similarly situated plaintiffs . . . the equal right to retain their property, the NLDC has denied similarly situated people equal protection of the laws in violation of both the Connecticut Constitution (Art. 1, Sec. 20) and the Fourteenth Amendment of the U.S. Constitution" (pp. 78-79 of initial brief).

First, the court will attempt to set forth some general principles governing the application of the equal protection clause, then it will discuss the relevant facts of this case. In this regard, some discouraging observations have been made. In *Louisville Gas Co. v. Coleman,* 277 U.S. 32, 37, 72 L. Ed. 770, 48 S. Ct. 423 (1928), the court said: "The equal protection clause, like the due process of law clause, is not susceptible of exact delineation. No definitive rule in respect of either, which automatically will solve the question in specific instances, can be formulated." And as



said in that eminent source of black letter law: "The phrase 'equal protection of the laws' has never been precisely defined. In fact, the phrase is not susceptible of exact definition." 16B Am. Jur. 2d, Constitutional Law, § 778, p. 298.

Certain general principles, however, have emerged. The protection afforded by this clause of the constitution applies, of course, to the actions of municipalities or their agents.[24] *Navarro v. Block,* 72 F.3d 712, 713 (9th Cir. 1995), *see* § 796 of Am. Jur. 2d Article at 16B Am. Jur. 2d. The NLDC acted under Chapter 132 and there is no claim here that that statutory scheme in any way deprived these particular plaintiffs of their right to equal protection; but "it is well established that discriminatory application of a facially neutral law also offends the constitution." *Navarro* at 72 F.3d p. 716.

What interest does the clause protect? In *Coleman* the court said:

> . . . the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all the powers of the

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[24] There is no contradiction between the plaintiffs' argument that the NLDC is a private entity and not an agent of the city and therefore cannot exercise eminent domain power and their present position that the NLDC, being subject to the requirements of the equal protection clause, violated their rights. That is, Fourteenth Amendment complaints require "state action," but the NLDC can certainly be said to qualify as a "state actor" and be subject to the amendment without being otherwise characterized as an agent of the city for other purposes, such as eminent domain analysis. *See* a very general definition of "state actor" in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 621-22, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991).

> state which can affect the individual or his (sic) property.

277 U.S. at p. 37.

In *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587-88, 59 L. Ed. 2d 587, 99 S. Ct. 1355 (1979), the court said, "Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle (equal protection of the laws) is violated." On the other hand, "The law is clear that: 'The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated,'" *Johnson v. Smith,* 696 F.2d 1334, 1336 (11th Cir. 1983).

How is an equal protection claim analyzed? First, the foregoing language establishes the predicate proposition that "a claimant wishing to assert an equal protection claim . . . 'must establish that he (sic) is similarly situated to members of the class who are treated differently from him' (sic) . . . If that point cannot be established, there is no need to continue with an equal protection analysis." *Lowe v. State,* 267 Ga. 754, 482 S.E.2d 344, 345 (Ga. 1997); *Johnson v. Smith, supra,* at 696 F.2d, p. 1336. This then is a "preliminary step" requirement for an equal protection analysis.

If this preliminary step is met, how is it determined whether a classification between those who are similarly situated is a "reasonable classification?" Selective application of a statute or government policy or regulation might



offend equal protection rights "if it rested on grounds wholly irrelevant to achievement of the regulation's (or statute's or policy's) objectives." *Kotch v. Pilot Commissioners,* 330 U.S. 552, 556, 91 L. Ed. 1093, 67 S. Ct. 910 (1947). Or, as put in *Asbury Hospital v. Cass County,* 326 U.S. 207, 214, 90 L. Ed. 6, 66 S. Ct. 61 (1945): "The ultimate test of validity is not whether the classes differ, but whether the differences between them are pertinent to the subject with respect to which the classification is made"; also *see Coleman,* 277 U.S. 37.

Thus, in conducting an equal protection analysis, the purpose of the governmental action for which any classification is purportedly made is a paramount consideration. For this court, at least, this is necessary because of the need for judicial restraint and the right of other branches of government to act as they see fit within their assigned spheres. Any other rule would, in effect, encourage judicial legislation – judges would be deciding reasonable classification based on what they see as reasonable goals or purposes as opposed to the legislature's vision of appropriate objects of legislation.

In any event, given this analytical framework, what level of evaluation and criticism should courts use to determine if classifications are in fact reasonable and not based on some invidious purpose to favor one class for a reason having nothing to do with the purported government goal or to prejudice another class?

Am. Jur. 2d succinctly sets forth the standards of review. At 16B Am. Jur. 2d, § 812, p. 344, it says:

Three degrees of scrutiny are applied by the courts in analyzing statutes (or governmental application of statutes) challenged under the Equal Protection Clause:

if a legislative classification disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny and the statute must fall unless the government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest;

if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand such scrutiny; and if neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality.

The plaintiffs argue that a strict scrutiny test should be applied. The constitution is "unambiguous" in its recognition of the right to private property as "fundamental." *State v. Geisler,* 222 Conn. 672, 687, 610 A.2d 1225 (1992), is referred to which says, "The sanctity of the home has a well-established place in our jurisprudence." They point to *Zapata v. Burns,* 207 Conn. 496, 505, 542 A.2d 700 (1988), which says that "a right is fundamental for equal protection analysis if it is explicitly or implicitly guaranteed by the Constitution." Here, it is argued, plaintiffs' right to their homes is fundamental because their right to own private property safe from unauthorized condemnation is explicitly protected by the taking clauses of the state and federal constitution. The argument misses the point, however, and is somewhat circular since the whole point of the taking clause is that it underlines the fact that the right to property is subject to the government's right of eminent domain – that is, if the property is to be taken for



a public use and it is necessary to take the property for that use. The defendants cite two cases for the proposition that the strict scrutiny standard should not be applied in equal protection cases made in the context of eminent domain, *Jackson v. Water Works, Inc. v. Public Utilities Commission,* 793 F.2d 1090, 1093 (9th Cir. 1986); *U.S. v.. 16.92 Acres of Land,* 670 F.2d 1369, 1373 (7th Cir. 1982). The plaintiffs cite no cases directly on point for the proposition they assert, but ask the court to ignore these cases because they are not controlling precedent in our state. Also, they say that these cases do not reflect the Connecticut principle that rights explicitly protected by the constitution are fundamental rights subject to strict scrutiny, citing *Frazier v. Manson,* 176 Conn. 638, 645-46, 410 A.2d 475 (1979). But *Frazier* did not involve the right to hold property but a prisoner's claim that he was entitled to good conduct credit off his sentence and that its denial violated his right to equal protection because people sentenced before a statutory change received the credit. In fact, *Jackson Water Works* cites *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973), which rejected an equal protection argument in a claim for educational benefits. The court said educational benefits are very important and significant, "But the importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of examination under the equal protection clause." 411 U.S. at 30. As said in *Shapiro v. Thompson,* 394 U.S. 618, 642, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), "The court today does not pick out particular human activities, characterize them as 'fundamental' and give them added protection . . . " To the contrary, the court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than

the Constitution itself demands. The plaintiffs simply pluck out the notions that a person's property cannot be seized or impaired without procedural due process or by compliance with the taking clause and translate those irrefutable propositions into an argument that the right to property, historically and constitutionally important enough to warrant those rights, is also fundamental for equal protection purposes and thus strict scrutiny analysis applies.

As said in *Modern Constitutional Law,* Antieau, Rich, 2d Ed., Vol. 2, § 30.04, pp. 218-19:

> Equal protection doctrine purports to draw rigid lines around a limited number of "fundamental interests" which trigger increased judicial scrutiny, relegating all other subject matters to the broad category of social and economic regulations. Doing so, they have concluded that interests in welfare assistance, medical assistance, food, housing and education, which are of critical importance to recipients and to those denied assistance – do not occupy a special level of constitutional protection. While the court may use other doctrines to avoid the harshness of this approach, they nevertheless insist that deference to government should not vary whether dealing with regulation of gas companies, optical dispensers or with "the stuff that sustains needy . . . dependent children."

The federal Supreme Court has not specifically decided the issue now before the court, but has issued some opinions which are suggestive despite any "police power" tag that is put upon them. The court in *San Antonio School District v. Rodriguez, supra,* made the following comment on a case decided only a few months before:



*Lindsey v. Normet,* 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under "a more stringent standard than mere rationality." *Id.* at 73. The tenants argued that the statutory limitations implicated "fundamental interests which are particularly important to the poor," such as the "need for decent shelter" and the "right to retain peaceful possession of one's home." *Id.* MR. JUSTICE WHITE'S analysis, in his opinion for the court, is instructive:

> We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. *Id.* at 74.

411 U.S. at pp. 32-33.

The point is that as noted in "Modern Constitutional Law," *supra* at § 25.04, pp. 12-13:

> The primary interests designated as fundamental for equal protection purposes affect the electoral process, the right to travel – identified for

> equal protection purposes by discrimination against new residents of a state – and access to the courts. State burdens on individual decisions involving personal and family relationships have on occasion also been labeled fundamental in the equal protection context, but are generally categorized as liberty interests protected by the Due Process Clause.

Fundamental interests, and therefore strict scrutiny standards, have been confined to the basic requisites of federal citizenship – the right to vote and move freely within the federal union. Also, in some cases, the most personal of rights have been protected – the right to procreate, *Skinner v. State of Oklahoma,* 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942), to marry, *Zablocki v. Redhail,* 434 U.S. 374, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978), the right to pursue a lawful business, *Sail'er Inn, Inc. v. Kirby,* 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (Cal., 1971); but *see Pollard v. Cockrell,* 578 F.2d 1002 (5th Cir. 1978).

If the definition of a fundamental interest is expanded to cover interests affected by social and economic legislation even though the legislation touches on very important rights such as medical assistance, education, housing, etc., the required application of a strict scrutiny standard to differentiation of treatment to members of a similarly situated class would hobble the practical implementation of such legislation when disputes arise over its application.

Furthermore, can a strict scrutiny standard operate intelligibly when dealing with equal protection claims in eminent domain cases? The constitutional rights granted under the taking clauses of the state and federal constitution are always tempered by the observation of the courts



that great deference must be given to the legislature not only in defining what is a public use but also in determining the necessity of a particular taking.

Honoring that deference would present an interesting analytical tight rope for the courts to walk if on equal protection claims arising from the exercise of eminent domain strict scrutiny were to apply.

In any event, if the equal protection clause applies at all to the facts of this case, given the claim made, the court concludes that the rational basis, not the strict scrutiny test, should be applied to test that claim.

The court will now attempt to analyze the claim under the equal protection clause made in this case relying on the foregoing discussion.

The first question that must be addressed or a preliminary step to any equal protection analysis is the issue of whether the plaintiffs and the IDC are similarly situated. The crux of the plaintiffs' position, as stated in their brief, appears to be: "The IDC and the plaintiffs are similarly situated for a very simple reason: both were slated for acquisition and demolition under the Municipal Development Plan even though both wanted to stay . . . the IDC was saved while the plaintiffs' buildings are slated to be destroyed without compelling or rational justification." It is not quite so simple – it is tantamount to arguing that if two entities are treated differently with regards to government action, they are similarly situated. But that is the statement of the problem, not the solution.

On the other hand, the defendants' argument that the plaintiffs' buildings are private residences while the IDC is a commercial property being retained just like so-called

Building 2 and 194 Howard Street which are also commercial buildings is also not convincing. The IDC is not commercial property and there is nothing to realistically support the claim that it is being retained because of any potential for office space use. Unlike the two other buildings, Building 2 and 194 Howard Street, once scheduled for destruction but now being retained, the IDC is a social club.

It makes more sense, at least to the court, to look at the IDC and the plaintiffs' properties qua buildings and to keep the stated purpose of the MDP in mind. If the problem is examined from the perspective of the time when the MDP was first adopted, it is clear that the IDC and the residences on parcel 3 could not be considered similarly situated in the analytically relevant context – i.e. the development goal or purpose for parcel 3.

That purpose was the development of parcel 3 for office buildings. As discussed in other sections of this decision, according to Mr. Hicks who helped formulate the MDP and the president of the developer, Mr. Jones, it would not have been feasible to accomplish that purpose and allow the residences in the Fort Trumbull area, including the plaintiffs' buildings, to remain. Development of a unified clear site was needed not only to encourage development prospects, but to prepare the site for development. If, on the other hand, the IDC had been allowed to remain under the MDP as a free-standing building, it is difficult to see how its presence would have interfered with that purpose – it would have been one building at the edge of the parcel.

But as noted, the IDC was scheduled to be destroyed and is now to be retained. The plaintiff owners of five pieces of property now come to court after all the other



residences have been taken and raise an equal protection claim of now being similarly situated to the IDC even though the claim would not have passed muster when the MDP was first adopted. Assuming the viability of such an argument, what is the validity of the plaintiffs' position that presently the plaintiffs are similarly situated to the IDC, keeping in mind the governing template, the purpose of the MDP? The purpose has not changed and the IDC has not moved. The IDC is still at the border of parcel 3, the Cristofaro and Pataya properties, although clustered, go into the parcel. In fact, a street is being done away with under the MDP which provided access to these properties. The developer testified that retaining the IDC would present no problem – it is after all one building. But it seems reasonable to infer that if its retention is used as an opening wedge to retain several other private residential parcels, this would present problems for those seeking to develop the parcel as Mr. Hicks and Mr. Jones indicated and as the court previously discussed. There is good reason to conclude that the IDC and the plaintiffs' properties are not similarly situated and, on that supposition, the equal protection analysis need proceed no further.

But assuming the court's analysis on this point is incorrect, the court will assume the IDC is similarly situated to the plaintiffs. The court has previously decided the rational basis test should be used for this equal protection analysis. Our court has recently set forth that test relying on federal Supreme Court case law. In *City Recycling, Inc. v. State*, 257 Conn. 429, 778 A.2d 77 (2001), the court said as regards social and economic legislation – and Chapter 132 and activity thereunder is nothing if not that – "the equal protection clause is satisfied so long as there is a plausible policy reason for the classification . . . the

legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker . . . and the relationship of the classification to its goal is not so articulated as to render the distinction arbitrary or irrational." *Id.* at 445. On the next page, the court said, "the presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate *every conceivable basis* which might support it . . . " (Emphasis by Supreme Court.) *See* generally, 16B Am. Jur. 2d, § 813, pp. 345 et seq. In *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973), the court also expounded on the test in the context of reviewing legislation, but the general principles are applicable both to statutory analysis and application of statutory schemes. In *San Antonio Independent School District,* the court said, "the showing of some inequality or disparate treatment is not enough to make an equal protection claim against a statutory provision. 411 U.S. at 50; cf. *Abdullah v. Comm'r. of Insurance,* 84 F.3d 18, 22 (1st Cir. 1996). A law will be upheld "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group." *Romer v. Evans,* 517 U.S. 620, 632, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). It has even been said that "the rational basis test does not require the state choose the best or fairest means of advancing its goals." *VanRobinson v. Marshall,* 66 F.3d 249, 251 (9th Cir. 1995).

Using these broad tests and relying on the previous discussion in this section and at other points in this



decision the court cannot say that there is no rational basis to distinguish between the plaintiffs' buildings and the IDC based on the perceived requirements to develop this parcel in accordance with MDP goals.

But the protections afforded by the equal rights amendment would be shallow indeed if by reference to standards of review of legislation those *applying* statutory mandates could be insulated from claims that they acted not for the purported goal of advancing legislative policy, but to favor the politically powerful or those having advantages unrelated to the achievement of legislative goals. Even when legislation is being examined under the rational basis test, although declarations of government purposes are accepted at face value, a court will not be so accepting if "an examination of the circumstances forces (the court) to conclude that they could not have been a goal of the classification." *Barket, Levy & Fine v. St. Louis Thermal Energy Corp.,* 21 F.3d 237, 240 (8th Cir. 1994); cf. cases giving preference to state residents over nonresidents, e.g. *Williams v. Vermont,* 472 U.S. 14, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985). Classifications based on such motives are by definition fundamentally arbitrary and irrational in the sense that they cannot be based on any purpose sought to be accomplished by the legislatively chosen goal – here, economic development under Chapter 132 through the auspices of the MDP.

The plaintiffs have strenuously argued that the true and only motive of the decision to allow the IDC to remain while the same right was not extended to them was based not on any purpose to accomplish the MDP's goals, but to placate important political interests represented by the IDC, its supporters and members. The court will examine

the evidence to determine if the plaintiffs can meet their burden of proof on this issue.

The record is not as clear on the alleged discriminatory favoritism shown to the IDC as the plaintiffs would suggest. Although the court has some concerns regarding what really happened here and the motivations of city and NLDC officials, the problem is that questions that would have been expected to be asked and witnesses who would have been expected to be called were never produced by the plaintiffs.

The city council moved pursuant to Chapter 132 to request $12.5 million from the Department of Economic Development for the Fort Trumbull area project in May of 1998. The NLDC was designated as the development agency in the same month. A consulting team was put together in June of 1998 to prepare an environmental impact study. Between June and November 1998 several alternatives were considered by this team which was to prepare an environmental impact study. The alternative they selected eventually became the MDP. The consulting team received comments from the public and the public may have been permitted to attend some of their discussions. In any event, seven public information hearings were held regarding the environmental impact study from April 1998 to November 1998. Alternatives considered by the consulting team envisaged retaining some or all of the residences in the Fort Trumbull area, but several did not and these also would have not permitted the IDC to remain.

James Mahoney was the executive director of the NLDC from April 1992 to November 1998 when all of the above was going on. When he first became involved in the



Fort Trumbull project, he was told (by whom and exactly when is not clear) that the IDC was a membership club and if its property was taken, there might be political ramifications in terms of the plan's adoption or perhaps it would be something that would be considered in the political process. An Hispanic church presented the same circumstances to the NLDC while no other properties presented a similar problem. Mr. Dunn is the director of real estate acquisition for the NLDC and he testified that the possible condemnation of the IDC was "politically sensitive."

Given the length of the process and the fact that the public had access to its working one would think IDC supporters and members would have known that the possibility of the demolition of the IDC was being bandied about by the NLDC consulting team. Yet Mr. Hicks on this team said during the time they worked on the project no one from the NLDC told him the IDC had to be retained. No other members of this team were called to testify and no NLDC people were pressed at trial for information concerning any input they or other NLDC employees might have had with the consulting team concerning retention of the IDC.

In any event, the consulting team, appointed by the NLDC, came up with a final environmental impact plan in November of 1998, which not only envisaged taking the residential properties on the development area, but also the demolishing of the IDC. After the environmental impact statement to this effect was published in November of 1998, a forty-five day public review and comment period ensued.

A year went by while the political pot had an opportunity to boil, and in January 2000 with the NLDC under new management and the NLDC voted to adopt the MDP after a public hearing – the very MDP which provided that the residences *and* the IDC would be removed from the site. Days thereafter the city council was to vote to approve the MDP. This would be a body that by its very nature one would expect to be subjected to political pressure and influence such as could be brought to bear by a purportedly politically connected organization like the IDC. But the city council voted to approve the MDP and the purpose expressed therein to demolish the residences and the IDC. The court will discuss at a later point the plan to contact the Governor's office regarding the retention of the IDC long after the approval of the IDC. But it is interesting to note that a state agency, the DECD, had to approve the MDP along with its evident purpose not to retain the IDC and it did so. Not only did the IDC's prospective removal have no impact on the eventual approval of the MDP by the NLDC, the city council, or the DECD, there was no evidence of any kind presented that in the events leading up to the formulation of the MDP or its approval the IDC attempted to influence the approval process or was actually considered in any way by anyone involved in the process.

A developer was chosen by the NLDC after the MDP was approved. Its president testified. He said the NLDC asked him at some point if it was feasible to retain the IDC as part of the plan. He was asked also about the feasibility of retaining other buildings besides the IDC in parcels 1, 2 and 3. But the latter was a generic request, the IDC request was specific. Yet there was no evidence presented that anything more than a feasibility question



was asked – testimony or other evidence was not offered that would suggest that a demand was made that the IDC be retained. It would have been helpful to the court if the person at NLDC who made the request was identified and subjected to examination as to why the question concerning the IDC was asked, how it was exactly phrased and when it was asked in relation to the decision not to take that property.

There is also evidence indicating that the possibility of not demolishing other properties besides the IDC was considered after the MDP was formulated and even after the approval process.

On the night the NLDC held public hearings on the MDP, Admiral Goebel said that it was not "inconceivable" that properties scheduled for demolition under the MDP might be saved. He could not "guarantee" this and the plan did not call for that as proposed. Mr. Hemmerdinger, who was once director of real estate development for the NLDC, said in April 2000 at one neighborhood presentation the IDC was discussed and the present plaintiffs or some of them inquired about saving certain buildings and about whether the plan could be adjusted to accomplish that goal. The president of the NLDC and Mr. Jones, the developer's president, were present and asked the NLDC staff to investigate that request. The investigations were not limited to the IDC and Mr. Hemmerdinger went on to discuss the scope of the investigations made and the conclusion reached – the location of the IDC relative to street frontage, position on the parcel, its elevation were compared to that of the residential property, and on that basis the IDC presented better reasons for retention. The wisdom of those conclusions is not now at issue, but just the fact that they were made can be considered some

evidence that discriminatory animus did not drive NLDC decisions on this subject.

The plaintiffs, however, point to two other events that for them underline the fact that the IDC was given constitutionally unacceptable preferential treatment that led to a reversal of the decision to demolish the IDC while permitting plans to proceed regarding the demolition of their homes. In October 2000, they argue it was decided by the NLDC not to condemn the IDC.[25] But this decision was preceded by a meeting at the IDC on June 23, 2000. The president of the IDC was there, as was Admiral Goebel, Mr. Hemmerdinger and Mr. Milne, president of the Pfizer Global Research Division, and Claire Gaudiani, the NLDC president. The meeting was about the possibility of the IDC remaining. The plaintiffs note that none of the plaintiff homeowners were invited to the IDC meeting. After this meeting, Hemmerdinger received a message from Gaudiani to the effect that Milne was talking to the Governor about the IDC. There was no evidence Milne ever talked to the Governor, but "a little more than two months later the NLDC decided that the IDC, but not any of the homes in parcel 3, could remain." As to this latter event, at trial the plaintiffs argued it was being offered to show the IDC was given special treatment and it shows

[25] The evidence is somewhat confusing on this point in that the developer's president, Mr. Jones, said at his deposition it was decided to allow the IDC to remain in the spring or summer of 2000. That does not appear possible since there would then be no need to have the June 2000 meeting or purpose in contacting the Governor's office. Jones could be referring to an internal decision by Corcoran Jennison, but why would that not have been communicated to the NLDC? Most likely, the time frame given by Jones reflected a memory lapse.



knowledge on the part of NLDC of a high level conversation about the IDC.

A Scottish philosopher, David Hume, established over two centuries ago that because A follows B that does not mean B caused A. Although that observation may not pass muster in legal circles, there are other problems with the plaintiffs' position on these events. The court is being asked to rely on speculation and conjecture by parties who, after all, have the burden of proof. Why wasn't Milne called to testify or be deposed, or the president of the IDC? If the IDC had all this political clout, why did there have to be a meeting? Why did two and one-half months have to pass before the IDC saving decision was made? Was Milne's call to the Governor a private venture of his own or something orchestrated by the NLDC? Why weren't NLDC officers cross examined about any results from Milne's planned call or why wasn't there more detail provided at trial concerning what transpired at the IDC meeting itself? In the absence of more directly relevant evidence on the equal protection claim, perhaps the best that could be argued is that all these activities indicate the NLDC was going through the motions of currying favor with a politically-connected organization. But that does not mean this affected any decisions made with regard to the entity. Burden shifting arguments cannot be relied upon by the court to save the day for the equal protection argument since the plaintiffs had access to witnesses, not called, who could have fleshed it out or witnesses called who could have presented more direct evidence concerning how these events influenced any ultimate decision.

Also, the plaintiffs' argument does not take account of another aspect of Mr. Hemmerdinger's testimony. He testified that a meeting was held with the IDC in June

2000, but similar meetings were held with other property owners. Hemmerdinger was not personally at any meeting where the purpose was specifically to discuss saving the plaintiffs' homes, but he also testified these issues were discussed with him by the plaintiffs regularly in all kinds of settings. The NLDC did not just respond to the IDC concerns. Hemmerdinger noted that various issues were discussed with the plaintiffs, including the possibility of relocating in the development area or outside of it. Admiral Goebel testified the NLDC looked into the possibility of moving residences and did individual estimates of the cost as to each house. This notion was even discussed with the president of Corcoran Jennison. Mr. Jones remembered that the discussion involving moving homes possibly occurred in 2001, the year of his deposition. Also, all of the foregoing was transpiring in the context of other matters already mentioned. The NLDC request to Jones about the possibility of retaining other buildings besides the IDC and the Gaudiani's and Jones' request to the NLDC to make a similar investigation after an April 2000 neighborhood meeting. Finally, on the subject of the possible call to the Governor, an observation should be made. Between January 1998 and August 2001, over $31 million was spent on this project. The great bulk of this money has come from the state. From January 1998 to the time of the takings of the plaintiffs' property, just one month before the decision to retain the IDC, about $25 million had been spent on the project. The state had already heavily committed to this project, and if NLDC motives are at issue, no evidence was presented that the NLDC had reason to fear a diminution let alone a cut-off of funds if the IDC request was not complied with. The court has not been presented with any grant proposals or information about when such proposals were made and approved, all of



which could have been keyed into the time when the decision was made to allow the IDC to remain.[26]

In any event, for the foregoing reasons, the court does not accept the equal protection argument of the plaintiffs.

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[26] The court would make one more comment on the application of the rational basis test in this case. It has been said by more than one witness for the defendants that if residences were allowed to remain at any point after the MDP were approved, the whole laborious process of Chapter 132 plan approval would have to be begun again – environmental impact study, approval by city council and state and regional body, etc. In light of the desire to move the project along, this arguably could be a "plausible policy reason" for distinguishing between the IDC and the residences. Clearly, residences would be a "substantial" change to the plan. It is more difficult to arrive at that conclusion as to the IDC in a plan that already contains provisions for a health club and four-star hotel with a bar and restaurant that will attract social visitors. Of course, this observation, for whatever it is worth, and it certainly does not tip any balances for the court, is only appropriate in an equal protection analysis. If the MDP is illegal or unconstitutional for the other reasons advanced by the plaintiffs, it need not be considered.

Also, it should be noted that the residences in parcel 3 would not contribute to the MDP economic development goals – office development in parcel 3 – or relate in any way to the other major component of the MDP, the building of a four-star hotel. That hotel does have various social components such as a bar, lounge, etc. which is at least tangentially related to the social aspects of the IDC. Perhaps more to the point, it has been stated that one of the important aims of the MDP is to the development of the Fort Trumbull area to downtown development. The court cannot say it is beyond the realm of rational consideration to want to have a social club of admittedly some political clout, with members and guests from outside the Fort Trumbull area, remain in that area. Even if this factor was not considered and articulated at the time of the decision to keep the IDC in place, it can be considered by the court under a rational basis analysis. *See Panama City Medical Diagnostic, Ltd. v. Williams,* 13 F.3d 1541 (11th Cir. 1994). The court recognizes that this observation, like the immediately preceding one in this footnote, has a certain make weight quality and was not a primary or even determinative consideration of the court in reaching its decision.

Procedural Due Process

The plaintiffs also claim that they were denied procedural due process under the Fourteenth Amendment to the federal constitution. This is so, they argue, because property owners who face eminent domain pursuant to the Municipal Development Act (Chapter 132) are not afforded the opportunity to raise challenges to the constitutionality or legality of the eminent domain proceedings in the condemnation actions that were brought against them. In the condemnation proceedings that the NLDC and the city initiated, the only issue that can be litigated will be the compensation that might be owing to them. Under Connecticut law, the property owner must find counsel and file a separate action for injunctive and/or declaratory relief, pursue litigation in superior court and then in the appellate courts.

The plaintiffs concede that *Bahr v. O'Brion,* 146 Conn. 237, 246-47, 149 A.2d 691 (1959), rejected a similar challenge to the Redevelopment Act. They refer to the case as "dated," but seek to avoid its binding effect on this trial court by maintaining that they bring their procedural due process claim under the due process clause of the Fourteenth Amendment to the federal constitution. In fact, as will be discussed, *Bahr* has been relied upon in more recent Connecticut cases and its underlying principles appear to have been adopted in our appellate court's interpretation of federal procedural due process.

*Bahr* was relied upon in *Conn. Light & Power Co. v. Norwalk,* 179 Conn. 111, 119, 425 A.2d 576 (1979). The procedural due process claim was raised in a special defense that based the claim on the state and federal due



process clauses. The briefs do not refer to federal case law (*see* Conn. Supreme Ct. Records & Briefs, June 1979 term, part 1). *Fishman v. Stamford,* 159 Conn. 116, 121, 267 A.2d 443 (1970), relied on *Bahr* on a procedural due process issue arising in an eminent domain case. In *Bahr* itself, as in the two just cited cases, the court did not indicate whether it was deciding the procedural due process claim under the state or federal constitution or both. The briefs only cite state cases but, interestingly, the complaint raises the due process claim under both the state and federal due process clauses (Conn. Supreme Ct. Records & Briefs, Feb., 1959 term).

The plaintiffs are correct in noting that *Bahr* relied heavily on *State v. Vachon,* 140 Conn. 478, 101 A.2d 509 (1953). The plaintiffs argue that *Vachon* used an "outmoded" analysis articulated in a 1934 case, *Nebbia v. New York,* 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505, set forth at 291 U.S. at 525 of *Nebbia*: "So far as the Fourteenth Amendment . . . is concerned, it suffices for due process that the law shall not be unreasonable, arbitrary or capricious." According to the plaintiffs, "procedural due process analysis has come a long way since the time of that decision".

Connecticut apparently cherishes the past because *Vachon* was relied upon for a procedural due process analysis in two fairly recent cases, *October Twenty Four, Inc. v. Planning & Zoning,* 35 Conn. App. 599, 608-09, 646 A.2d 926 (1994), and *Danziger v. Demolition Board,* 18 Conn. App. 40, 46, 556 A.2d 625 (1989). Also, in *Ryburski v. State Employees Retirement Commission,* 173 Conn. 462, 378 A.2d 547 (1977), the court quoted with approval the "outmoded" principle reflected in *Nebbia v. New York, supra,* and went so far as to set it forth in its opinion (*see*

quotation from *Nebbia, supra*). 173 Conn. at 472. Also *see* reference to *Nebbia* analysis in *All Brands Importers v. Dept. of Liquor Control,* 213 Conn. 184, 203, 567 A.2d 1156 (1989).

In any event, *Vachon* made its procedural due process analysis under the federal due process clause referencing federal case law and found no violation of that clause or the state due process clause based on that analysis. 140 Conn. at 485-86.

On the basis of the foregoing analysis, the court concludes that our appellate courts have, in fact, interpreted federal procedural due process in a way that is consistent with *Bahr* even if it can be said that that case rested on state grounds. Being a trial court, this court is bound by that analysis.

But the court, in any event, will address the federal procedural due process claim on the supposition that its view is incorrect.

The test for federal procedural due process has been set forth in *Matthews v. Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). That case held that when a private interest is affected what process is due depends on "the risk of an erroneous deprivation of such interest through the procedure used and the probable value, if any, of additional or substitute safeguards 'and' the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 335.

Cases like *Connecticut v. Doehr,* 501 U.S. 1, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991), and *Memphis Light,*



*Gas and Water Division v. Craft,* 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978), basically follow the direction given by the *Matthews* analysis.

Two quotes from 16B Am. Jur. 2d, "Constitutional Law" nicely sum up the law in this area in their view of the application of *Matthews* to particular cases:

> The requirements of due process frequently vary with the type of proceeding involved. Procedural due process in the administrative setting does not always require application of the judicial model. Due process is flexible and calls for such procedural protections as the particular situation demands; the quantum and quality of the process due in a particular situation depends on the need to serve the due process function of minimizing the risk of error in decision making.

(§ 904, p. 490). *See Hannah v. Larche,* 363 U.S. 420, 442, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960); *Dixon v. Love,* 431 U.S. 105, 112, 52 L. Ed. 2d 172, 97 S. Ct. 1723 et seq. (1977); *Gilbert v. Homar,* 520 U.S. 924, 928, 138 L. Ed. 2d 120, 117 S. Ct. 1807 et seq. (1997). The Am. Jur. 2d article makes another pertinent observation:

> Though the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.

(§ 902, p. 489). *See Mackey v. Montrym,* 443 U.S. 1, 13, 61 L. Ed. 2d 321, 99 S. Ct. 2612 (1979).

And it is also true that "the due process clause does not . . . require a state to adopt one procedure over another

on the basis that it may produce results more favorable to the party challenging the existing procedure." *Heller v. Doe,* 509 U.S. 312, 332, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993), quoting from *Medina v. California,* 505 U.S. 437, 451, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992) (§ 908 16B Am. Jur. 2d, p. 498).

The plaintiffs rely heavily on *Memphis Light, Gas and Water Division v. Craft, supra,* but nothing in that opinion differs from any of the just stated principles. In that case, a municipal agency cut off the homeowner's utilities. At 436 U.S. at 20, the court said that "Although utility service may be restored ultimately, the cessation of essential services for any appreciable length of time works a uniquely final deprivation." The court said in some circumstances all prior process can be dispensed with, but found that "exceptions to the requirement of some due process are not present here." *Id.* at 20.

The heart of the court's opinion is set forth at 436 U.S. at 19. There, the court said:

> Ordinarily, due process of law requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest . . . On occasion, this court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional procedural safeguards . . .

The plaintiffs in these cases have had condemnation proceedings filed against their property. This litigation is about whether the takings should stand, but it is quite



true that the plaintiffs have to the present suffered a deleterious effect on their property rights. But federal procedural due process even given these factors does not require a particular type of hearing at a particular stage or, in some cases, a pre-deprivation hearing at all; in *Shaumyan v. O'Niell,* 987 F.2d 122 (2nd Cir. 1993), the court held homeowners were not deprived of their property without due process as a result of the attachment of their homes by a home repair contractor pursuant to our state's prejudgment attachment statute which did not require a pre-deprivation hearing or the posting of bond (paraphrasing 16B Am. Jur. 2d at footnote 64, p. 492).

In summary, the process that is due depends, as *Matthews* indicates, on a variety of factors, such as the property interest affected, the nature of the deprivation, the purpose of the deprivation, the competing interests of all the parties involved with the question of the propriety of the taking, the possibility of error factor. What due process does mandate is that "some kind of hearing is required at some time before a person is finally deprived of his or her property in interest." *Wolf v. McDonnell,* 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974).

*Bahr* arose under the Connecticut Redevelopment Act, Chapter 130, and is a good starting point for the analysis of the procedural due process claim given the foregoing observations. Although the court in *Bahr* did not link it to the due process discussion, the court pointed out that members of the public, including presumably those affected by the agency decision, were given an opportunity to be heard on the redevelopment plan. In this case, a team of consultants was chosen by the NLDC in June 1998, and over the course of several months, considered several alternative development plans for the Fort Trumbull area,

two of which entertained the possibility of retaining all or some of the existing residential property. Comment was elicited and received from the public during this process and the alternative chosen, in part, reflected that public comment. The MDP was then available for inspection by interested parties. Section 8-191 of Chapter 132 requires that the development agency shall "hold at least one public hearing" on the plan before it adopts it. The NLDC held such a hearing the evening the MDP was adopted, scores of people attended, the transcript was 47 pages long, notice of the meeting was given to the public. After that approval, the plan was adopted by the city council at a meeting open to the public. Once the MDP went through the approval process, numerous meetings were held throughout the Fort Trumbull development area, some with the plaintiffs in this litigation. Up to this time the actual taking of all residences was contemplated, but the plan could have been modified to preserve residences although this would have represented a substantial modification of the plan requiring a return to what was described as "ground zero" – the whole approval process would have to be reinitiated.

The plaintiffs point to the real effect takings have on their use of the property. An occupancy fee can be charged to the owners, tenants pay rent to the development agency. But the plaintiffs certainly long had notice of the fact that their properties were to be taken and at least the just-mentioned consequences could be forestalled if restraining orders were to be filed against the condemnor to prevent the condemnation. *Aposporos v. Urban Redevelopment Commission,* 259 Conn. 563, 790 A.2d 1167 (2002). The affected parties are not forced from their property and can seek injunctive relief even after a taking to reconvey the



property back to them. *Pequonnock Yacht Club, Inc. v. Bridgeport,* 259 Conn. 592, 790 A.2d 1178 (2002). Even if at that point a court decides adversely to their position, the property owners can request a temporary injunction to maintain the status quo while their case is being appealed. Affected parties can also receive compensation for the loss suffered by them as a result of the taking.

The plaintiffs still would understandably complain that even with these liberal equitable remedies, the burden would still be on them to retain counsel and resort to the courts and refer to cases that indicate this impinger on due process rights. But *Matthews* requires the government interest in the type of procedure utilized to be taken into account and this relates to the government function involved. Keeping in mind the just discussed opportunities given the affected public and these plaintiffs to make their interests and positions known as regards the development plan while it was being formulated and after it is adopted the question becomes how does that bear on the issue of whether all of this constituted procedural due process. The court concludes under *Matthews* that this inquiry requires an examination of the "government function" involved, i.e. here, eminent domain – and a balancing of these factors. None of the cases cited by the plaintiffs involve the exercise of eminent domain power. *Luedeke v. Village of New Paltz,* 63 F. Supp. 2d 215 (N. D. N.Y. 1999) (application of snow removal ordinance); *U.S. v. James Daniel Good Real Property,* 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993) (seizure of house through asset forfeiture statute); *Connecticut v. Doehr,* 501 U.S. 1, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991) (prejudgment attachment on real estate); *Kukanskis v. Griffith,* 180 Conn. 501, 430 A.2d 21 (1980) (lis pendens statute application).

Before the concept was embedded in our constitutions, the states exercised the power of eminent domain. In some cases, the people acting through their representatives have to have the effective right to seize property when it is done for a public purpose and compensation is paid to the property owner. In recognition of the importance of some of these public purposes, courts have been willing to give a certain deference to legislative decisions regarding eminent domain. The plaintiffs have not even set forth the parameters of the process they claim is due. Broad economic development and redevelopment projects could be hobbled if full scale hearings had to be afforded as to each piece of property within a redevelopment or economic development area – dozens or even hundreds of people might be affected by a redevelopment or development plan.

Also, in light of the nature of the eminent domain function and the long-recognized deference given to legislative decisions in this area regarding public purpose and the need to take particular property in light of that purpose, why is not the public input allowed in formulating the development plan and the need for a public hearing adequate to satisfy that other goal of procedural due process "minimizing the risk of error in decision making." In fact, what does that really mean in the eminent domain area and to satisfy it, what type of due process hearing would have to be conducted at the pre-deprivation stage? Would affected parties be allowed to bring in experts and witnesses – each affected party – could there be consolidation of such hearings? As far as that goes, there is no evidence the court is aware of that the committee formulating the MDP would have refused or had any policy barring the acceptance of any materials, studies or reports



from people in the Fort Trumbull area no matter what their position might be on how the MDP should finally turn out. All of this leads to a final observation about the relationship between the eminent domain clauses and due process clauses of the state and federal constitutions.

The due process clause should not be used in such a way as to defeat the practical operation of another constitutional provision, eminent domain, which in appropriate circumstances – a separate question – can greatly advance the public good. *Memphis Light* itself recognizes that practical considerations should dictate the scope and operation of procedural due process. One of the reasons due process was held to require some sort of hearing before utilities were cut off was indicated at 436 U.S. at 21, where the court said: "Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit." Forcing people to go to court to resolve such matters would be burdensome and in effect mean that it would be likely no challenge to a possibly illegal policy would ever be made. That certainly is not true here; we are not talking about cutting off the electricity or snow plow expenses. People's homes are involved in these types of cases, many people will often be affected by broad socio-economic legislation and singularly or together they can be expected to resort to the courts. Given the panoply of remedies available and the importance of the policies behind eminent domain, the court cannot say that balanced against the plaintiffs' admittedly important interest it would violate federal procedural due process to have them resort to those remedies, especially in light of the input allowed during the formulation of

development plans and the approval process and the fact that the plan can be amended.

Neither do cases like *Connecticut v. Doehr,* 501 U.S. 1, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991), or *Kukanis* [sic] *v. Griffith,* 180 Conn. 501 (1980), alter the court's view of an appropriate analysis under *Memphis Light* and *Matthews.* In neither case was an important government interest involved which could be deleteriously affected by formalized pre-condemnation hearings – whatever they may be – and also no input at all was permitted by the party affected before the complained of ex parte action was allowed.

In *Kukanis,* in fact, the court at 180 Conn. at p. 510, made comments concerning federal due process which underline how different the case now before the court is from the unconstitutional procedure authorized by the lis pendens statute under examination in that case. The court said:

> While it is true that a flexible test for determining the existence of due process is used, and that prior hearing is not constitutionally mandated in every case, the Connecticut lis pendens statutes fail to provide even the barest minimum of due process protection. *Most conspicuously absent is any provision whatsoever for any sort of a timely hearing, either before, or after the recording of the notice of lis pendens,* which would give the property owner an opportunity to be heard or require the party recording the notice to demonstrate in any way the probability of prevailing on the underlying action. *The statutes allow the notice of lis pendens to continue indefinitely without any further action on the part of the party recording, during which time the property owner is without*



> *recourse to the courts to contest the merits of the underlying claim.*

(Emphasis added.)

The equitable remedies available to litigants in eminent domain cases in our state remove the concerns emphasized above. It has been said that the "duration of any potentially wrongful property interest under a state's procedures is an important factor" (§ 905, 16B Am. Jur. 2d p. 495, citing *Mackey v. Montrym,* 443 U.S. 1, 61 L. Ed. 2d 321, 99 S. Ct. 2612 (1979)). Under Connecticut procedure, equitable relief can be resorted to for the purpose of preventing the condemnation itself once it has been approved (previously noted). *See Aposporos* case, *supra.*

Finally, when a due process analysis is being conducted, it is often instructive to examine how jurisdictions throughout the nation confront a problem – here, the procedural method of challenging the exercise of the power of eminent domain. Cf. Justice Rehnquist's mode of analysis in *Washington v. Glucksberg,* 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997), deciding issue of substantive due process, in part, he looked to legal practices and traditions in the states; *see also Corn Exchange Bank v. Coler,* 280 U.S. 218, 222-23, 74 L. Ed. 378, 50 S. Ct. 94. The court has read many cases in this area and, at least as of the date they were decided, several seem to contemplate a procedure similar to what we have in our state under Chapter 132 and other statutory exercises of the power of eminent domain. That is, takings are challenged in court in actions brought by the parties affected. *See In re Brown v. McMorran,* 39 Misc. 2d 716, 241 N.Y.S.2d 483 (1963); *Cannata v. City of New York,* 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (N.Y. 1962);

*Tierney v. Planned Industrial Expansion Authority,* 742 S.W.2d 146 (Kan. 1987); *Greenup County v. Utilities Commission,* 632 S.W.2d 463 (Ky. 1982); *Stewart v. El Paso,* 62 Tex. Civ. App. 144, 130 S.W. 590 (Tex. 1910); *Edens v. City of Columbia,* 228 S.C. 563, 91 S.E.2d 280 (S.C. 1956); *Hogue v. Port of Seattle,* 54 Wash. 2d 799, 341 P.2d 171 (Wash. 1959); *Merrill v. City of Manchester,* 127 N.H. 234, 499 A.2d 216 (N.H. 1985); *Griffin v. Bendick,* 463 A.2d 1340 (R.I. 1983); *Mayor & City Council of Baltimore v. Chertkof,* 293 Md. 32, 441 A.2d 1044 (Myd. 1982); *Adams v. Housing Authority,* 60 So. 2d 663 (Fla. 1952); *Grubstein v. Urban Renewal Agency,* 115 So. 2d 745 (Fla. 1959); *Falkner v. Northern States Power Co.,* 75 Wis. 2d 116, 248 N.W.2d 885 (Wis. 1977); *People v. Pegues,* 304 N.W.2d 455 (Mich. 1981); *Oliver v. City of Clairton,* 374 Pa. 333, 98 A.2d 47 (Pa. 1953). More recently Pennsylvania cases reflect a slightly different procedure; a declaration of taking is filed and the property owner commences litigation by filing objections which are then tried. *In re Matter of Condemnation of Real Property of Naaman King,* 124 Pa. Cmmw. 472, 556 A.2d 527 (Pa. 1989); *White v. Redevelopment Authority,* 147 Pa. Cmmw. 175, 607 A.2d 314 (Pa. 1992). For federal cases, *see Mid Pipeline Co. v. Lario Enterprises,* 716 F. Supp. 511 (D. Kan. 1989); *Rosenthal & Rosenthal, Inc. v. NY State Urban Development Corp.,* 771 F.2d 44 (2nd Cir. 1985); *Hawaii Housing Auth. v. Midkiff,.* 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984); *Berman v. Parker,* 348 U.S. 26 (1954) (District of Columbia Land Agency was proceeding under act similar in structure to our Chapter 130 and Chapter 132; opponents of plan sought injunctive relief to enjoin condemnation of their property). Connecticut procedure on this issue under eminent domain procedural remedies does not appear unique.



In any event, for all the foregoing reasons, separately considered and together, the court does not accept the plaintiffs' objections to the taking based on the alleged violation of their rights to procedural due process under the Fourteenth Amendment to the United States Constitution.

Substantive Due Process

The plaintiffs have also made a claim of substantive due process relying on Article I, § 8 of our state constitution and the Fourteenth Amendment to the state constitution. They cite *Daniels v. Williams,* 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), and *Foucha v. Louisiana,* 504 U.S. 71, 79, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992), for two basic propositions. Substantive due process protects against arbitrary exercise of government power and it requires government action to bear a reasonable relationship to its purpose.

The plaintiffs rely on the same factual and legal arguments under this claim that they relied upon in making their arguments under the taking clauses of the state and federal constitution. Thus, a taking is unconstitutional if the condemnor acts unreasonably or in bad faith. *Bahr* at 146 Conn. p. 250; *Gohld,* 141 Conn. at p. 146. They argue the defendants acted unreasonably in preparing their road widening plans – taking of the plaintiffs was not reasonably necessary, standards are relaxed concerning planting strips, sidewalks, etc. in certain areas of Fort Trumbull, but not when doing so would save a home of one of the plaintiffs from demolition. The plaintiffs note that our law requires eminent domain to be strictly construed, yet New London exceeded its

powers violating state statutes and its own charter. Finally, the condemnation of plaintiffs' homes without future assurance of public use is unreasonable and an abuse of power.

The plaintiffs' argument fails for several reasons. The United States Supreme Court has made it quite clear that "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Graham v. Connor,* 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865; *Albright v. Oliver,* 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994); *U.S. v. Lanier,* 520 U.S. 259, 272, n.7, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997); *Portuondo v. Agard,* 529 U.S. 61, 74, 146 L. Ed. 2d 47, 120 S. Ct. 1119 (2000).

The court has taken this position because they have been reluctant to expand the concept of substantive due process. *County of Sacramento v. Lewis* 523 U.S. 833, 842, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998).

In *Collins v. Harker Heights,* 503 U.S. 115, 126, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992), the court said:

> As a general matter, the court has always been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this unchartered area are scarce and open ended . . . The doctrine of judicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.



The claims the plaintiffs have made under substantive due process can be accommodated under the taking clauses of the state and federal constitution and able counsel have performed that task very well in their briefs. It would be a dangerous course of action if trial or appellate judges, dissatisfied with the ambit of a particular provision of the constitution drafted by the founding fathers to protect a certain right could use vague concepts of substantive due process to expand, according to their own whim, the protections they deem more appropriate by relying on some notion of substantive due process. Long past should be the days inspired by cases like *Lochner v. New York,* 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), which under the guise of substantive due process struck down as arbitrary social and economic legislation of the New Deal which, whether one agreed with it or not, was enacted by popularly-elected representatives of the people. There is a whole body of law in our state, in other states and at the federal level which, under the taking clauses, protects the citizen from unreasonable exercise of the power of eminent domain and there is no need to go beyond the parameters of that protection. Certainly, the plaintiffs offer none in either their initial brief or reply brief.

There is another reason why the court believes substantive due process cannot be relied upon by the plaintiffs. In *Sylvia Development Corp. v. Calvert County,* 48 F.3d 810, 827 (4th Cir. 1995), the court set forth apparently generally accepted law (*see* 16B Am. Jur. 2d, § 914, p. 506) when it said: "The protection of substantive due process is indeed narrow and covers only state action which is so arbitrary and irrational, so unjustified by any circumstance or government interest, as to be literally

incapable of avoidance by any pre-deprivation procedural protections or adequate rectification by any post-deprivation state remedies."

Our state allows litigants to request injunctive relief to forestall condemnation, *see Aposporos v. Urban Redevelopment Corporation, supra,* and permits such relief to reverse the taking, as here, and to order the property reconveyed to the property owner, *Pequonnock Yacht Club, Inc. v. City of Bridgeport, supra.*

The court can ascertain no reason, and none has been offered, as to why our state constitution should be interpreted any differently than the federal constitution on this issue.

Therefore, the court concludes the plaintiffs cannot make a claim of a violation of substantive due process under the state or federal constitution.

Temporary Injunction

The court has granted the request for permanent injunctive relief as to the plaintiffs' properties on parcel 4A, but has denied that relief as to the properties on parcel 3. This discussion then will be confined to whether a temporary injunction should be granted barring demolition of the homes in parcel 3 until the matter is decided on appeal. The parties entered into a stipulation concerning this question. Basically, the stipulation is to the effect that upon final review of the plaintiffs' complaint at trial, the court would separately consider both plaintiffs' request for temporary injunctive relief under the standards for a temporary injunction and the request for permanent injunctive relief. If the court were to render a judgment



adverse to them, the plaintiffs were to be able to apply to this court "representing that they intend to appeal the case . . . , and praying that the terms of this Pretrial Stipulation may be continued until final decision upon said appeal." The defendants under the terms of the stipulation reserved the right to oppose any such application (to the trial court) pursuant to Connecticut General Statutes § 52-476:

> Sec. 52-476. Continuance pending appeal. When a temporary injunction has been granted and upon final hearing judgment has been rendered adverse to its continuance, either party may apply to the court rendering the judgment, representing that he intends to appeal the case to the court having jurisdiction and praying that the temporary injunction may be continued until the final decision therein. Unless the court is of the opinion that great and irreparable injury will be done by the further continuance of the injunction, or that the application was made only for delay and not in good faith, the court shall continue the injunction until a final decision is rendered in the court having jurisdiction.

The parties further agreed that there would be one trial on both the request for temporary and permanent injunction.

The city seems to argue that because the homes were not demolished during the trial, the temporary injunction question is moot – where is the irreparable harm? The court accepts the plaintiffs' observation as to this position. The whole point of the stipulation was to determine what would happen to the plaintiffs' homes *after* the trial and to set forth the guidelines by which the court would decide this discrete issue. The only reasonable interpretation of

the stipulation is that the plaintiffs have a right to argue, as they do now, that despite the court's adverse ruling as to the homes on parcel 3, the court should enjoin the defendants from demolishing these homes pending final resolution of these matters on appeal.

The same observation applies to a position taken by the defendant NLDC where it argues at one point that: "If the court finds for the defendants on plaintiffs' request for a permanent injunction, it must also deny the plaintiffs' request for a temporary injunction because any doubt which remains about the probability of the plaintiffs' success on the merits will have been extinguished by the court's decision." But the stipulation of the parties explicitly says, "The parties further agree that there will be one trial on both the request for a Temporary Injunction and the plaintiffs' request for a permanent injunction. Contemporaneously with its decision on the merits of the permanent injunction, the trial court shall issue a decision on the temporary injunction under the proper standards for the issuance of a temporary injunction for purposes of Connecticut General Statutes § 52-476 and the Superior Court decision in *Friends of Hillhouse v. Yale University,* 24 Conn. L. Rptr. 515 (1999)." In *Friends of Hillhouse,* no temporary injunction was in effect so the court allowed the demolition to proceed even though an appeal was pending. Section 52-476 could therefore not apply. In this case, it was to the advantage of both sides to avoid the delay and possible duplication of effort that could arise if there was to be a hearing first on the temporary injunction. Also, a decision on a preliminary injunction would give no right of appeal to the losing party. That is why a two-track type of hearing was to be conducted with the court considering the right to the temporary injunction separately from what it



might also decide on the permanent injunction. Otherwise, the just quoted language of the stipulation is inexplicable and any protections sought to be achieved by the plaintiffs would have been completely illusory in a scenario where they lost the request for a permanent injunction. But the only reasonable interpretation of the stipulation is that its purpose was to ensure the plaintiffs' right to argue against the demolition of the homes, even if they lost their request for permanent injunctive relief. At another point in its brief, the NLDC appears to concede that by saying: "The significance of Connecticut General Statutes § 52-476 is that if the plaintiffs prevail in their request for a temporary injunction and lose their request for a permanent injunction, the burden would then shift to the defendants to prove that 'great and irreparable injury will be done by the further continuance of the injunction' in order to prevent the injunction from continuing."

The court will perform the task *all parties* assigned to it and will decide the temporary injunction separately from the permanent injunction question *and* if it is to perform that task in a fair manner, it cannot conclude that because it has denied the request for permanent injunctive relief as to the parcel 3 homes then ipso facto, the request for temporary injunctive relief must therefore be denied.

First, the court will determine whether a temporary injunction should issue. The law on this issue was set forth in *Olcott v. Pendleton,* 128 Conn. 292, 22 A.2d 633 (1941), cited in *Griffin Hospital v. Commission on Hospitals,* 196 Conn. 451, 493 A.2d 229 (1985), and still good law. In that case, the *Olcott* court said:

> The principle purpose of such an injunction is to preserve the status quo until the rights of the parties can be finally determined after a hearing

> on the merits . . . In deciding whether it should be granted or, if granted, continued or dissolved, the court is called upon to balance the results which may be caused to one party or the other, and if it appears that to deny or dissolve it may result in great harm to the plaintiff and little to the defendant, the court may well exercise its discretion in favor of granting or continuing it, unless indeed, it is very clear that the plaintiff is without legal right.

128 Conn. at 295.

*Olcott* seems to say that on the chance of success on the merits prong of the test, the moving party need not show likelihood of success but only must show that it is not very clear that he or she will not be successful, a much more relaxed standard.

This is a so-called "balancing of equities test" approved in the *Griffin Hospital* case, 196 Conn. at p. 457. The analytical difficulty presented in these cases lies in the success on the merits aspect of the test. This court believes the analysis of the Second Circuit Court of Appeals as set forth in cases like *Triebwasser & Katz v. American Tel. & Tel. Co.,* 535 F.2d 1356 (2nd Cir. 1976); *Consolidated Gold Fields PLC v. Minorco,* 871 F.2d 252 (2nd Cir. 1989) (890 F.2d 569); and *SEC v. Unifund SAL,* 910 F.2d 1028 (2nd Cir. 1990), is instructive. Dobbs in his second edition of the *Law of Remedies,* Vol. 1, § 2.11(2), p. 254, fn. 5, gives a concise definition of that circuit's test for provisional injunctive orders:

> . . . if the probability of the plaintiff's success on the merits is more likely than not, that fact plus proof of irreparable harm will justify the injunction. If the plaintiff cannot show such a good



> probability of success but only shows "serious questions on the merits," then the plaintiff will have to show that her irreparable loss of rights will be greater than the defendants'.

Nothing about this refinement of *Olcott* is repugnant to that case or any balancing of equities test approved of in *Griffin Hospital.*

However, the defendant NLDC seeks to import another factor into the appropriate test which the court must employ to decide the temporary injunction request. It refers to other Second Circuit case law citing *Carpenter Technology Corporation v. City of Bridgeport Port Authority,* 180 F.3d 93 (2nd Cir. 1999), where the court said: "Because (the plaintiff) seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, it must establish a likelihood that it will succeed on the merits." *Id.* at 97. This is a stricter standard than that expressed in *Olcott, Griffin Hospital,* and the other Second Circuit cases just referred to by the court, *Triebwasser, Minorco* and *Unifund, supra.* A fuller statement of Second Circuit law than that expressed in *Carpenter Technology* is found, however, in *Time Warner Cable of N.Y.C. v. Bloomberg,* 118 F.3d 917 (2nd Cir. 1997), where the court said:

> This Circuit has offered differing views on the appropriate standard for issuance of a preliminary injunction against governmental action. We have sometimes required a strong showing of entitlement to a preliminary injunction against governmental action . . . , at least where the injunction "stays governmental action taken in the public interest pursuant to a . . . statutory scheme . . . or the injunction might adversely affect the public interest in a manner which cannot

> be compensated for by an injunction bond" . . . Judge Friendly expressed the view that the "serious question/balance of hardship test is not applicable where an injunction is sought against a sovereign . . . " (*See Mitchell v. Cuomo,* Friendly, J. dissenting.)

On the other hand, we have said that the "probability of success standard" need not always be followed merely because a movant seeks to enjoin governmental action . . ., and we have applied a lesser standard in suits against governmental entities . . . As *Haitian Centers* pointed out, in some litigation against the government, "no party has an exclusive claim on the public interest."[27]

Cases where the more rigorous *Carpenter Technology* standard was not employed in favor of the sovereign include *Patton v. Dole,* 806 F.2d 24 (2nd Cir. 1980), where a former midshipman in the Merchant Marine Academy sought a preliminary injunction to preclude the Secretaries of Transportation, Defense and Navy from compelling his involuntary induction after he voluntarily resigned from the Academy. The court at one point noted that: "Patton's prospect of involuntary naval service clearly outweighs defendants' temporary loss of the services of one able-bodied seaman." *Id.* at 30. In *Time Warner* itself, the court applied the balance of interest test, not the probability of success test, noting that unlike cases applying the more rigorous test the case before it was not one "where the injunction was sought to prevent the exercise of governmental regulatory authority. Here, the proposed action of the city in deciding what programming to place

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[27] *Haitian Centers Council, Inc. v. McNary,* 969 F.2d 1326 (2nd Cir. 1992).



on one of its reserved PEG channels is more akin to the sort of propriety action in a federally-regulated field, that if undertaken by a state, has sometimes been said to waive the defense of sovereign immunity." 118 F.3d at pp. 923-24. In *Haitian Centers, supra,* various organizations and Haitian aliens challenged procedures under an interdiction program with respect to people fleeing Haiti set forth in a presidential executive order. The government claimed its conduct was taken pursuant to the Congress' broad grant of authority. The court rejected the notion that the "serious questions" prong of the preliminary injunction standard was not available to the movants but the more rigorous probability of success standard since government action was involved. The court pointed out in cases using that standard where government action was sought to be enjoined "private litigants sought to enjoin a governmental agency from taking action in the public interest authorized by a specific statute." In the case before it, the court, as noted, concluded "no party has an exclusive claim on the public interest and in any event the likelihood of success prong need not always be followed merely because a movant seeks to enjoin governmental action." 969 F.2d at pp. 1338-39.

This court agrees; given the facts and circumstances here, the balance of interests/serious questions test, not the likelihood of success test, should be applied even though governmental entities will have their desired action stayed.

We are not concerned with staying some broad, ongoing statutory scheme aimed at classes of people of which particular plaintiffs are only a part. The eminent domain power is here being applied to discrete individuals and their property and the question is the propriety of the

particular exercise of that power in these specific instances. Perhaps more to the point, this is not the type of government action, the staying of which will have an immediate effect upon decided-upon government policy. That may be true in some eminent domain cases, but here, eminent domain law, as this court decided when it ruled in the defendants' favor as to parcel 3 properties, gives government entities a reasonable amount of time to accomplish the development project. There is no government interest in demolishing the plaintiffs' property as such and, as will be discussed, any stay here will not delay the immediate accomplishment of the MDP.

In most instances involving redevelopment plans under Chapter 130 or economic development plans under Chapter 132, there is no credible reason that can be offered, and none was given here, to think that allowing the appellate process to work itself out will interfere with the accomplishment of the development plan or even delay it. The defendants can immediately appeal even this stay.

Finally, the plaintiffs' arguments are under the taking clause of the state and federal constitution. Those provisions define the public interest by, in effect, providing no one's property can be taken even if compensation is offered unless it is taken for a public use. Therefore, the defendant government entities cannot make an exclusive claim to the public interest, the public has recognized the interest the plaintiffs should have as of right in their property by means of constitutional bestowal.

Besides, in several instances throughout this decision, it is made clear that the authority of the city and the NLDC to exercise eminent domain power was being challenged – did Chapter 132 give that right, does the city



charter authorize the exercise of eminent domain power, is the NLDC an agent of the city, did Pfizer call the tune here so that it cannot be said that the city was exercising eminent domain power for its own purposes, etc.? The court decided these matters in favor of the defendants. But the court said in *Simmons v. State,* 160 Conn. 492, 500, 280 A.2d 351 (1971), that: "The authority to condemn is to be strictly construed in favor of the owner and against the condemnor and the prescribed method of taking must be strictly pursued." It would be incongruous to dilute and skewer the constitutional rights the plaintiffs have under the taking clause per *Simmons* to satisfy a Second Circuit exception to the usual test used to determine whether a preliminary injunction should issue based on the fact that the government is sought to be enjoined.

The court will not use the *Carpenter Technology* test, but the test set out in *Olcott* and *Griffin Hospital.* Using that test, it is clear to the court that the standards for a temporary injunction have been met. The plaintiffs in parcel 3 will suffer irreparable harm if their homes are demolished. The fact that if such action occurs, they will receive compensation provides no refutation of that conclusion since that result only ensues if their property has been seized for a "public use" which is an issue intrinsic to the whole litigation. The harm to the defendants certainly at the time of the hearing was de minimis – they agreed to the stay until the time of trial. In any event, a development agreement has not been signed, and even if one were to be signed, there is no prospect of immediate development. Nor was any evidence introduced at trial that demolition of these homes, right now or at any predictable time in the near future, would in any way mean development would be likely to occur sooner rather than later –

let alone that it would affect in any way whether a development agreement is to be signed, the lynchpin for any development.

Also, using temporary injunction standards and paying due attention to the preliminary pleadings, evidence brought out at trial and three hundred pages of briefs, this court cannot say fairly that "it is very clear that the plaintiff(s) [are] without legal right." (*See Olcott*, cf. Second Circuit test.) This is true for the court even in light of its decision on permanent injunctive relief. The court appreciates that reasonable judges can differ on the issues presented, several appellate courts in other states have taken positions differing from this court's conclusions. Serious legal issues are presented.

Relying on the foregoing, the court concludes that the plaintiffs are entitled temporary injunctive relief. Having reached that conclusion, the parties' stipulation now requires the court to apply § 52-476. What does our court say about that statute? In *Tomasso Bros., Inc. v. October Twenty Five, Inc.*, 230 Conn. 641, 657, 646 A.2d 133 (1994), the court gives that provision of our laws the common sense reading the statutory language suggested: "Section 52-476 provides that if a temporary injunction was initially granted and later dissolved after a final hearing on the merits, and either party intends to appeal, there is a presumption in favor of granting the application to continue the temporary injunction pending appeal. Thus, the statute reflects the importance placed by the legislature on maintaining the status quo pending appeal."

Using the standards of § 52-476, a stay pending appeal is certainly warranted if not demanded by the circumstances of this case. The plaintiffs have a good faith



desire to keep their homes and their position has been argued by skilled lawyers who have presented complicated and excellent arguments for their clients' position at trial and through lengthy briefs referring, as noted in some instances, to appellate law from other jurisdictions which this court may have disagreed with, but which address issues our Supreme Court has not addressed. This litigation has been brought in good faith to protect important rights raising important claims that have merit and which an appellate court may very well agree with. Also, the court, for reasons already stated, cannot say a stay on the demolition of these properties will cause great and irreparable harm to the defendants when balanced against the prospective harm to the plaintiffs.

There is an added reason why the court concludes that a stay should be granted to the demolition of homes in parcel 3. This court in a previous section of this tome discussed the issue of procedural due process. The court concluded the process given was due because (1) at least some input was given property owners prior to and even after the adoption of the MDP – input that is to people formulating and charged with approving and administering the plan; (2) and such a result was necessitated by the very nature of eminent domain and the required policies and goals supporting its exercise. One of the primary purposes of procedural due process is to ensure, as far as is possible, error-free decision making. Many novel issues have been raised in this case not explicitly decided by our appellate courts. For that reason, given the paramount purpose of procedural due process or at least given concerns akin to that policy, this court does not believe it is appropriate based on this record, to deprive the plaintiffs of the opportunity to resort to the appellate courts to

finally determine, before their homes are demolished, whether this court committed error.

In any event for the just stated reason and/or previously stated reasons, the court will grant the plaintiffs' request for a stay as regards the demolition of homes in parcel 3.

Conclusion

The court grants permanent injunctive relief against the demolition of the plaintiffs' properties in parcel 4A, but denies permanent injunctive relief against condemnation to the plaintiffs who own property in parcel 3. Pursuant to this order, the Statements of Compensation and Certificates of Taking filed against these properties should be dismissed.

However, the court will grant a temporary injunction against demolition of the properties in parcel 3 pending a final resolution of this matter in the appellate courts.

Corradino, J.

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**SUPREME COURT**

**STATE OF CONNECTICUT**

**NO. SC 16742**

**SUZETTE KELO ET AL.**

**v.**

**CITY OF NEW LONDON : APRIL 20, 2004**

**ORDER**

THE MOTION OF THE PLAINTIFFS, FILED MARCH 29, 2004, FOR STAY FOR EXECUTION PENDING DECISION BY UNITED STATES SUPREME COURT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **GRANTED, WITHOUT CONDITIONS**. THE MOTION IS GRANTED UNTIL THE EXPIRATION OF THE TIME TO PETITION TO THE UNITED STATES SUPREME COURT OR, IF A PETITION IS FILED, UNTIL THAT COURT HAS TAKEN ACTION IN THIS CASE, EITHER BY A DENIAL OF THE PETITION FOR CERTIORARI OR, IF APPLICABLE, BY A DECISION ON THE MERITS.

BY THE COURT,

/s/ Michele T. Angers
CHIEF CLERK

NOTICE SENT: APRIL 21, 2004
CONWAY & LONDREGAN, P.C.
WALLER, SMITH & PALMER, P.C.
MATTHEW H. GREENE
SCOTT WILLIAM SAWYER
SCOTT G. BULLOCK, PRO HAC VICE
DANA BERLINER, PRO HAC VICE
HON. THOMAS J. CORRADINO

CLERK, NEW LONDON SUPERIOR COURT
(CV01-0557299S)
REPORTER OF JUDICIAL DECISIONS

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**SUPREME COURT**

**STATE OF CONNECTICUT**

**NO. SC 16742**

**SUZETTE KELO ET AL.**

**v.**

**CITY OF NEW LONDON : APRIL 20, 2004**

**ORDER**

THE MOTION OF THE PLAINTIFFS, FILED MARCH 29, 2004, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **DENIED**.

BY THE COURT,

/s/ Michele T. Angers
CHIEF CLERK

NOTICE SENT: APRIL 21, 2004
CONWAY & LONDREGAN, P.C.
WALLER, SMITH & PALMER, P.C.
MATTHEW H. GREENE
SCOTT WILLIAM SAWYER
SCOTT G. BULLOCK, PRO HAC VICE
DANA BERLINER, PRO HAC VICE
HON. THOMAS J. CORRADINO
CLERK, NEW LONDON SUPERIOR COURT
(CV01-0557299S)
REPORTER OF JUDICIAL DECISIONS

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## U.S. Constitutional Provisions

United States Constitution Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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## Connecticut General Statutes
## Chapter 132 – Municipal Development Projects

§ 8-186. Declaration of policy.

It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

§ 8-187. Definitions.

As used in this chapter, (1) "municipality" means a town, city, consolidated town and city or consolidated town and borough; (2) "legislative body" means (A) the board of selectmen in a town that does not have a charter, special act or home rule ordinance relating to its government or (B) the council, board of aldermen, representative town meeting, board of selectmen or other elected legislative

body described in a charter, special act or home rule ordinance relating to government in a city, consolidated town and city, consolidated town and borough or a town having a charter, special act, consolidation ordinance or home rule ordinance relating to its government; (3) "development agency" means the agency designated by a municipality under section 8-188 through which the municipality may exercise the powers granted under this chapter; (4) "development project" means a project conducted by a municipality for the assembly, improvement and disposition of land or buildings or both to be used principally for industrial or business purposes and includes vacated commercial plants; (5) "vacated commercial plants" means buildings formerly used principally for business or industrial purposes of which more than fifty per cent of the usable floor space is, or which it is anticipated, within eighteen months, shall be, unused or substantially underutilized; (6) "project area" means the area within which the development project is located; (7) "commissioner" means the Commissioner of Economic and Community Development; (8) "planning commission" means the planning and zoning commission designated pursuant to section 8-4a or the planning commission created pursuant to section 8-19; (9) "real property" means land, subterranean or subsurface rights, structures, any and all easements, air rights and franchises and every estate, right or interest therein; and (10) "business purpose" includes, but is not limited to, any commercial, financial or retail enterprise and includes any enterprise which promotes tourism and any property that produces income.



§ 8-188. Designation of development agency.

Any municipality which has a planning commission is authorized, by vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency and exercise through such agency the powers granted under this chapter, except that the Quinnipiac Valley Development Corporation, organized and existing by virtue of the provisions of number 625 of the special acts of 1957, may be designated as a development agency, for the purposes of this chapter, to act as such within the geographical area specified in section 2 of said special act. Any municipality may, with the approval of the commissioner, designate a separate economic development commission, redevelopment agency or nonprofit development corporation as its development agency for each development project undertaken by the municipality pursuant to this chapter.

§ 8-189. Project plan.

The development agency may initiate a development project by preparing a project plan therefor in accordance with regulations of the commissioner. The project plan shall include: (a) A legal description of the land within the project area; (b) a description of the present condition and uses of such land or building; (c) a description of the types and locations of land uses or building uses proposed for the project area; (d) a description of the types and locations of present and proposed streets, sidewalks and sanitary, utility and other facilities and the types and locations of other proposed site improvements; (e) statements of the present and proposed zoning classification and subdivision status of the project area and the areas adjacent to the

project area; (f) a plan for relocating project-area occupants; (g) a financing plan; (h) an administrative plan; (i) a marketability and proposed land-use study or building use study if required by the commissioner; (j) appraisal reports and title searches; (k) a statement of the number of jobs which the development agency anticipates would be created by the project and the number and types of existing housing units in the municipality in which the project would be located, and in contiguous municipalities, which would be available to employees filling such jobs and (l) findings that the land and buildings within the project area will be used principally for industrial or business purposes; that the plan is in accordance with the plan of development for the municipality adopted by its planning commission and the plan of development of the regional planning agency, if any, for the region within which the municipality is located; that the plan is not inimical to any state-wide planning program objectives of the state or state agencies as coordinated by the Secretary of the Office of Policy and Management; that the project will contribute to the economic welfare of the municipality and the state; and that to carry out and administer the project, public action under this chapter is required. Any plan which has been prepared by a redevelopment agency under chapter 130 may be submitted by the development agency to the legislative body and to the commissioner in lieu of a plan initiated and prepared in accordance with this section, provided all other requirements of this chapter for obtaining the approval of the commissioner of the project plan are satisfied.

§ 8-190. Planning grants and special planning grants.

The commissioner is authorized to make planning grants and special planning grants to municipalities to



facilitate the planning of development projects, provided (a) no such grant shall be made in an amount in excess of fifty per cent of the estimated reasonable cost of such planning as determined by said commissioner and (b) the municipal share of such planning costs may be paid in noncash contributions, the value of such contributions to be determined by the commissioner. Planning grants and special planning grants may be made to any distressed municipality, as defined in section 32-9p, in amounts up to one hundred per cent of such planning costs if the commissioner determines that there is a substantial likelihood that the planned development project will be consummated. Special planning grants may be authorized for development projects consisting, predominantly, of industrial buildings, which it is anticipated, within eighteen months, shall have more than fifty per cent of the usable floor area unused or substantially underutilized and shall result in significant unemployment. Said commissioner may consult with and advise any development agency in the preparation of a plan for a development project.

§ 8-191. Adoption of plan.

(a) Before the development agency adopts a plan for a development project, (1) the planning commission of the municipality shall find that the plan is in accord with the plan of development for the municipality; and (2) the regional planning agency, if any, for the region within which such municipality is located shall find that such plan is in accord with the plan of development for such region, or if such agency fails to make a finding concerning said plan within thirty-five days of receipt thereof by such agency, it shall be presumed that such agency does not disapprove of such plan; and (3) the development agency

shall hold at least one public hearing thereon. Upon approval by the development agency, the agency shall submit such plan to the legislative body which shall vote to approve or disapprove the plan. After approval of the plan by the legislative body, the development agency shall submit the plan for approval to the commissioner. Notice of the time, place and subject of any public hearing held under this section shall be published once in a newspaper of general circulation in such town, such publication to be made not less than one week nor more than three weeks prior to the date set for the hearing. In the event the commissioner requires a substantial modification of the project plan before giving approval, then upon the completion of such modification such plan shall first have a public hearing and then be approved by the development agency and the legislative body. Any legislative body, agency or commission in approving a plan for a development project shall specifically approve the findings made therein.

(b) The provisions of subsection (a) with respect to submission of a development project to and approval by the commissioner shall not apply to a project for which no grant has been made under section 8-190 and no application for a grant is to be made under section 8-195.

§ 8-191a. Effect of commissioner's failure to make environmental evaluation.

No plan prepared and approved under sections 8-189 and 8-191, which includes the findings enumerated in subsection (k) of section 8-189, shall be invalid and deemed ineffective solely because of the commissioner's failure to comply with any provision of sections 22a-1a to 22a-1f, inclusive. All actions taken by the commissioner between February 1, 1975, and June 14, 1977, are validated.



Nothing in this section or section 8-191, 8-193 or 8-196 shall relieve the commissioner from his obligation to comply with sections 22a-1a to 22a-1f, inclusive, subsequent to June 14, 1977.

§ 8-192. Bond issues. Connecticut Development Authority. Federal and state aid. Taxes. Temporary notes.

(a) For the purpose of carrying out or administering a development plan or other functions authorized under this chapter, a municipality, acting by and through its development agency, is authorized, subject only to the limitations and procedures set forth in this section, to issue from time to time bonds of the municipality which are payable solely from and secured by: (1) A pledge of and lien upon any or all of the income, proceeds, revenues and property of development projects, including the proceeds of grants, loans, advances or contributions from the federal government, the state or other source, including financial assistance furnished by the municipality or any other public body pursuant to this chapter; (2) taxes or payments in lieu of taxes, or both, in whole or in part, allocated to and paid into a special fund of the municipality pursuant to the provisions of section 8-192a; or (3) any combination of the methods in subdivisions (1) and (2) of this section. Any bonds payable and secured as pro-vided in this subsection shall be authorized and the appropriation of the proceeds thereof approved by a resolution adopted by the legislative body of the municipality, notwithstanding the provisions of any other statute, local law or charter governing the authorization and issuance of bonds and the appropriation of the proceeds thereof generally by the municipality. No such resolution shall be adopted until after a public hearing has been held upon

such authorization. Notice of such hearing shall be published not less than five days prior to such hearing in a newspaper having a general circulation in the municipality. Such bonds shall be issued and sold in such manner; bear interest at such rate or rates, including variable rates to be determined in such manner as set forth in the proceedings authorizing the issuance of the bonds; provide for the payment of interest on such dates, whether before or at maturity; be issued at, above or below par; mature at such time or times not exceeding forty years from their date in the case of bonds issued to finance housing and facilities related thereto or thirty years from their date in all other cases; have such rank or priority; be payable in such medium of payment; be issued in such form, including, without limitation, registered or book-entry form; carry such registration and transfer privileges and be made subject to purchase or redemption before maturity at such price or prices and under such terms and conditions, including the condition that such bonds be subject to purchase or redemption on the demand of the owner thereof; and contain such other terms and particulars as the legislative body of the municipality or the officers delegated such authority by the legislative body of the municipality shall determine. The proceedings under which bonds are authorized to be issued may, subject to the provisions of the general statutes, contain any or all of the following: (A) Provisions respecting custody of the proceeds from the sale of the bonds and any bond anticipation notes, including any requirements that such proceeds be held separate from or not be commingled with other funds of the municipality; (B) provisions for the investment and reinvestment of bond proceeds until such proceeds are used to pay project costs and for the disposition of any excess bond proceeds or investment earnings



thereon; (C) provisions for the execution of reimbursement agreements, or similar agreements, in connection with credit facilities, including, but not limited to, letters of credit or policies of bond insurance, remarketing agreements and agreements for the purpose of moderating interest rate fluctuations; (D) provisions for the collection, custody, investment, reinvestment and use of the pledged revenues or other receipts, funds or moneys pledged for payment of bonds as provided in this section; (E) provisions regarding the establishment and maintenance of reserves, sinking funds and any other funds and accounts as shall be approved by the legislative body of the municipality in such amounts as may be established by the legislative body of the municipality, and the regulation and disposition thereof, including requirements that any such funds and accounts be held separate from or not be commingled with other funds of the municipality; (F) covenants for the establishment of maintenance requirements with respect to facilities and properties; (G) provisions for the issuance of additional bonds on a parity with bonds issued prior to the issuance of such additional bonds, including establishment of coverage requirements with respect to such bonds as herein provided; (H) provisions regarding the rights and remedies available in case of a default to the bond owners, note owners or any trustee under any contract, loan agreement, document, instrument or trust indenture, including the right to appoint a trustee to represent their interests upon occurrence of any event of default, as defined in any such default proceedings, provided that if any bonds or bond anticipation notes are secured by a trust indenture, the respective owners of such bonds or notes shall have no authority except as set forth in such trust indenture to appoint a separate trustee to represent them; and (I) other provisions or covenants of

like or different character from the foregoing which are consistent with this section and which the legislative body of the municipality determines in such proceedings are necessary, convenient or desirable in order to better secure the bonds or bond anticipation notes, or will tend to make the bonds or bond anticipation notes more marketable, and which are in the best interests of the municipality. Any provisions which may be included in proceedings authorizing the issuance of bonds under this section may be included in an indenture of trust duly approved in accordance with this section which secures the bonds and any notes issued in anticipation thereof, and in such case the provisions of such indenture shall be deemed to be a part of such proceedings as though they were expressly included therein. Any pledge made by the municipality shall be valid and binding from the time when the pledge is made, and any revenues or other receipts, funds or moneys so pledged and thereafter received by the municipality shall be subject immediately to the lien of such pledge without any physical delivery thereof or further act. The lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the municipality, irrespective of whether such parties have notice of such lien. Neither the resolution nor any other instrument by which a pledge is created need be recorded. The legislative body of the municipality may enter into a trust indenture by and between the municipality and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the municipality. Such trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bond owners and note owners as may be reasonable and proper and not in violation of law, including covenants



setting forth the duties of the municipality in relation to the exercise of its powers pursuant to this section and the custody, safeguarding and application of all moneys. The municipality may provide by such trust indenture for the payment of the pledged revenues or other receipts, funds or moneys to the trustee under such trust indenture or to any other depository, and for the method of disbursement thereof, with such safeguards and restrictions as it may determine. All expenses incurred in carrying out such trust indenture may be treated as project costs. Such bonds shall not be included in computing the aggregate indebtedness of the municipality, provided, if such bonds are made payable, in whole or in part, from funds contracted to be advanced by the municipality, the aggregate amount of such funds not yet appropriated to such purpose shall be included in computing the aggregate indebtedness of the municipality. As used in this section, "bonds" means any bonds, including refunding bonds, notes, temporary notes, interim certificates, debentures or other obligations. Temporary notes issued in accordance with this subsection in anticipation of the receipt of the proceeds of bond issues may be issued for a period of not more than five years and notes issued for a shorter period of time may be renewed by the issue of other notes, provided the period from the date of the original notes to the maturity of the last notes issued in renewal thereof shall not exceed five years.

(b) For the purpose of carrying out or administering a development plan or other functions authorized under this chapter, a municipality, acting by and through its development agency, may accept grants, advances, loans or other financial assistance from the federal government, the state or other source, and may do any and all things necessary or desirable to secure such financial aid. To

assist any development project located in the area in which it is authorized to act, any public body, including the state, or any city, town, borough, authority, district, subdivision or agency of the state, may, upon such terms as it determines, furnish service or facilities, provide property, lend or contribute funds, and take any other action of a character which it is authorized to perform for other purposes. To obtain funds for the temporary and definitive financing of any development project, a municipality may, in addition to other action authorized under this chapter or other law, issue its general obligation bonds, notes, temporary notes or other obligations secured by a pledge of the municipality's full faith and credit. Such bonds, notes, temporary notes and other obligations shall be authorized in accordance with the requirements for the authorization of such obligations generally by the municipality and the authorization, issuance and sale thereof shall be subject to the limitations contained in the general statutes, including provisions on the limitation of the aggregate indebtedness of the municipality. Notwithstanding the provisions of sections 7-264, 7-378 and 7-378a, and any other public or special act or charter or bond ordinance or bond resolution which limits the issuance or renewal of temporary notes issued in anticipation of the receipt of the proceeds of bond issues to a period of time of less than five years from the date of the original notes or requires a reduction in the principal amount of such notes or renewal notes prior to the fifth anniversary of the date of the original notes, such temporary notes may be issued for a period of not more than five years and notes issued for a shorter period of time may be renewed by the issue of other notes, provided the period from the date of the original notes to the maturity of the last notes issued in renewal thereof shall not exceed five years.



(c) Notwithstanding the provisions of subsections (a) and (b) of this section and any other public or special act or charter or bond ordinance or bond resolution which limits the renewal of temporary notes issued pursuant to said subsections in anticipation of the receipt of the proceeds of bond issues to five years or less from the date of the original notes, any municipality may renew temporary notes in accordance with the provisions of this section for an additional period of not more than four years from the end of such five-year period. The officers or board authorized to issue the bonds or determine the particulars of the bonds may adopt a resolution authorizing the renewal of temporary notes for such additional period under the following conditions: (1) All project grant payments and bond sale proceeds received shall be promptly applied toward project costs or toward payment of such temporary notes as the same shall become due and payable or shall be deposited in trust for such purposes; (2) no later than the end of each period of twelve months after the end of such five-year period a portion of such temporary notes equal to at least one-twentieth of the municipality's estimated cost of the project shall be retired from funds other than project grants or land sale proceeds or note proceeds; (3) the interest on all temporary notes renewed after such five-year period shall be paid from funds other than project grants or land sale proceeds or note proceeds; (4) the principal amount of each bond issue when sold shall be reduced by the amounts spent under subdivision (2) of this subsection, and the principal of such bonds shall be paid in annual installments commencing no later than one year from the date of issue; and (5) the maximum authorized term of the bonds when sold shall be reduced by not less than the number of months from the end of such five-year period to the date of issue. Any

anticipated federal or state project grants or land sale proceeds may be used in computing the municipality's cost of the project. Any municipality in which such resolution is passed shall include in its annual budget or shall otherwise appropriate sufficient funds to make the payments required by subdivisions (2) and (3) of this subsection.

(d) For the purposes of carrying out or administering a specified development plan authorized under this chapter, the Connecticut Development Authority may, upon a resolution with respect to such project adopted by the legislative body of the municipality, issue and administer bonds which are payable solely from and secured by the pledge and security provided for in subsection (a) of this section subject to the general terms and provisions of law applicable to the issuance of bonds by the Connecticut Development Authority, except that the provisions of subsection (b) of section 32-23j shall not apply.

§ 8-192a. Allocation of taxes on real or personal property in a development project.

Any development plan authorized under this chapter or any proceedings authorizing the issuance of bonds under this chapter may contain a provision that taxes, if any, identified in such plan or such authorizing proceeding and levied upon taxable real or personal property, or both, in a development project each year or payments in lieu of such taxes authorized pursuant to chapter 114, or both, by or for the benefit of any one or more municipalities, districts or other public taxing agencies after adoption of the development plan as provided by section 8-191 or such authorizing proceedings, as the case may be, shall be divided as follows: (a) In each fiscal year that portion of the taxes or payments in lieu of taxes, or both, which



would be produced by applying the then current tax rate of each of the taxing agencies to the total sum of the assessed value of the taxable property in the development project on the effective date of such adoption or the date of such authorizing proceedings, as the case may be, or on any date between such two dates which is identified in such proceedings, shall be allocated to and when collected shall be paid into the funds of the respective taxing agencies in the same manner as taxes by or for said taxing agencies on all other property are paid; and (b) that portion of the assessed taxes or the payments in lieu of taxes, or both, each fiscal year in excess of the amount referred to in subdivision (a) of this section shall be allocated to and when collected shall be paid into a special fund of the municipality or the Connecticut Development Authority as issuer of such bonds to be used in each fiscal year, first to pay the principal of and interest due in such fiscal year on loans, moneys advanced to, or indebtedness, whether funded, refunded, assumed, or otherwise, incurred by such municipality or the Connecticut Development Authority as issuer of such bonds to finance or refinance in whole or in part, such development project, and then, at the option of the municipality or the Connecticut Development Authority as issuer of such bonds, to purchase bonds issued for the project which has generated the tax increments or payments in lieu of taxes and then, at the option of the municipality or the Connecticut Development Authority as issuer of such bonds, to reimburse the provider of or reimbursement party with respect to any guarantee, letter of credit, policy of bond insurance, funds deposited in a debt service reserve fund, funds deposited as capitalized interest or other credit enhancement device used to secure payment of debt service on any bonds, notes or other indebtedness issued pursuant to section 8-192 to finance

or refinance such development project, to the extent of any payments of debt service made therefrom. Unless and until the total assessed valuation of the taxable property in a development project exceeds the total assessed value of the taxable property in such project as shown by the last assessment list referred to in subdivision (a) of this section, all of the taxes levied and collected and all of the payments in lieu of taxes due and collected upon the taxable property in such development project shall be paid into the funds of the respective taxing agencies. When such loans, advances, and indebtedness, if any, and interest thereon, and such debt service reimbursement to the provider of or reimbursement party with respect to such credit enhancement, have been paid in full, all moneys thereafter received from taxes or payments in lieu of taxes, or both, upon the taxable property in such development project shall be paid into the funds of the respective taxing agencies in the same manner as taxes on all other property are paid.

§ 8-192b. Temporary notes. Extension of time for renewal.

Notwithstanding the provisions of subsection (b) of section 8-192 and any other public or special act or charter or bond ordinance or bond resolution which limits the renewal of temporary notes issued pursuant to said subsection in anticipation of the receipt of the proceeds of bond issues to five years from the date of the original notes, any municipality may renew temporary notes in accordance with the provisions of this section for an additional period of not more than four years from the end of such five-year period. The officers or board authorized to issue the bonds or determine the particulars of the bonds may adopt a resolution authorizing the renewal of temporary notes for



such additional period under the following conditions: (a) All project grant payments and bond sale proceeds received shall be promptly applied toward project costs or toward payment of such temporary notes as the same shall become due and payable or shall be deposited in trust for such purposes; (b) no later than the end of each period of twelve months after the end of such five-year period a portion of such temporary notes equal to at least one-twentieth of the municipality's estimated net cost of the project shall be retired from funds other than project grants or land sale proceeds or note proceeds; (c) the interest on all temporary notes renewed after such five-year period shall be paid from funds other than project grants or land sale proceeds or note proceeds; (d) the principal amount of each bond issue when sold shall be reduced by the amounts spent under subdivision (b) of this section, and the principal of such bonds shall be paid in annual installments commencing no later than one year from the date of issue; and (e) the maximum authorized term of the bonds when sold shall be reduced by not less than the number of months from the end of such five-year period to the date of issue. Any anticipated federal or state project grants or land sale proceeds may be used in computing the municipality's net cost of the project. Any municipality in which such resolution is passed shall include in its annual budget or shall otherwise appropriate sufficient funds to make the payments required by subdivisions (b) and (c) of this section. In no event shall any notes renewed pursuant to the provisions of this section be due and payable later than June 30, 1988.

§ 8-193. Acquisition and transfer of real property. General powers of agency.

(a) After approval of the development plan as provided in this chapter, the development agency may proceed by purchase, lease, exchange or gift with the acquisition or rental of real property within the project area and real property and interests therein for rights-of-way and other easements to and from the project area. The development agency may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area and real property and interests therein for rights-of-way and other easements to and from the project area, in the same manner that a redevelopment agency may acquire real property under sections 8-128 to 8-133, inclusive, as if said sections specifically applied to development agencies. The development agency may, with the approval of the legislative body and, of the commissioner if any grants were made by the state under section 8-190 or 8-195 for such development project, and in the name of such municipality, transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property in the project area to any person, in accordance with the project plan and such disposition plans as may have been determined by the commissioner.

(b) A development agency shall have all the powers necessary or convenient to undertake and carry out development plans and development projects, including the power to clear, demolish, repair, rehabilitate, operate, or insure real property while it is in its possession, to make site improvements essential to the preparation of land for its use in accordance with the development plan,



to install, construct or reconstruct streets, utilities and other improvements necessary for carrying out the objectives of the development project, and, in distressed municipalities, as defined in section 32-9p, to lend funds to businesses and industries in a manner approved by the commissioner.

§ 8-194. Readjustment, relocation and removal of public service facilities.

As used in this section, "public service facility" includes any sewer, pipe, main, conduit, cable, wire, pole, tower, building or utility appliance owned or operated by an electric, gas, telephone, telegraph or water company. Whenever a development agency determines that the closing of any street or public right-of-way is provided for in a development plan adopted and approved in accordance with this chapter, or where the carrying out of such a development plan, including the construction of new improvements, requires the temporary or permanent readjustment, relocation or removal of a public service facility from a street or public right-of-way, the agency shall issue an appropriate order to the company owning or operating such facility, and such company shall permanently or temporarily readjust, relocate or remove the same promptly in accordance with such order, provided an equitable share of the cost of such readjustment, relocation or removal, including the cost of installing and constructing a facility of equal capacity in a new location, shall be borne by the development agency. Such equitable share shall be fifty per cent of such cost after the deduction hereinafter provided. In establishing the equitable share of the cost to be borne by the development agency, there shall be deducted from the cost of the readjusted, relocated

or removed facilities a sum based on a consideration of the value of materials salvaged from existing installations, the cost of the original installation, the life expectancy of the original facility and the unexpired term of such life use. For the purposes of determining the equitable share of the cost of such readjustment, relocation or removal, the books and records of the company shall be available for the inspection of the development agency. When any facility is removed from a street or public right-of-way to a private right-of-way, the development agency shall not pay for such private right-of-way. If the development agency and the company owning or operating such facility cannot agree upon the share of the cost to be borne by the development agency, either may apply to the superior court for the judicial district within which the street or public right-of-way is situated, or, if the court is not in session, to any judge thereof, for a determination of the cost to be borne by the development agency, and such court or such judge, after causing notice of the pendency of such application to be given to the other party, shall appoint a state referee to make such determination. Such referee, having given at least ten days' notice, to the parties interested, of the time and place of the hearing, shall hear both parties, shall take such testimony as such referee may deem material and shall thereupon determine the amount of the cost to be borne by the development agency and forthwith report to the court. If the report is accepted by the court, such determination shall, subject to right of appeal as in civil actions, be conclusive upon such parties.



§8-195. Development grants and special development grants.

(a) The commissioner is authorized to make development grants to municipalities for development projects, provided (1) no such grant shall be made for any such project until said commissioner has given approval to the plan therefor and (2) no such grant shall be made for any such project in an amount exceeding fifty per cent or, in the case of grants to any distressed municipality, as defined in section 32-9p, sixty-five per cent of the net cost, excluding, except as provided in this subsection, planning costs and special planning costs of such project as determined by said commissioner, and except that when two or more towns jointly initiate such a project in accordance with the provisions of section 8-196, such grant may be in an amount not exceeding seventy-five per cent of the net cost, excluding, except as provided in this subsection, planning costs and special planning costs of such project as determined by said commissioner. In distressed municipalities, as defined in section 32-9p, the commissioner may authorize such grants to be used for loans to businesses and industries locating, constructing, expanding, renovating or operating within development projects. Said commissioner may include planning costs or special planning costs of such project if such costs have already been paid or reimbursed by the municipality. Any distressed municipality's share of the cost of development projects may, to the extent permitted by federal law, be paid entirely or partially from amounts received by the municipality under any federal capital grant program. Special development grants, as provided in subsections (b) and (c), may be made to any municipality, regardless of whether or not it is a distressed municipality, in amounts up to one hundred per cent of such costs.

(b) The commissioner is authorized to make special development grants to municipalities to plan, install, construct or reconstruct utilities, sewerage and water lines and systems, and water towers and to acquire rights-of-way, therefore, to the boundaries of development projects. Such development grants may be made in amounts to their total costs, but not to exceed, ten per cent of the estimated physical development costs within the development project as last approved by the commissioner.

(c) The commissioner is authorized to make special development grants to municipalities for site improvement, utility, water, roads and sewerage facilities, renovation of building space, related engineering services, and for relocation expenses for the purpose of assisting industrial and business firms to locate or expand within development projects and which, upon such location or expansion, would result in a significant increase in employment or municipal real estate tax revenue to the municipality within which such development projects are located. All relocation assistance shall be in conformance with the provisions of chapter 135. Such grants may be made in amounts to their estimated total cost.

(d) In allocating funds available for the making of development grants, said commissioner is authorized to establish priorities among municipalities, taking into account their relative needs for development projects, the effects of proposed projects on existing housing and the extent to which particular projects are likely to advance the purposes of this chapter.



§ 8-196. Joint projects.

Any two or more municipalities by vote of their respective legislative bodies may, through their respective development agencies, jointly initiate a development project where the project area is to be located in one or more of such towns, and after approval by the commissioner of the project plan therefor if any state aid is to be requested under section 8-190 or 8-195, enter into, and thereafter amend, an agreement for the purposes of jointly carrying out the project plan through their respective development agencies, which agreement may include provisions for furnishing municipal services to, and sharing costs of, and revenues, including property tax and rental receipts, from, the development project. A proposed form of the agreement to be entered into by such towns shall be included as part of the project plan. In furtherance of its obligations under such an agreement, each town which is a party thereto may make appropriations and levy taxes in accordance with the provisions of the general statutes and may issue bonds in accordance with section 8-192.

§ 8-197. Furnishing of municipal services to other municipalities.

Any municipality by vote of its legislative body may for consideration furnish municipal services to, or have municipal services furnished to it by, one or more other municipalities. The consideration for such services may be based, in whole or in part, upon a formula which takes into account the taxes levied on so much of the real property situated in the municipality to which such services are to be furnished as, in the judgment of the legislative

body thereof, will be appreciably benefited by such services.

§ 8-198. Regulations.

The commissioner is authorized to make and enforce reasonable regulations to carry out the provisions of this chapter.

§ 8-199. Action to be taken in name of municipality.

Any development agency shall exercise its powers in the name of the municipality, and all bonds issued pursuant to this chapter shall be issued in the name of the municipality and title to land taken or acquired pursuant to a development plan shall be solely in the name of the municipality.

§ 8-200. Modification of development plan. Abandonment of plan and conveyance of property.

(a) A development plan may be modified at any time by the development agency, provided, if modified after the lease or sale of real property in the development project area, the modification must be consented to by the lessees or purchasers of such real property or their successor or successors in interest affected by the proposed modification. Where the proposed modification will substantially change the development plan as previously approved, the modification must be approved in the same manner as the development plan.

(b) If after three years from the date of approval of the development plan the development agency has been unable to transfer by sale or lease at fair market value or



fair rental value, as the case may be, the whole or any part of the real property acquired in the project area to any person in accordance with the project plan, and no grant has been made for such project pursuant to section 8-195, the municipality may, by vote of its legislative body, abandon the project plan and such real property may be conveyed free of any restriction, obligation or procedure imposed by the plan but shall be subject to all other local and state laws, ordinances or regulations.

§ 8-200a. Conversion of balance of prior loans to grants-in-aid.

The unpaid balance of all loans made under the provisions of chapter 131 of the general statutes, revised to 1966, shall, on May 23, 1969, become state grants-in-aid under the provisions of this chapter and shall not be repaid to the state in whole or in part.

§ 8-200b. Payment of administrative costs under prior law.

Administrative or other costs or expenses incurred by the state in connection with the carrying out of the provisions of chapter 131 of the general statutes, revised to 1966, shall be paid from the proceeds of bonds issued for grants-in-aid for industrial or research development projects from funds available for the purposes of this chapter.

(3)

No. 04-108

Supreme Court, U.S.
FILED
AUG 18 2004
OFFICE OF THE CLERK

# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

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## QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment contemplate that an economically distressed city may satisfy the Clause's public use requirement if that city employs its eminent domain power to condemn private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, as long as the proposed condemnation is rationally related to the accomplishment of those goals?

## LIST OF PARTIES

The petitioners, who were the plaintiffs below, are: Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Wilhelmina and Charles Dery, James and Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle.

The respondents, who were the defendants below are: the City of New London, Connecticut, and the New London Development Corporation.



## RULE 29.6 DISCLOSURE STATEMENT

The New London Development Corporation is a non-stock, non-profit economic development corporation designated by the City of New London, pursuant to Conn. Gen. Stat. §8-188, as the official development agency of the City of New London.

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## STATEMENT OF THE CASE

The respondent city of New London has suffered through decades of economic decline. (Pet. App., 196, 272-73).[1] These economic woes – which include an unemployment rate substantially higher than the rest of the state, a shrinking population, a dearth of new home and business construction and the 1996 departure of one of the region's principal employers – caused the Connecticut Office of Planning and Management to designate New London a "distressed municipality". (Pet. App., 272-73). Faced with this untenable economic situation, the respondent New London Development Corporation (NLDC) planned a development project for the city's Fort Trumbull section, the Fort Trumbull Municipal Development Plan (MDP), that would, in the words of the trial court, "provide an economic and social uplift for [the] city – jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city. . . . " (Pet. App., 197). The goal of the MDP – to rejuvenate New London's dying economy – clearly constitutes a public use and justifies the taking of the petitioners' properties through eminent domain.

The NLDC was established in 1978 to assist the city in planning economic development. (Pet. App., 3). The findings made by the trial court regarding the steady deterioration of New London's economy from the 1970's onwards demonstrate the dire need for such planning:

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[1] All references in the respondents' brief in opposition to the opinion of the Connecticut Supreme Court and the memorandum of decision of the trial court are to versions of those decisions appearing in the Appendix to the Petition for a Writ of Certiorari.

What is New London's situation? New London has been designated a "distressed municipality" by the state Office of Planning and Management. Since 1970 the population of New London has been declining. It has a higher rate of unemployment than the region where it is located and than the state. The Naval Undersea Warfare Center has closed down along with two other uses supported by NUWC, which delivered a substantial blow to the city's economy. Housing starts are almost nonexistent and there has been little reinvestment in the city. . . . [T]he "distressed municipality" classification takes into account all these just mentioned factors – age of the housing stock, lack of economic growth, and population growth, a high percentage of poverty and of subsidized housing. New London is a small city with relatively little open land to develop. It also has a high degree of non-taxable property – 56 percent.

The people preparing the MDP had available to them information in several reports corroborating the foregoing bleak picture. The Environmental Impact Evaluation (EIE) completed in November 1998, reported the city's population had not been lower since 1930. Its unemployment was 7.6 percent, whereas Norwich was at 6.3 percent, Groton at 4.7 percent, and the state at 4 percent. Over the past twenty years, the city's economy has been outperformed by the region and the state. The regional labor market was up 45 percent, the state 40 percent and New London 17 percent. Sixty-one percent of the city's housing was built before 1950 with a high percentage of vacant housing. . . . As regards the Fort Trumbull area itself, there was an 82 percent vacancy rate for non-residential buildings



and a 20 percent rate for noncommercial property. The tax revenue for this entire 90-acre area is only $325,000, which is considered low. A building inventory dated December 11, 1998, indicates that 50 percent of the construction in the Fort Trumbull area was pre-1950. Nonresidential buildings were in poor shape with only two ranked high in long-range market potential. Less than 12 percent of residential buildings were on average or better condition in December 1998. Since 1990, the report says existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect.

(Pet. App., 272-73).

In addition to the above-quoted findings – which the petitioners did not dispute, either at trial or before the Connecticut Supreme Court – the trial court describes New London as a "distressed municipality struggling with a downtown in need of development, poor job creation performance, population decline, and a limited tax base." (Pet. App., 327). In short, the trial court found New London to be a "city buffeted for decades by hard times and until recently declining prospects." (Pet. App., 196).

This bleak economic picture is a recurring theme in the opinion of the Connecticut Supreme Court as well. The Court's opinion notes the devastating effect on the city's economy of "the loss of approximately 1900 government sector positions, and the closure of the United States Naval Undersea Warfare Center in 1996. . . . " (Pet. App., 7). Later, in its discussion of the public use issue, the Court points to "the severe economic distress faced by the city, with its rising unemployment and stagnant tax

revenues. . . . " (Pet. App., 65). Finally, the Court's opinion contains several short but telling descriptions of New London as "a city just beginning to come out of the economic doldrums"; "an economically struggling city"; and "an economically distressed community." (Pet. App., 66, 104, 105).

The record is clear that New London was a city desperate for economic rejuvenation. In 1998, the opportunity for such rejuvenation arose when Pfizer, Inc., a world leader in pharmaceutical development, announced its plan to build a global research facility in New London, on a site adjacent to the Fort Trumbull section in which the petitioners' properties are located. In April 1998, after the Pfizer announcement, the New London city council gave its initial approval to an economic development plan for a 90-acre parcel of land in the Fort Trumbull area and the NLDC held a series of informal neighborhood meetings to educate the residents about the development process. In May 1998, the city formally authorized the NLDC to begin the development process. (Pet. App., 4).

As part of that process, the NLDC considered six possible plans of action for the Fort Trumbull area, five of which the NLDC ultimately rejected.[2] (Pet. App., 7).

[2] The alternate plans considered and rejected by the NLDC were: "(1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements." (Pet. App., 7 n.6).



Indeed, the development plan actually selected by the NLDC was the result of a painstaking process that included the preparation of an Environmental Impact Evaluation, a marketing study, topographical, floodplain and soil studies, a relocation plan, a building inventory in the Fort Trumbull section, and a series of public hearings and neighborhood meetings. (Pet. App., 4, 102, 103, 195, 268-69, 299-302).

The development plan area chosen by the NLDC after this careful selection process will occupy approximately ninety acres along the Thames River in New London adjacent to the Pfizer research facility and Fort Trumbull State Park. The area includes thirty-two acres formerly occupied by the now-defunct United States Naval Undersea Warfare Center. (Pet. App., 4). The plan divides the ninety acres into seven parcels:

- Parcel 1: A waterfront hotel and conference center, marinas for tourist boats and commercial vessels, and a public walkway along the waterfront.
- Parcel 2: Eighty new residential properties organized in a planned urban-style neighborhood and linked by a public walkway to the rest of the plan area; this parcel also includes space reserved for the new site of the United States Coast Guard Museum.
- Parcel 3: 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.
- Parcel 4: Divided into two subparcels – 4A, which will provide "park support," including parking and

retail services; and 4B, which will include a renovated marina for both recreational and commercial boating.

- Parcel 5: 140,000 square feet of office space, parking and retail space.
- Parcel 6: Development of water-dependent commercial uses.
- Parcel 7: Additional office space and/or research and development space.

(Pet. App., 5-6). Four properties owned by three of the petitioners are located in Parcel 3. Eleven properties owned by four of the petitioners are located in Parcel 4A. (Pet. App., 6).

The potential economic benefits of this plan to the people of New London are enormous. According to the Connecticut Supreme Court, the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes.

(Pet. App., 7). As found by the trial court, this influx of jobs and revenue will be critical in continuing the economic revitalization of the city. (Pet. App., 196, 282, 327).

In early 2000, the NLDC board approved the development plan; the New London city council approved it shortly thereafter and authorized the NLDC to acquire the



properties located in the plan area.[3] In October 2000, after months of unsuccessful negotiations with the petitioners, the NLDC voted to acquire their properties by eminent domain. In November 2000, the NLDC brought condemnation actions for the petitioners' properties. (Pet. App., 8). In December 2000, the petitioners filed an eight-count complaint seeking permanent injunctive relief barring the seizure and demolition of their properties. (Pet. App., 2, 8).

After a seven-day bench trial, the trial court upheld the takings with respect to the four properties located in Parcel 3, but agreed with the petitioners with respect to the eleven properties located in Parcel 4A and granted permanent injunctive relief as to those eleven properties. (Pet. App., 9). The trial court determined that the taking of property for a development plan that has the economic revitalization of a distressed city as its purpose satisfies the public use requirement of both the United States and Connecticut Constitutions. (Pet. App., 28). However, with respect to Parcel 4A, the trial court found that the takings were improper because the statements of public use were too uncertain to allow it to determine whether they were necessary to the fulfillment of the redevelopment plan. (Pet. App., 343-50).

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[3] As required by Connecticut law; see Conn. Gen. Stat. §8-191; the Connecticut Department of Economic and Community Development, the Connecticut Department of Environmental Protection, the Connecticut Office of Policy and Management and the Southeastern Connecticut Council of Governments also approved the development plan. (Pet. App., 8 n.8).

The petitioners appealed[4] and the respondents cross appealed the trial court's decision; and the Connecticut Supreme Court transferred the appeal and cross appeal to itself pursuant to Conn. Gen. Stat. §51-199(c). (Pet. App., 2 n.3). In a 4-3 decision, the Court held that

> the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

(Pet. App., 2). The Court therefore upheld the trial court's ruling with respect to Parcel 3. The Court further held that the trial court's findings with respect to the necessity of the takings on Parcel 4A were clearly erroneous and therefore remanded the case to the trial court with direction to render judgment for the defendants with respect to the eleven properties located in Parcel 4A. (Pet. App., 133).

In reaching these conclusions, the majority heeded this Court's prior decisions on the scope of the public use requirement – specifically *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) – and adopted a "broad purposive approach to the interpretation of the federal public use clause". (Pet. App., 39). This approach, in keeping with the deference to the legislature mandated in *Berman* and *Midkiff*, emphasizes "the legislative purpose and motive behind the

[4] In addition to their claim regarding the scope of the public use requirement of the federal constitution, the petitioners' appeal raised numerous issues of state law, none of which are before this Court.



taking, and give[s] substantial deference to the legislative determination of purpose." (Pet. App., 42).

Three justices concurred in part and dissented in part (in one opinion authored by Associate Justice Zarella). As an initial matter, the three dissenters "agree[d] with the conclusion of the majority" that "private economic development projects . . . which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions." (Pet. App., 171). The dissent also conceded that there was "very little evidence" that the development plan "was executed primarily for the benefit of private interests." (Pet. App., 186). However, the dissent took issue with the analytical process employed by the majority, which it viewed as too deferential. In place of the majority's "purposive" test, the dissent called for a heightened degree of judicial scrutiny to ensure that a taking for economic development will, in fact, result in a public benefit. (Pet. App., 134-90).

The petitioners subsequently filed a motion for reconsideration, which the Connecticut Supreme Court denied on April 20, 2004. (Pet. App., 427). On July 19, 2004, the petitioners filed their petition for a writ of certiorari asking this Court to review only "the limits under the public use requirement of the U.S. Constitution when government takes land for private economic development." (Pet., 5-6).

## REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

### I. THE DECISION OF THE CONNECTICUT SUPREME COURT THAT THE REVITALIZATION OF AN ECONOMICALLY-DISTRESSED CITY IS A PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT FOLLOWS THE CLEAR PRECEDENT LAID DOWN BY THIS COURT IN *BERMAN V. PARKER* AND *HAWAII HOUSING AUTHORITY V. MIDKIFF*.

The petitioners attempt to portray this case as presenting a substantial and unresolved question of federal constitutional law concerning the scope of the Fifth Amendment's public use requirement. In fact, the supposedly novel issue that the petitioners claim is crying out for attention is actually controlled by this Court's decisions in *Berman*, *supra*, and *Midkiff*, *supra*. The Connecticut Supreme Court's decision that the revitalization of an economically-distressed city is a valid reason to condemn private property, far from being radical or groundbreaking, is merely the natural outgrowth of the bedrock principle of those two cases – i.e., deference to a legislative determination of public use and the means chosen to effectuate that use. As such, *certiorari* is unwarranted.

#### A. This Court requires great deference to a legislative determination of what constitutes a public use.

It is black letter law that a reviewing court must accord great deference to a legislative determination of public use. As this Court noted in *Berman*, the power of eminent domain is merely one expression of a state's police power, which is the bailiwick of the legislature, and not



the judiciary. *Berman*, 348 U.S. at 32. *Berman* is clear as to the limits of judicial authority in this area:

> Subject to specific constitutional limitations, when the legislature has spoken, *the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved. *The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.*

*Id.* (emphasis added).

Thirty years later, in *Midkiff*, this Court reiterated and refined the holding of *Berman*. Although the courts have a role to play in reviewing the determination of a public use, that role "is an extremely narrow one." *Midkiff*, 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Because "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers[,]" *Midkiff*, 467 U.S. at 240, the standard of review for Takings Clause cases is extremely deferential: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. Therefore, a court should be unwilling to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be *palpably without reasonable foundation*.'" *Id.* (emphasis added) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

Moreover, the need for such deference – which was recognized by the Connecticut Supreme Court in the present case – does not depend on the nature of the public use at issue. Whether the purpose to be served by a condemnation is the elimination of blight (*Berman*), the dissolution of an oligarchic property ownership structure (*Midkiff*), or the revitalization of a depressed city through the creation of thousands of jobs and an increase in tax and other revenues, the *principle* remains the same: Unless the proffered public use is "palpably without reasonable foundation," a reviewing court should not go beyond its established role and second guess the legislature's determination of public use or a city's good-faith attempt to achieve it. As this Court recognized in *Berman* and *Midkiff*, state and municipal elected officials, and not unelected judges, are best suited to the task of serving the public interest in this area.

The petitioners seek to distinguish *Berman* and *Midkiff* based on the specific public purposes discussed in those two cases. The petitioners contend that while the elimination of blight and the regulation of oligopolies are traditional exercises of the police power, "neither *Berman* nor *Midkiff* necessarily controls how courts should evaluate the constitutionality of eminent domain for the sole purpose of economic development." (Pet., 24). This argument elides the crucial point of both cases, namely, that courts should be loath to question a legislative judgment as to public use or the means chosen by a municipality to effectuate that use. At the end of the day, it is therefore irrelevant that this case presents a *different* public purpose – the economic revitalization of a depressed city – because *Berman* and *Midkiff* dictate the outcome of this



case based not on their specific public purposes, but on their jurisprudential attitude.

### B. The Connecticut Legislature has declared economic development to be a public purpose, and the revitalization of New London through the proposed redevelopment plan will further that purpose.

As the Connecticut Supreme Court noted in its opinion, the Connecticut Legislature has clearly and unequivocally determined economic development, and the acquisition of private property necessary to further such development, to be public uses:

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in

> the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Conn. Gen. Stat. §8-186.

This statement – that ensuring Connecticut's economic welfare by promoting the growth of business and industry is a public use – is entitled to great deference from a reviewing court. However, even if it were not, it would satisfy this Court's broad view of the state's police power. Although that power is not readily susceptible of a complete definition, it clearly encompasses the traditional function of legislative government to enact economic, commercial and social legislation. *Midkiff*, 467 U.S. at 239-40. After all, among the diverse activities that this Court has held to fall within the police power are: public safety; see *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 439 (2002); control over advertising; see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); the establishment of regulatory or licensing schemes; see *Cleveland v. United States*, 531 U.S. 12, 21 (2000); and the compensation of personal injuries through tort remedies; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Certainly, promoting the economic health of a state by encouraging the development of new business and industry – and thereby ensuring jobs for that state's citizens and tax revenues for that state's coffers – qualifies as an exercise of the police power as well. Indeed, the Connecticut Supreme Court was unanimous on this point. (Pet. App., 42, 172). As the trial court observed, New London's economic distress is a condition "just as worthy of attention and dangerous to the economic and moral health of



the state as slum or blighted areas. . . . " (Pet. App., 255 n.10).

In this case, there can be little doubt that the development plan is rationally related to accomplishing the goal of promoting the state's economic health and encouraging the development of new business and industry – and the Connecticut judiciary properly "takes into account *the actual public benefit* from the taking." (Pet. App., 67) (emphasis added). As set forth *supra*, the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes.

(Pet. App., 7). In addition, the plan is projected to offer 230,000 square feet of space for offices, retail shops and industrial and other types of research and development. (Pet. App., 5-6). There simply are no grounds to say that declaring these uses to be of substantial benefit to the public is "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241. Nor have the petitioners shown that the trial court's factual determination, upheld on appeal, that *this* development plan is primarily for the public purpose of economic development, was improper. The Connecticut Supreme Court also was unanimous on this point.

In addition, in assessing the relationship between the declared public use and the means chosen to achieve it in New London, one must consider the economic doldrums

that prompted this redevelopment. As set forth in detail *supra*, New London has been depressed for decades, deteriorating economically under the weight of a declining population; unemployment significantly higher than the rest of Connecticut; an underdeveloped tax base; and the loss of one of the region's principal employers. (Pet. App., 7-8, 272-73). Seen in the light of these dire circumstances, the rejuvenation of New London's dying economy clearly is a public use, and the means chosen to effectuate that use – i.e., encouraging the development of business and industry by creating a locale for such business and industry to be situated – are more than reasonable.

### C. The Decision of the Connecticut Supreme Court Does Not Nullify the Public Use Requirement.

Finally, the petitioners' assertion that the purposive standard adopted by the Connecticut Supreme Court to evaluate municipal claims of public use "nullifies the public use clause of the U.S. Constitution" is without merit. First, the Court's analysis is consistent with the deference mandated by this Court in *Berman* and *Midkiff*. Neither of those cases even hinted at the need for a more searching level of scrutiny so long as the ends sought to be achieved through condemnation were ones in keeping with a state's police power.

Second, to the extent that the petitioners raise the specter of the arbitrary or capricious exercise of the power of eminent domain by municipalities without any judicial check, the Connecticut Supreme Court has demonstrated several times in the past few years that it will not tolerate such nefarious behavior. See *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167 (Conn. 2002) (reversing



condemnation due to inadequate findings of blight); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002) (affirming injunction against condemnation due to failure of defendants to consider integration of plaintiff's non-blighted property); *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of industrial park plan adopted in bad faith as pretext to thwart affordable housing development). Indeed, the Court's opinion in the present case reinforces that notion – specifically the Court's detailed discussion of the "particularly egregious set of facts" that led the Illinois Supreme Court to declare a taking unconstitutional in *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (*SWIDA*). The Connecticut Court's express acknowledgement that it may be appropriate to invalidate a taking when, as in the *SWIDA* case, an agency clearly has exercised its eminent domain authority for the benefit of another, specific private entity, belies the petitioners' contention that the *Kelo* decision drains the meaning and substance out of the public use requirement.

In sum, the petitioners' assertion that the Connecticut Supreme Court's decision is part of a disturbing "national phenomenon," and that there is an "urgent need for this Court to address the limits of eminent domain authority," is really no more than an exercise in the avoidance of unfavorable precedent. (Pet., 9). As the Connecticut Supreme Court concluded, the rule of deference laid down in this Court's decisions in *Berman* and *Midkiff* in fact controls this case and makes review unnecessary because the perceived federal question of great importance is a mere chimera.

## II. THERE IS NO SIGNIFICANT CONFLICT BETWEEN THE STATES AS TO THE SCOPE OF THE PUBLIC USE REQUIREMENT UNDER THE FEDERAL CONSTITUTION.

Faced with the stark reality that this Court's jurisprudence is inhospitable to their claims, the petitioners attempt to attract this Court's attention by manufacturing a massive conflict among the states regarding the scope of the public use requirement under the federal constitution. However, the dispute posited by the petitioners is, in fact, almost entirely a false conflict not worthy of this Court's intervention because the vast majority of the state court decisions cited involve an interpretation of *only* a state constitutional provision. As such, certiorari is unwarranted because this Court's role as final arbiter of the meaning of the federal constitution is not significantly implicated by this case.

As the petition for certiorari notes, eighteen states, including Connecticut, have considered whether economic development or revitalization is a public use: Arkansas, Delaware, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, South Carolina and Washington. The petitioners separate those states based on two criteria: (1) whether they hold economic development or revitalization to be a public use; and (2) what test they use to scrutinize municipal claims of public use. On these two bases, the petitioners warn of "confusion" among the states that necessitates this Court's intervention. (Pet., 10-21).

These two criteria ignore the most relevant factor for *certiorari* purposes, namely, whether the decisions in



question involve an interpretation of the public use requirement of the *federal* constitution. Tellingly, the petitioners consign the answer to this key question to three footnotes in their petition – not a surprising choice of placement, given what it reveals about the purported constitutional conflict. (Pet., 10-11 n.3-5).

Of the eighteen state court decisions cited by the petitioners, eleven clearly involve *only* the construction of a state constitutional provision: Arkansas, *City of Little Rock v. Raines*, 411 S.W.2d 486, 491 (Ark. 1967) (interpreting art. II, §§22 & 23 of the Arkansas Constitution); Florida, *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455-58 (Fla. 1975) (interpreting art. X, §6 of the Florida Constitution); Kentucky, *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6-8 (Ky. 1979) (interpreting §§13 & 242 of the Kentucky Constitution); Maine, *Opinion of the Justices*, 131 A.2d 904, 907-08 (Me. 1957) (interpreting art. I, §§6 & 21, and art. IV, pt. 3, §1 of the Maine Constitution); Maryland, *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 286-89 (Md. 1975) (interpreting art. III, §40 of the Maryland Constitution); Massachusetts, *Opinion of the Justices*, 250 N.E.2d 547, 550 (Mass. 1969) (interpreting various clauses of art. 89 of the Massachusetts Constitution); Michigan, *County of Wayne v. Hathcock*, ___ N.W.2d ___, 2004 WL 1724875 (Mich., July 30, 2004)[5] (interpreting art. 10, §2 of the

[5] *Hathcock*, which was decided after the petitioners filed their petition, overruled *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), which the petitioners cited, on the question of whether art. 10, §2 of the Michigan Constitution permitted a municipality to take property through eminent domain in order to alleviate unemployment and revitalize a community's economic base. *Hathcock*, ___ N.W.2d at ___, 2004 WL 1724875 at *8-15.

(Continued on following page)

Michigan Constitution); New Hampshire, *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985) (interpreting pt. I, art. 12 of the New Hampshire Constitution); New York, *Cannata v. City of New York*, 11 N.Y.2d 210, 211-12, *appeal dismissed*, 371 U.S. 4 (1962) (interpreting art. XVIII of the New York State Constitution); South Carolina, *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 855-56 (S.C. 2003) (interpreting art. I, §13 of the South Carolina Constitution); and Washington, *In re City of Seattle/The Westlake Project*, 638 P.2d 549, 554-57 (Wash. 1981) (interpreting art. I, §16 of the Washington Constitution).

Although these eleven decisions take varying views on the constitutionality of economic development as a public use and the proper degree of scrutiny to employ, none of them discuss or interpret the federal constitution.[6] As

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*Hathcock*, like *Poletown*, construes only the Michigan Constitution. While it is true that *Poletown* does contain one brief reference to this Court's decision in *Berman*, the reference relates only to the principle of deference to the legislature and not any substantive analysis of the federal constitution. Nor, for that matter, does *Poletown* contain another reference to *Berman*, or any other of this Court's Takings Clause cases. In any event, given the recent demise of *Poletown*, and given the fact that *Hathcock* is devoid of any reference to either the federal constitution or federal caselaw, the petitioners' reliance on *Poletown* is moot.

[6] The petitioners characterize the Florida, Maryland and Michigan decisions as "explicitly cit[ing] to the U.S. Constitution or federal cases." (Pet., 10). This is literally true, but extremely misleading.

In *Prince George's County*, the Court of Appeals of Maryland mentions the Fourteenth Amendment to the United States Constitution in a footnote for the sole purpose of distinguishing one of its own earlier decisions. See *Prince George's County*, 339 A.2d at 287 n.4 (citing *Herzinger v. City of Baltimore*, 98 A.2d 87 (Md. 1953)). The Maryland court's ruling, however, is based entirely on its construction of the Maryland Constitution.

(Continued on following page)



such, their differing interpretations of their own state constitutions do not call for this Court's intervention. See *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (United States Supreme Court is final arbiter only of meaning of United States Constitution).

In addition to those eleven state decisions based explicitly on their individual state constitutions, the decisions of two states cited by the petitioners – Kansas and Minnesota – are devoid of any citation to, or discussion of, *either* the federal constitution or their own state constitutions. See *General Building Contractors, LLC v. Board of Shawnee County Commissioners*, 66 P.3d 873 (Kan. 2003); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980). These two decisions cite and discuss only Kansas and Minnesota statutes. As neither case contains even the briefest mention of the federal constitution, neither offers any support to the petitioners' assertion of an interstate conflict over the meaning of the Takings Clause.

Finally, one state, Delaware, merely involves inconclusive *dicta*. See *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 484-85 (Del. 1958) (upholding condemnation to eliminate blight, but expressing "the very

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The petitioners' characterization of the Florida case, *Baycol*, is similarly flawed. *Baycol* cites the Fourteenth Amendment only in one footnote. *Baycol*, 315 So.2d at 455 n.3. Moreover, the entire substantive discussion in *Baycol* centers around four prior decisions of the Florida Supreme Court – *Grubstein v. Urban Renewal Agency of Tampa*, 115 So.2d 745 (Fla. 1959), *Panama City v. State*, 93 So.2d 608 (Fla. 1957), *Gate City Garage, Inc. v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953), and *Adams v. Housing Authority of Daytona Beach*, 60 So.2d 663 (Fla. 1952) – none of which mention the federal constitution.

As for the Michigan decision, see footnote 5, *supra*.

gravest doubt" as to the future constitutionality of such actions). In fact, although the petitioners seek to rely on *Randolph*, it is worth noting the actual holding of that decision, i.e., that the taking was for a public purpose.

Therefore, once the wheat has been separated from the chaff, the massive conflict discussed at length in the petition boils down to a disagreement among four states: Connecticut, Illinois, Montana and North Dakota. Of these four states, Connecticut and North Dakota; see *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 369 (N.D. 1996); have held that economic development constitutes a public use under the federal constitution; while Illinois and Montana have held that economic development is not a public use under the federal constitution; see *SWIDA*, *supra*, 768 N.E.2d at 9-11; *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995). This is hardly the yawning constitutional chasm alluded to by the petitioners.

Moreover, as with the petitioners' bold, but ultimately greatly exaggerated, claims as to the scale of this conflict, a little digging into the three cases other than *Kelo* reveals the lead beneath the gold gilt. The clearest example of this is the Illinois case, which, although it strikes down a condemnation for private economic development, does so based largely on the egregious and unusual facts of the case – specifically the fact that the development authority acted as a "default broker" for the private developer in question.[7] *SWIDA*, 768 N.E.2d at 10. It is axiomatic that if

[7] Although *SWIDA* cites to the federal constitution and to *Berman* and *Midkiff*, it relies more heavily on two of its own prior decisions, *Gaylord v. Sanitary District*, 68 N.E. 522, 524 (Ill. 1903), and *Limits Industrial R.R. Co. v. American Spiral Pipe Works*, 151 N.E.2d 567,

(Continued on following page)



the public purpose proffered for a taking is a charade formulated to cover up municipal misbehavior, a court should intervene. Such may have been the case in *SWIDA*, but it is emphatically not so here. The public benefits to the citizens of New London of the development plan are direct and substantial, and the petitioners do not claim that the decision to take their properties was the result of municipal malfeasance.

As for the Montana and North Dakota cases, they require a close inspection simply to locate *any* discussion of the federal constitution. Although both cases do mention the Fifth Amendment, their analysis is cursory at best – and neither case even mentions *Berman*, *Midkiff*, or any other of this Court's Takings Clause decisions. This Court should not exercise its *certiorari* discretion to resolve a supposed conflict between the states when two of the four states in question have engaged in no real substantive analysis of the federal issue.

Viewed without the entrancing fog of the petitioners' rhetoric, this disagreement between four state courts of last resort is simply too minor a conflict to merit this Court's attention. This Court already has struck the appropriate balance between the role of the courts and the

569-70 (Ill. 1926), to engraft onto Illinois law a requirement that property taken for a development project be available for public use as of right. *SWIDA*, 768 N.E.2d at 9-10. This Court specifically rejected that proposition in *Midkiff*, 467 U.S. at 243-44; and it is a creature of state law, not federal constitutional analysis. *Gaylord* expressly was premised on "the language of the statute, the constitution of this State and the holdings of this court as to what is a public use, within the meaning of the constitution. . . . " *Gaylord*, 68 N.E. at 583. *Limits Industrial* mentions neither the federal constitution nor federal precedent.

role of the legislature in this area. The constitutional analysis envisioned by *Berman* and *Midkiff* provides a meaningful and workable framework for determining the legitimacy of condemnations, and the standard of review enunciated by the Connecticut Supreme Court merely reinforces that appropriate standard of review for governmental takings. The respondents' position is not intended to denigrate the importance of private property rights. However, those rights already enjoy the necessary constitutional protections – and the numerous cases from the Connecticut Supreme Court and other state courts demonstrate that these protections are far from vitiated.

At the end of the day, the power, upheld by this Court on countless occasions, of the legislature to enact social legislation and implement it via the power of eminent domain is vital to the health and safety of the public whom the legislature represents. As a part of that power, comprehensive redevelopment is sometimes necessary to correct the myriad of social and economic ills that plague economically-distressed cities such as New London – problems such as crime, inefficient use of land and parking, and other limitations on the beneficial commercial and cultural activities vital to the health of a city and the well-being of its citizenry. As the voice of the public, the legislature is uniquely suited to determine the best interests of the communities it serves.



## CONCLUSION

For the foregoing reasons, the respondents respectfully pray that the petition for a writ of *certiorari* to review the decision of the Connecticut Supreme Court be denied.

Respectfully submitted,

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In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

In its opposition to the petition, Respondents to a large extent argue the merits of the legal dispute rather than presenting reasons why the petition should not be granted. As directed by this Court's rules, we will not re-argue the substance of our case. Moreover, in their opposition, Respondents do not really contest that this case presents a federal constitutional issue of vital public importance that affects thousands of property owners throughout the country, which, in and of itself is a reason to grant certiorari. Nor do Respondents contest that the instant case, unlike other recent petitions on the public use issue, presents a clear legal dispute, without factual complications or procedural difficulties, that lends itself to resolution by this Court.

Instead, Respondents contend that this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), control the outcome of this case. Brief in Opposition of City of New London and New London Development Corporation [hereinafter Brf. in Opp.] at 10-17. They also claim that a conflict on the issue of the use of eminent domain for private development largely does not exist. *Id.* at 18-24. Both of these erroneous contentions are addressed below.

1. Respondents incorrectly claim that this Court's decisions in *Berman* and *Midkiff* control the outcome of this case and are so on point that this Court does not need to hear the instant matter. As set forth in the petition, *Berman* addressed the use of eminent domain to clear slums and blighted areas while *Midkiff* addressed the ability of Hawaii to alleviate oligopolistic land holdings.

This Court has never addressed the issue of whether eminent domain can be used simply for the purpose of increasing tax revenues and improving the local economy of a city. *See* Petition for Certiorari [hereinafter Petition] at 23-24; *see also* Brief *Amicus Curiae* of the Property Rights Foundation of America at 5-8 (arguing *Berman* and *Midkiff* do not control the instant case).

Moreover, the unfettered use of eminent domain for economic development would not be an application of the principles set forth in *Berman* and *Midkiff* but would rather constitute a vast expansion of eminent domain authority. While substantial deference should be given to legislative determinations of public use, as this Court pointed out in *Midkiff*, 467 U.S. at 45, "a purely private taking could not withstand the scrutiny of the public use requirement." Accordingly, the definition of public use must allow the judicial identification of private uses. Moreover, pursuant to *Berman* and *Midkiff*, and as acknowledged by Respondents, not only must takings serve a valid public use, the means chosen by the government must rationally effectuate that use. Brf. in Opp. at 10.

This case will determine whether these requirements place any meaningful limits on eminent domain authority under the Fifth Amendment. As pointed out in the petition, acceptance of economic development as a public use, and adoption of the largely subjective "purposive" test set forth by the majority of the Connecticut Supreme Court, makes it virtually impossible, contrary to *Midkiff*, to identify a private use. *See* Petition at 25-29.

In their opposition brief, Respondents claim that the Connecticut Supreme Court's decision below does not



completely negate the public use requirement of the U.S. Constitution. In support of their contention, Respondents cite to three Connecticut cases that supposedly demonstrate a robust public use requirement but in fact do not address public use at all. *See* Brf. in Opp. at 16-17. First, they cite to two cases that were decided on purely statutory grounds. *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167, 1177-78 (Conn. 2002); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1186-87 (Conn. 2002). Neither indicates any vitality to the constitutional public use requirement on takings; they simply hold that the government bodies did not follow the relevant statutes. The other Connecticut case, *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001), finds that a development plan was improperly adopted and then expressly declines to make any holding regarding the potential public use of eminent domain by finding the question moot. *Id.* at 303-04.

Respondents also argue that the Connecticut Supreme Court's approving citation of the Illinois Supreme Court's decision in *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (SWIDA), means that it is still possible for there to be some violation of the public use requirement. Brf. in Opp. at 17. As explained in the petition, however, under the reasoning of the majority opinion below, the condemnation in *SWIDA* would easily survive judicial scrutiny if it occurred in Connecticut. Petition at 13 n.7. The case did not turn, as Respondents would have it, on misconduct by government officials, but instead on the Illinois Supreme Court's rejection of economic development as a public use for purposes of condemnation. Acknowledging that the project would lead to revenue

expansion in the region, 768 N.E.2d at 6, 11, the *SWIDA* court nonetheless ruled that regional revenue growth was not sufficient to constitute a public use. *Id.* at 11 (rejecting "trickle down" economic benefits as a public use).

The majority of the Connecticut Supreme Court read this Court's decisions in *Berman* and, especially, *Midkiff*, as imposing no substantive limits on eminent domain authority under the U.S. Constitution's public use requirement. As set forth in the petition and in the *amicus curiae* brief filed by the Pacific Legal Foundation in this case, other courts have also interpreted these decisions as requiring no or very little protection to property owners facing very expansive uses of eminent domain authority. Moreover, the fact that different state supreme courts (and the majority and dissenting opinions in the instant case) have adopted vastly different and conflicting standards with regard to economic development condemnations suggests in the strongest possible terms the urgent need for this Court to provide direction. And with eminent domain now being used by governments simply to increase their tax base and improve their economies, the time is very ripe for this Court to reexamine the limits on eminent domain authority under the Fifth Amendment.

2. As Petitioner homeowners explain in their petition for certiorari, the analysis of state courts on the question of whether economic development alone constitutes a public use is all over the map. Petition at 10-21.

Respondents do not dispute that Petitioners have accurately identified the differing holdings and standards regarding whether economic development is a public use. Brf. in Opp. at 18. They also agree that Petitioners accurately identified the eight states that cite to the U.S.



Constitution or federal cases.[1] *Id.* at 20-21; *see Petition* at 10 n.3. Indeed Respondents' principal response to this confusion is to complain that even though these states do rely in part on federal law, they primarily interpret their state constitutions. Brf. in Opp. at 20-23 & n.6. Therefore, according to Respondents, this Court need not shed any light on the matter. To the contrary, a decision from this Court is desperately needed to provide guidance to states struggling with this issue.

Questions of public use are nearly always litigated in state court, because condemnees typically raise the defense of lack of public use after the government initiates a condemnation action in state court. Although Respondents grumble that the discussions of federal constitutional law by some of the state supreme courts are not particularly clear or thorough, the fact remains that at least seven states – Connecticut, Delaware, Florida, Illinois, Maryland, Montana, and North Dakota – rely in part on the federal constitution or case law in deciding whether economic development is a public use.[2] *See* Petition at 10 & n.3.

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[1] That number has now fallen to seven, after the Michigan Supreme Court decided *County of Wayne v. Hathcock*, No. 124070, 2004 Mich. LEXIS 1693 (Mich. July 20, 2004) solely under the Michigan Constitution.

[2] Respondents feel that a citation to the federal Takings Clause or federal caselaw is not enough to make the case one that interprets federal law if most of the discussion involves the state constitution. *See* Respondents' Brief at 20-22 & n.6. Certainly, it is possible that if the parties in those cases had appealed, this Court would have found that there were independent state constitutional grounds for the decision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). But that is neither here nor there. The point is that some states think that the Takings Clause of the U.S. Constitution supports the use of eminent

(Continued on following page)

Respondents grudgingly admit that, even eliminating all the cases that Respondents think should be ignored because their discussion of the federal constitutional issue is too short, there is still a conflict between four states. Respondents flatly assert that four is simply too few to merit this Court's attention. Brf. in Opp. at 23. To Petitioner's knowledge, this Court has no requirement of a minimum number of conflicting states, and Respondents cite no authority to that effect. Certainly the Court has considered many important cases in which there was a conflict between fewer courts. *See, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (2-1 split); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 695 (1995) (1-1 split).

Respondents also argue that the Illinois Supreme Court was incorrect in characterizing its holding that economic development is not a public use as a decision under federal law, because its decision conflicts with decisions of this Court. Brf. in Opp. at 22-23 n.7. In other

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domain for economic development and some think it does not. In particular, Respondents argue that Maryland and Florida do not rely on their interpretations of the U.S. Constitution. Brf. in Opp. at 20-21 n.6. In fact, while both Maryland and Florida primarily rely on state constitutional law, they also invoke federal law in support of their decisions. In *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 287 (Md. 1975), the Maryland Supreme Court relies in part on a prior Maryland Supreme Court public use decision that was decided under the U.S. Constitution, because that court treated the public use limitations in both constitutions as equivalent. In *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 n.3 (Fla. 1975), the Florida Supreme Court cites to the Fourteenth Amendment for the proposition that eminent domain is "the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use."



words, Respondents think the Illinois Supreme Court got it wrong. The fact that Respondents do not agree with the Illinois Supreme Court's interpretation of this Court's prior decisions is certainly a claim that Respondents may make if this Court grants the petition for certiorari. Petitioners also think that some of the state supreme courts have got it wrong, but Petitioners of course believe that it is the other states – the ones who find that economic development is a public use under the U.S. Constitution – that are incorrect. That is the dispute that Petitioners have asked this Court to resolve.

Petitioners also agree that few of the state supreme court cases have lengthy and comprehensive discussions of federal constitutional law, as distinct from state constitutional law. That is one reason why the case at bar is particularly appropriate for review by this Court. As Petitioners explained in their petition, Petition at 21-25, other cases have not presented the issue nearly as clearly or neatly.

Finally, even accepting all of Respondents' claims about the state supreme court decisions, this Court should still grant certiorari. This Court frequently considers important constitutional cases in which there is no split, but the Court addresses the interpretation and application of prior Supreme Court precedent. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (clarifying interpretation of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-39 (1997) (clarifying interpretation of prior Supreme Court ripeness precedents in regulatory takings cases). The main issue in the case at bar is how *Berman* and *Midkiff* should be applied to condemnations for economic development.

This Court also considers cases involving significant constitutional issues where there is substantial disagreement in state supreme courts about the proper interpretation of similar state, as well as federal, constitutional provisions. *See, e.g. Lawrence v. Texas*, 539 U.S. 558 (2003) (deciding constitutionality of state sodomy statute);[3] *Troxel v. Granville*, 530 U.S. 57 (2000) (deciding constitutionality of state statute pertaining to child visitation rights; other decisions included both state and federal constitutional construction);[4] *cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 569-70 (1996) (deciding whether punitive damage award violated constitution and noting diversity of relevant state statutes and judicial decisions). The issue of eminent domain for economic development has a similar profusion of decisions under both state constitutions and the U.S. Constitution.

Confusion reigns in state courts regarding whether economic development is a public use under the U.S. Constitution (and under state constitutions as well).[5]

[3] The brief for the petitioner discusses the varying decisions from state supreme courts interpreting their state constitutions. *See* Brief of Petitioner on the Merits, Case No. 02-102, 2002 U.S. Briefs 102, *22-24 (Jan. 16, 2003) (available on Lexis).

[4] The dissent in the Washington Supreme Court discusses the decisions of numerous other states considering similar questions under both state and federal constitutional law. *See Smith v. Stilwell-Smith*, 969 P.2d 21, 36-38 (Wash. 1998) (Talmadge, J., concurring and dissenting).

[5] The confusion has deepened even since the filing of the petition for certiorari. As noted by the Respondents, the Michigan Supreme Court decided *County of Wayne v. Hathcock*, No. 124070, 2004 Mich. LEXIS 1693 (Mich. July 20, 2004). That case overturned the court's prior decision in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). *Poletown* was the first case upholding the use of eminent domain for economic development alone. Other state supreme

(Continued on following page)



Neither *Berman* nor *Midkiff* answers that question. As condemnations for private development proliferate throughout the country, state courts need to know the constitutional baseline beneath which condemnations may not fall. This case presents this Court with the opportunity to provide that much needed baseline.

## CONCLUSION

This case raises a substantial question of national importance. It magnifies a split in authority and highlights the need for guidance from this Court on a fundamental constitutional issue. It does so in a manner that is hospitable to clear resolution by this Court. We respectfully urge this Honorable Court to address this issue of

courts, including the Connecticut Supreme Court in this case, have relied in part on the now-overturned *Poletown* decision in reaching their conclusion that economic development is a public use. *See Kelo v. New London*, 843 A.2d 500, 528 & n.39 (Conn. 2004) (App. 43-45). Indeed, the decision in *Hathcock* shows just how much of an outlier the Connecticut decision is. The Connecticut Supreme Court relied on *Poletown*'s holding that economic development could be a public use but then rejected even the slightly increased scrutiny adopted by the Michigan Supreme Court in *Poletown*, instead adopting a standard of nearly absolute deference. *See id.*

paramount public importance and to reaffirm a vital constitutional guarantee.

Respectfully submitted,

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No. 04-108

In the
# Supreme Court of the United States

SUSETTE KELO, *et al.*,

*Petitioners,*

v.

CITY OF NEW LONDON, CONNECTICUT, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut**

## BRIEF AMICUS CURIAE OF JAMES M. BUCHANAN AND GORDON TULLOCK AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

The Fifth Amendment, as incorporated to the states, limits the power of eminent domain to "public use[s]." The state of Connecticut condemned private property to transfer to private developers who use it for their own profit. Do the social benefits resulting from this profit constitute a "public use"?

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. Written consent for the filing of this brief was granted by counsel for all parties and lodged with the Clerk of the Court.

PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government, and private property rights. PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

James M. Buchanan, Ph.D., is Distinguished Professor Emeritus of Economics at George Mason University and University Distinguished Professor Emeritus of Economics and Philosophy at Virginia Polytechnic and State University. He was awarded the 1986 Nobel Prize in Economics. Gordon Tullock, J.D., Ph.D., is University Professor of Law and Economics and Distinguished Research Fellow in the James M. Buchanan Center for Political Economy at George Mason University. Together, Professors Buchanan and Tullock were the authors of *The Calculus of Consent* (1965), and are considered the fathers of "public choice" economics, a major

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[1] Pursuant to Supreme Court Rule 37.6 counsel for a party did not author this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

area of economic theory which explains lobbying behavior in democratic societies.

Because of its history and experience with regard to private property and the power of eminent domain, PLF believes its perspective will aid this Court in considering the petition. Because of their understanding of the public choice problems inherent in the use of eminent domain for "economic redevelopment" purposes, Professors Buchanan and Tullock believe their perspective will also aid the Court in considering the petition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution prohibits the government from taking private property for anything except a "public use." U.S. Const. amend. V. Private property may not be taken for private uses at all. Yet this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954), reduced the Public Use Clause to a practical nullity. As a result, states and local governments routinely take property for redistribution to private interests, particularly businesses which use the property for their own private profit.

Erasing the Public Use limitation has resulted in what economists call "rent seeking": private parties try to gain control of the eminent domain power and use it for their own advantage. Rent-seeking behavior is economically wasteful, damages the rule of law, and seriously undermines private property rights. In the past five years alone, there have been approximately 10,000 reported cases of condemnation or threatened condemnation for the benefit of private parties. *See generally* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Those who suffer the most from the public choice effect are the parties who have the least political influence, which usually means racial minorities and the poor. Donald J. Kochan, *"Public Use" and the Independent*



*Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998).

Only this Court can restore the Public Use Clause as an effective constitutional limit on the abuse of government power. The Court has repeatedly declared that such private takings are unconstitutional. *See, e.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Certiorari should be granted here to elevate this language from dicta to holding, and by so doing, restore the Constitution's protections for private property.

## REASONS FOR GRANTING THE WRIT

### I

### *BERMAN* AND *MIDKIFF* HAVE LED TO AN EPIDEMIC OF CONDEMNATIONS FOR PRIVATE PROFIT WHICH ONLY THIS COURT CAN REMEDY

Early in its history, this Court explained that government had no constitutional authority to "take[ ] property from A and give[ ] it to B . . . ." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). In *Wilkinson v. Leland*, 27 U.S. (2 Peters.) 627, 658 (1829), Justice Story writing for the Court noted that "[w]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal . . . ." Specifically, the Fifth Amendment's assertion that private property could be taken only for a "public use," U.S. Const. amend. V, was held to prohibit the redistribution of property for *private* uses.

The major exception to this rule was railroads, which were privately owned and operated. Yet railroads exercising the power of eminent domain were regulated by government so as to make them essentially public highways. *See, e.g., Bonaparte*

*v. Camden & Amboy R.R.*, 3 F. Cas. 821, 829 (1830). Moreover, highways were generally considered proper functions of government to begin with; thus government could properly delegate the power of eminent domain to private developers to build these highways, so long as it regulated them in a way that kept the highways open to all members of the public. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting) ("[E]xclusive grants for ferries, bridges, and turnpikes . . . [are] of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed.").

The rationale of these cases was that since government had the authority to undertake projects for the welfare of the general public, it could delegate that authority in some cases to private companies. *See further County of Wayne v. Hathcock*, 2004 WL 1724875, at *11 (Mich. July 30, 2004). But since government had no legitimate authority merely to distribute "resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want," Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984), the government could not use eminent domain to benefit private parties. The regulations to which the railroads were subject ensured that the economic benefits they accumulated by using the eminent domain power were shared by the public, rather than by a private enterprise, and that the use of the land remained public. *See Hathcock*, 2004 WL 1724875, at **11-12.

On the other hand, as the Michigan Supreme Court explained in *Township v. Van Hoesen*, 87 Mich. 533 (1891), laws permitting condemnation for the benefit of private companies were unconstitutional:



> It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public.

*Id.* at 539.

This was an important rule because the use of eminent domain by private parties enables them to capture a surplus value not open to other members of the marketplace. As Prof. Epstein writes,

> [a] numerical example . . . makes the point clear. If the sum of all wealth in the state of nature is 100 and that in society is 150, then there is a potential surplus of 50, which must be distributed . . . . The surplus created by political life is distributed not only at the formation of the state but also during the course of its operation. When the state acquires private property for public use, the public use requirement should ensure the "fair" allocation of surplus by preventing any group from appropriating more than a pro rata share. Takings for private use are therefore forbidden because the takers get to keep the full surplus, even if just compensation is paid.

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 163-64 (1985).

Courts have gradually drifted from this rule, however. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court held that using eminent domain to eradicate slums was justified by the Public Use Clause because the eradication of slums was

beneficial to public health. Since "[i]t is within the power of the legislature to determine that the community should be beautiful," *id.* at 33, the Court concluded that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.* The Court did not address the rule that when eminent domain is exercised by a private party, it must be regulated in a way that ensures that its use or management is used for public purposes. Rather, it held that so long as the legislature's purpose was legitimate, "the means by which it will be attained is also for [the legislature] to determine." *Id.*

After *Berman*, the rationale of slum-clearance condemnations was again broadened. Courts began to hold that "job creation" or other economic consequences justified the redistribution of property from one private party to another. Most famous among these cases was *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), in which the Michigan Supreme Court allowed Detroit to condemn a neighborhood and give it to the General Motors Corporation to build an auto factory. *Poletown* held that "revitalizing the economic base of the community" was a public use. *Id.* at 634. (Significantly, the Michigan Supreme Court recently overruled *Poletown*. *See Hathcock, supra*.)

Earlier law prohibited the use of eminent domain for this purpose because there is no logical limit to redistributing property under that theory. Any interest group can show some plausible reason why giving it the property currently owned by others would benefit that interest group, and, therefore, the public. Under the rational basis standard this Court has applied to takings cases, however, *see Midkiff*, 467 U.S. at 241, such a failure of the political process can escape detection, which renders every person's property as insecure as in the "state of nature" that Thomas Hobbes described: "[T]here [can] be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can



keep it." Thomas Hobbes, *Leviathan* 101 (Michael Oakeshott ed., Collier Books 1962) (1651). The Constitution was written precisely to prevent this situation. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (explicitly rejecting Hobbesian theory of property rights).

*Berman* and *Midkiff* provide minimal guidance for determining when the purpose to be accomplished through a condemnation is a public use. *Midkiff* asserts that eminent domain may not be used for private purposes, *see, e.g.*, 467 U.S. at 240, but when a government agency asserts that a condemnation is a valid public purpose, the courts generally take their most deferential perspective in reviewing that assertion. *See id.* at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

The legal consequence of this is that the Public Use Clause has been rendered essentially meaningless. *See, e.g., Gov't of Guam v. Moylan*, 407 F.2d 567, 568-69 (9th Cir. 1969) ("On urban renewal condemnations . . . the whole scheme is for a public agency to take one man's property away from him and sell it to another. The founding fathers may have never thought of this . . . but under all modern federal decisions our hands are tied—if the book on the procedure is followed."). As Prof. Epstein notes, some legal scholars have even taken to replacing the Clause with ellipses when they reprint the text of the Fifth Amendment. *See* Epstein, *supra*, at 162 (citing Bruce A. Ackerman, *The Jurisprudence of Just Compensation*, 7 Envtl. L. 509, 510 (1977)). This further suggests that lower courts need guidance in interpreting "public use," since any reading of the Constitution which renders a clause nugatory or redundant must be in error. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); *United States v. Lopez*, 514 U.S. 549, 588-89 (1995) (Thomas, J. concurring).

These considerations recently led the Michigan Supreme Court to overrule its decision in *Poletown, supra*. *See Hathcock, supra*. By equating "public use" with "public benefit," the *Poletown* decision "would validate practically any exercise of the power of eminent domain on behalf of a private entity." 2004 WL 1724875, at *15. Since any private business will "contribute in some way to the commonwealth," *id.*, the *Poletown* court's interpretation had rendered the Public Use Clause nugatory and threatened the security of private property throughout the state: "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.*

This Court's decisions in *Berman* and *Midkiff* have created the same insecurity for property rights. The Court should grant certiorari to explain to what degree, if any, the federal Constitution's Public Use Clause limits the government's condemnation power.

## II

## GOVERNMENT'S POWER TO REDISTRIBUTE PROPERTY TO PRIVATE PARTIES SPURS COMPETITION AMONG INTEREST GROUPS

### A. *Berman* and *Midkiff* Have Led to Thousands of Cases of Eminent Domain Abuse

The practical effect of the erosion of the "Public Use" Clause has been a rash of condemnations benefitting private parties. One recent study found over 10,000 instances of government using or threatening to use eminent domain to benefit private parties, just in the past five years. *See* Dana Berliner, *Public Power, Private Gain: A Five-Year,*



*State-by-State Report Examining the Abuse of Eminent Domain* (2003). Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998. *Id.* at 2.

In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners, who often have few resources available to oppose a condemnation. Most eminent domain abuse occurs at the local level; for example, the City of Merriam, Kansas, recently condemned a Toyota dealership, in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4, *available at* 1999 WL 2402262. Las Vegas condemned the property of a private landowner to make way for an entertainment area that even included an adult strip club; the Nevada Supreme Court determined that this was a "public use." *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (2003), *cert. denied*, 124 S. Ct. 1603 (2004). The City of Bremerton, Washington, condemned 22 homes, including the home of an elderly widow named Lovie Nichols, in part to resell the land to private developers. Mrs. Nichols challenged the condemnation, but the court upheld the taking. *City of Bremerton v. Estate of Anderson*, 1999 WL 1116811 (Wash. App. Div. 2 Dec. 3, 1999), *rev. denied*, 10 P.3d 407 (Wash. 2000). The City of Corte Madera, California, condemned a private owner's land to give to a developer to build a grocery store. This, too, was permitted. *Town of Corte Madera v. Yasin*, No. A092777, 2002 WL 1723997 (Cal. App. 1st Dist. July 25, 2002). In one especially egregious case, billionaire Donald Trump nearly convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot. *See Casino Redevelopment Auth. v. Banin*, 727 A.2d 102 (N.J. 1998); Stephen Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use*

*Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 288 (2000).

The primary victims of such condemnations are poor minorities, and the primary beneficiaries are wealthy, politically powerful groups, who are more able to persuade local authorities to condemn property for their benefit. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998). As explained below, the reason for this epidemic is what economists call the "public choice" phenomenon. Suffice to say that under the holdings of *Berman* and *Midkiff*, "the public use doctrine is no longer an impediment to interest-group capture of the condemnation power . . . ." Kochan, *supra*, at 51. This Court should grant the petition to provide lower courts with guidance as to how the Public Use Clause limits the use of eminent domain.

### B. The "Public Choice" Phenomenon Arises When Government Can Redistribute Benefits and Burdens as Political Favors

Whenever government has the power to redistribute benefits and burdens between constituents, those constituents will devote time and energy to gaining control over government. Modern scholars refer to this as the problem of "public choice." Interest groups try to gain control of the apparatus of the state to secure benefits for themselves or to impose burdens on their enemies. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 286 (Ann Arbor Paperbacks, 1965) (1962) ("[I]nterest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups . . . .").

As Buchanan and Tullock explain, interest groups lobby government to exercise its authority on their behalf: "[T]he



profitability of investment in [political] organization is a direct function of the size of the total public sector and an inverse function of the 'generality' of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . . ." *Id.* at 287. Economists call this pursuit of differential advantages "rent-seeking." *Dist. Intown Properties Ltd. P'ship v. Dist. of Columbia*, 198 F.3d 874, 885 (D.C. Cir. 1999) (Williams, J., concurring in the judgment). It leads to at least four major social problems.

First, it is fundamentally unfair for citizens to have their property taken from them and given to others not for punishment, or for any other valid public reason, but simply because they are less successful at political activism. As Prof. Sunstein has put it, the framers of the Constitution believed it was unjust for "government power [to] be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Instead, they believed that "government action [should] result[ ] from a legitimate effort to promote the public good rather than from a factional takeover . . . . Under that conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate." Sunstein, *supra*, at 1690-91.

Second, rent-seeking is economically inefficient, because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying rather than into wealth-creating activity or innovation. Businesses spend time and money hiring lobbyists and attorneys to persuade city officials to condemn property for their benefit, rather than finding new and more economical ways to meet consumer demands. *See generally*, Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, in *Toward a Theory of the Rent-Seeking Society* 16 (James M. Buchanan, et al., eds., 1980); Buchanan & Tullock, *supra*, at 111 ("[B]argaining opportunities afforded in the political process *cause the individual to invest more*

*resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly."). This therefore harms the public because it distracts producers from meeting consumer needs.

Third, rent-seeking tends to have a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth distribution. *See* Buchanan & Tullock, *supra*, at 287-88 (noting "spiral effect" of ever-greater lobbying efforts). Suppose government takes one dollar from each of 100 people, and gives it all to person X. It is in X's interest to spend at most $100 to convince the government to do this again; but it is only in the interest of each victim to spend $1 to convince it to leave them alone. *See also* Kochan, *supra*, at 81 ("It is not cost-efficient, however, for a taxpayer to fight a particular piece of special-interest legislation."). Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

The fourth problem, related to the third, is that rent-seeking behavior rewards those who are already most wealthy and powerful. A group's wealth can greatly affect its ability to influence legislation. *See McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 644-45 (2003). Small grass-roots organizations, or individuals, are less able to rally support behind a cause, and when the cause in question is the redistribution of wealth to the winner of the election, winners become increasingly likely to win the next time around. This problem is acute in eminent domain abuse.

> Even though a particular condemnation may concentrate the cost of the taking on the affected landowner and the information costs associated with identifying that impact may be low, that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators . . . . "[T]he dispossessed [property owners] are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout." Additionally, the interest group is unlikely to seek rents through condemnation and transfer if it does not believe that it has a reasonable likelihood of success.

Kochan, *supra*, at 82 (quoting Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Comment. 279, 290 (1992)). Experience bears out these predictions. Wealthy neighborhoods are rarely condemned for "economic development." Instead, poor or middle class neighborhoods are condemned to make way for those in higher income brackets. For example, in one recent case, the city of Canton, Mississippi, tried to condemn 23 acres of minority-owned land to give to the Nissan Corporation to build an auto plant. Sandefur, *supra*, at 598. Although the state dropped its case before the State Supreme Court ruled, the case is typical of economic development condemnations: landowners who are less politically adept are at the mercy of those who exercise raw political power.

### C. The Public Use Clause Was Intended to Limit the Public Choice Effect

Buchanan & Tullock, *supra*, explain that there are two primary ways to limit rent-seeking behavior: either to prohibit government entirely from distributing any economic rents to interest groups, or to require it to distribute such advantages equally: "[W]e may imagine a government that undertakes only those activities which provide *general* benefits to all individuals and groups and which are financed from *general* tax revenues. Under these conditions there would be relatively little incentive for particular groups of individuals to organize themselves into associations designed specifically to secure special advantages through governmental action." *Id.* at 287. *See also* The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.").

In other words, when government can confer concentrated benefits on a particular class, that class has a greater incentive to lobby the government to give it that benefit. So, where the benefit is legally required to be given to everyone equally—where, the surplus must be shared *pro rata*, as Epstein says, *supra*, at 164—this incentive for lobbying will be much less.

> If all collective action should be of such a nature that the benefits and costs could be spread equally over the whole population of the community, no problem of the interest group, and indeed few of the problems of government, would arise. If each individual, in his capacity as choice-maker for the whole group, could, in his calculus, balance off a pro-rata share of the total benefits against a pro-rata share of the total costs, we could expect almost any collective decision-making rule to produce reasonably



> acceptable results . . . . [and] groups would have relatively little incentive . . . to utilize the political process to secure advantages over their fellows . . . . One means of . . . [approximating] truly "general" legislation would be to require that those individuals and groups securing differential benefits also bear the differential costs.

Buchanan & Tullock, *supra*, at 291-92.

The Public Use Clause is an example of a rule which requires government to provide *general* benefits to all individuals and groups, and thus prohibits the granting of concentrated benefits to particular groups. James Madison, who wrote the Public Use Clause, explained that government was created to "*impartially* secure[ ] to every man, whatever is his *own*." *Property, reprinted in Madison: Writings* 515 (Jack N. Rakove ed., 1999). But strong interest groups—or "factions," as he called them—could take over the government and use it to their own benefit by stealing the property of their opponents; by, in Madison's words, "unit[ing] and oppress[ing] the weaker [interest groups]." The Federalist No. 51, at 323-24 (James Madison). There were two ways to prevent the stronger faction from committing this injustice: either by "creating a will in the community independent of the majority," which would impartially supervise interest groups to ensure they do not violate the Constitution, or by balancing interest groups against one another to prevent them from uniting. *Id.* The Constitution embraced both methods—the latter through the electoral processes, and the former by creating an independent judiciary. *See id.* No. 78, at 465-68 (Alexander Hamilton). The Public Use Clause would ensure that when property was condemned, the public at large, rather than the condemning authority, would share in the surplus—or, in Madison's words, "the vital principle of monopoly [would be] lost. The benefit is not confined to one or a few, but is enjoyed by the whole or a majority of the Community." Detached Memorandum on

*Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.* (c. 1819), in Rakove, *supra*, at 757.

The Public Use Clause was designed to avoid the "Public Choice" problem by deterring factions from seizing property for their own benefit. *See further* Sunstein, *supra*, at 1689 (the public use limitation is "focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.") As Madison explained elsewhere,

> there is no maxim . . . more liable to be misapplied . . . than the current one, that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "ultimate happiness," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil and enslave the minority of individuals . . . . In fact, it is only re-establishing, under another name and a more specious form, force as the measure of right.

Letter to James Monroe (Oct 5, 1786) in *The Complete Madison* 45 (Saul K. Padover ed., 1953). By ensuring that all members of society had a pro rata share in the surplus gained through condemnations, the Public Use Clause qualified the power of eminent domain with the necessary moral ingredients. Moreover, it ensured that the condemning power could not keep all the profits of the taking, but would be forced to share those benefits with the public at large. The power of eminent domain would therefore not be used by powerful interest groups to



"despoil" the less powerful. The erosion of the public use limitation under *Berman* and *Midkiff*, however, has practically eliminated this protection. The Court should take this opportunity to cure this error and protect innocent, politically uninfluential landowners from falling victim to the public choice problem.

## III

## THE COURT SHOULD PLACE MEANINGFUL LIMITS ON EMINENT DOMAIN TO REIN IN THIS POLITICAL BREAKDOWN

Under our Constitution the judiciary serves as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 467 (Alexander Hamilton). This means that where factions unite to unconstitutionally suppress or commandeer the property of a minority simply because it lacks the political power to protect itself, the Court ought to step in. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). One might describe condemnations which benefit private parties as a breakdown of a constitutional process that was designed to protect the people impartially. *See* The Federalist No. 51, at 324 (James Madison) ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger."). In such circumstances, judicial review is appropriate.

The erosion of the Public Use limitation has led to an epidemic of special-interest lawmaking, whereby powerful private interests exercise their skill at lobbying to profit at the expense of less powerful groups. This public choice effect is a breakdown of the protection provided by the Public Use Clause which can only be rectified by this Court. The Court should reconsider its decisions in *Berman* and *Midkiff* and provide

lower courts with guidance as to how to determine when a condemnation is so private as to violate the Fifth Amendment.

## CONCLUSION

The petition for a writ of certiorari should be *granted*.

DATED: August, 2004.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

SUSETTE KELO, ET AL.,

*Petitioners,*

v.

CITY OF NEW LONDON, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Connecticut**

## BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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## BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Property Rights Foundation of America, Inc. ("PRFA"), is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grassroots organization committed to assisting citizens, policymakers, and those in the media concerned with protecting the rights of property owners against governmental abuse.

PRFA has been recognized for its public events, publications, and outreach programs. PRFA sponsors the Annual New York Conference on Private Property Rights, where

experts from across the country speak on topics of prime importance to property rights advocates and policymakers. In addition, since 1994, PRFA has published *Positions on Property*, which initially cataloged and exposed the multitude of land use regulations and controls in New York State. Finally, PRFA helps other grassroots organizations seeking advice or assistance by connecting them to PRFA's National Advisory Board and other experts.

PRFA has a particular interest in *Kelo* v. *City of New London*, 843 A.2d 500 (Conn. 2004), because this case raises a constitutional question of fundamental importance—namely, what limits does the Constitution impose when government decides to take property from one private party and transfer it to another private party for the stated purpose of stimulating economic development? As the sad facts of this case show, residents of the Fort Trumbull area of the City of New London stand to lose cherished family homes for the sake of projected job creation and tax revenues. PRFA believes that the City's condemnation actions are a misuse of its eminent domain power, particularly since the Fort Trumbull area is in no sense a slum or blighted area.

Unfortunately, and of great concern to PRFA, the affected residents of Fort Trumbull are not alone. Across the Nation, local governments are taking private property to permit its development by private entities as an exercise of the authority to take property for public use. *See, e.g., County of Wayne* v. *Hathcock*, 2004 WL 1724875 (Mich. July 30, 2004) (involving Wayne County's plan to condemn real property and transfer it to private parties for the construction of a business and technology park). This case presents an opportunity for this Court to clarify the limits of government's ability to use the eminent domain power to transfer private property from the hands of one party to the hands of another, and to ensure that, when state and local governments take private property for the purpose of economic development, such a taking is in fact for a valid public use.



This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.[1]

## INTRODUCTION

In the decision below, the Connecticut Supreme Court, both the Justices in the majority and those who dissented, agreed that the taking of private property for the purpose of economic development can, in a proper case, be a permissible taking for "public use." But the four Justices in the majority and the three dissenters fundamentally disagreed about what standards a reviewing court should apply in deciding whether a particular taking for that purpose is, in fact, a valid taking for public use.

The majority held that an economic development taking is for public use so long as "the development plan primarily was *intended* to benefit the public interest, rather than private entities." 843 A.2d at 543 (emphasis added). Furthermore, the majority indicated that the trial court properly "[a]ssum[ed] * * * to be correct" the City's economic development projections. *Id.* at 542. Finally, the majority reviewed the trial court's determination that the taking was primarily intended to benefit the public as "a question of fact that we review pursuant to the clearly erroneous standard of review." *Id.* at 540.

In sharp contrast to the approach taken by the majority, the dissenters concluded that the fact "that the development plan was intended primarily to benefit the public, per se, is insufficient to justify the takings." *Id.* at 596 (Zarella, J., concurring in part and dissenting in part). Rather, in the view of the dissenters, "the taking party must assume the burden of proving, by clear and convincing evidence, that the antici-

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Property Rights Foundation of America, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

pated public benefit will be realized." *Id.* Finally, the dissenters would have had appellate courts "review de novo the [trial] court's legal determination that the takings primarily were intended to serve the public interest." *Id.* at 595.

Thus, the majority and the dissenters disagreed whether the government's intent to benefit the public through economic development is enough to support a taking; whether a reviewing court should assume that the benefits of development projected by the government will, in fact, come to pass or should instead require the government to prove they will; and whether an appellate court should review a trial court's public interest determination de novo or under a deferential standard.

The sharp division between the Justices of the Connecticut Supreme Court reflects the fact that this Court's cases do not provide clear guidance to courts reviewing the constitutionality of economic development takings and that lower courts have struggled to come up with appropriate standards on their own.

## SUMMARY OF ARGUMENT

This Court's precedents construing the Public Use Clause of the Fifth Amendment do not address whether or when government can take property from one private party and transfer it to another private party for the purpose of economic development. Those precedents, therefore, do not control this case or answer the question presented here. Nor do those cases stand as clear authority for the decision of the Connecticut Supreme Court in this case.

Furthermore, the decision below is inconsistent with decisions of the Court of Appeals for the Seventh and Ninth Circuits, and such inconsistency between the decision of a state supreme court and federal circuit court decisions warrants this Court's review.

This Court should clarify the meaning of the public use requirement in the context of government's taking of property for the purpose of economic development, as the lower



courts have struggled to find the proper standard for determining whether such a taking is for public use.

Finally, this Court's cases and the history of the public use requirement casts doubt upon the government's ability to transfer property from one private party to another private party for the purpose of economic development.

## ARGUMENT

### I. *BERMAN* AND *MIDKIFF* DO NOT CONTROL THIS CASE OR ANSWER THE QUESTION PRESENTED.

The first reason why the writ should be granted is that the Connecticut Supreme Court's decision in this case countenances an eminent domain power beyond that which this Court's cases construing the Fifth Amendment's Public Use Clause have authorized. The court below cited this Court's decisions in *Berman* v. *Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), as supporting what it called "[t]he broad purposive approach to the interpretation of the federal public use clause." *Kelo*, 843 A.2d at 526. Relying on *Berman* and *Midkiff*, the Connecticut Supreme Court held that "an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power." *Id.* at 528.

In *Berman*, this Court held that the eradication of blighted conditions is a public purpose sufficient to satisfy the Fifth Amendment's "public use" limitation on the exercise of the eminent domain power. 348 U.S. at 32-33. This Court explained that the power of eminent domain is a "means to [an] end," and, therefore, if the "object" or purpose of a taking is within the authority of the sovereign, the authority to use eminent domain to accomplish that purpose necessarily lies. *Id.* at 33. This Court then determined that the "end" of abating the blighted conditions found in a particular Washington, D.C., community justified the use of the emi-

nent domain power. The Court's opinion emphasized the unique and manifest public harm presented by blight:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. [*Id.* at 32-33.]

In this case, the New London Development Corporation is proceeding under Chapter 132 of Connecticut's General Statutes—a chapter governing municipal development—not under Chapter 130, which authorizes the use of eminent domain to clear slums and blighted areas. As this case does not involve Connecticut's blight statute—or even an allegation of blight—*Berman* does not control here. Furthermore, the state of the condemned property in *Berman* was extraordinary, with staggering rates of property degradation. *See Berman*, 348 U.S. at 30. Here, no party asserts that the Fort Trumbull neighborhood in which petitioners' property is located is a slum or blighted area or in any way approaches such "misery of housing." *Id.* at 33. Therefore, the issue in this case is not settled by this Court's holding in *Berman*.

In *Midkiff* this Court clarified that the "public use" requirement of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. And this Court further explained that a reviewing court must defer to a governmental exercise of eminent domain authority so long as the government's "purpose is legitimate and its means are not irrational." *Id.* at 242-243. Stating that the regulation of oligopolies is "a classic exercise of a State's police powers," this Court determined that the dissolution of a feudal landownership system was a satisfactory public purpose justifying the taking of private property. *Id.* at 242. Therefore, under *Midkiff*, the central consideration is whether the purpose of the taking is within the sovereign's police



power, *i.e.*, the power to enact regulations substantially related to the advancement of the public health, safety, morals or general welfare. *See Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Under *Berman* and *Midkiff*, a sovereign may choose any rational means to accomplish a constitutionally-permissible end, and hence judicial review of a condemnation action must focus on the public purpose asserted by the government. But *Berman* and *Midkiff* do not stand for the proposition that all asserted public purposes satisfy the public use requirement of the Fifth Amendment. On the contrary, the Public Use Clause must place some cognizable limit on the power to condemn property, as this Court has recognized. *See Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); *Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

The takings in both *Berman* and *Midkiff* share two characteristics that are absent in the case of an economic development taking. First, the taking of property in those cases directly resulted in an immediate public benefit. The removal of blight in *Berman* was accomplished when the government transferred possession of the blighted area, and, similarly, the dissolution of the land oligopoly in *Midkiff* was accomplished by the act of transferring the property, regardless of its proposed future use. Second, in both cases the public benefit flowed from the actions of the government itself.

In contrast to the *Berman* and *Midkiff* takings, where, as here, a taking is justified on the basis of economic development, the public benefit is uncertain, as there is no guarantee that the expected development will materialize, and any public benefit that is achieved will be attenuated in time from the taking of property. Furthermore, the public benefit, if any, to be achieved by an economic development taking ultimately is dependent upon the efforts of a private party, not the government. If the private party to whom the prop-

erty is transferred does not succeed in its venture, no public benefit is ever realized. Thus, an economic development taking differs from takings of the sort approved in *Berman* and *Midkiff* because such a taking proceeds on the theory that the transfer of property from one private party to another—which is not a permissible end or a public benefit in and of itself—will confer a "trickle down" benefit upon the public at large.

Because the benefits to be gained from an economic development taking are necessarily uncertain and indirect, judicial review of the public purpose of such a taking is a difficult task. Under the standard employed by the Connecticut Supreme Court, judicial review is limited to an evaluation of the legislature's stated purpose for the taking. That standard, however, gives government carte blanche to take private property from one person and transfer it to another person, limited only by the government's willingness or ability to proclaim that its intent is to promote economic development. Therefore, takings justified solely on the basis of a prospective public benefit from economic development would seem to warrant greater scrutiny under the Fifth Amendment.

In short, this case presents a significant question unsettled by either *Berman* or *Midkiff*: assuming that a sovereign may condemn property for the purpose of job creation and increased tax revenue, under what standard should a court review the public purpose of such a condemnation? This Court has never considered the constitutionality of a taking based *solely* on a legislative determination, necessarily subjective and speculative, that the taking will result in future private economic development and the attendant increase in tax revenue and employment. This Court should grant the writ in this case to clarify whether the Public Use Clause of the Fifth Amendment places *any* meaningful restriction on legislative power to take property for the purpose of private economic development and the associated, but potential, increase in tax revenue and jobs.



## II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND NINTH CIRCUITS.

Petitioners have set forth the numerous state supreme court decisions with which the decision below conflicts. *See* Pet. 10-21; *see also Kelo*, 843 A.2d at 532 ("We acknowledge that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have * * * ruled that economic development is, by itself, not a public use for eminent domain purposes."). But the decision below also conflicts with decisions of the Seventh and Ninth Circuits interpreting the Public Use Clause. Such a conflict provides further grounds for review by this Court. *See* S. Ct. R. 10(b).

In *Daniels* v. *Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002), the Area Plan Commission of Allen County, Indiana, sought to facilitate commercial development within a residential subdivision by vacating a restrictive covenant that limited the subdivision to residential use and then rezoning certain lots to allow such development. *See id.* at 449-450. Because such a covenant is a constitutionally-protected property interest, the Plan Commission could take that property only for a public purpose. *See id.* at 459.

The Seventh Circuit held that the required public purpose was lacking. The court explained that, because "it is apparent that the public benefit of the vacation and rezoning action will not materialize absent any promised commercial development of the [l]ots," the developer "is thus the primary beneficiary of the vacation of the restrictive covenant, and not Allen County." *Id.* at 462. The Seventh Circuit also reasoned that

> while in this case there may be some conceivable public benefit of some possible future use of the property, * * * "public use" is to be determined at the time of the taking, and at the time of the taking of the restrictive covenant, the possible future commercial development could not be rationally described as for a public purpose. [*Id.* at 466.]

Unlike *Daniels*, the decision below holds that the primary beneficiary of a taking in which property is transferred from one private party to another for the purpose of economic development is the public, not the developer. And, again unlike *Daniels*, the decision below did not determine "public use" at the time of the taking.[2]

In *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996), officials of the City of San Bernadino, California, conducted sweeps of low income housing units in search of housing code violations. The plaintiffs, the owners of these units, alleged that the sweeps were conducted as part of a scheme to deprive them of their property—either by forced sale, driving down the market value of the properties, or foreclosure—so that a shopping center developer could buy the units at a lower price. *See id.* at 1313-15.

The Ninth Circuit held that, if the plaintiffs could prove their allegations, the actions of the defendant officials would be a taking of property, not "for a 'public use' as the Fifth Amendment requires but rather for the use of another private person, the shopping-center developer." *Id.* at 1321. The Ninth Circuit went on to say that

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a "public use," and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause would lose all power to restrain government takings. [*Id.*]

*See also 99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129-31 (C.D. Cal. 2001) (holding that a plan condemning commercially viable property in order to transfer such property to another private

[2] Notably, the *Daniels* court distinguished *Midkiff* on the ground that "[i]n *Midkiff*, the actual act of the transfer, regardless of the proposed use of the property, was found to serve a public purpose." 306 F.3d at 465. *See supra* at 7.



entity for more lucrative use was an unconstitutional private taking), *appeal dismissed as moot and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003).

Thus, the Ninth Circuit in *Armendariz* held that government cannot take private property from its current owner solely to allow that property to be owned instead by a private developer. Such a purpose, without more, does not constitute a constitutionally-permissible public use.

## III. THIS COURT SHOULD CLARIFY THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT.

Although this Court provided general guidance with respect to the meaning of the Fifth Amendment's "public use" requirement in *Berman* and *Midkiff*, the lower courts continue to struggle with the issue, particularly in cases involving the use of eminent domain authority to transfer property from one private party to another. Indeed, commentators who have analyzed the application of *Berman* and *Midkiff* in state court cases have observed that state courts often do not give to legislative determinations of public use the high degree of deference this Court gave to such determinations in *Berman* and *Midkiff*.[3]

Some commentators have applauded this development, arguing that the deferential approach to the public use question taken by this Court in *Berman* and *Midkiff* is not

[3] *See, e.g.*, Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 564 (2002) ("[S]tate courts are split regarding whether strict scrutiny or rational relationship review, employed by most federal courts, is the appropriate standard to evaluate public use justifications."); Glen E. Summers, Note, *Private Property Without* Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 866-867 (1993) ("[S]tate courts are frequently willing to depart from *Berman*'s virtual abandonment of judicial review in their treatment of public use questions in Takings Clause analysis.") (quotation omitted).

appropriate in eminent domain cases.[4] Professor Nicole Garnett recently examined a number of federal and state cases holding the government to an arguably higher standard than the rational-basis test applied in *Midkiff*. These decisions instead "requir[ed] a demonstrated connection between the challenged taking and the particular purpose used to justify it." Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936 (2003) (citing *Daniels* v. *Area Plan Comm'n*, *supra*, *99 Cents Only Stores*, *supra*, and *Southwestern Ill. Dev. Auth.* v. *National City Envtl., LLC*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002)). In her view, "[t]he courts were justifiably frustrated with the *Midkiff* straightjacket and underwent doctrinal contortions to escape it," and she suggested that "*Midkiff* needs to be supplemented with precisely the kind of means-end scrutiny employed in these recent cases." *Id.* Similarly, Professor James Ely has noted that "there is some recent indication that lower federal and state courts are more willing to review the use of eminent domain to make certain that property is not being taken primarily for private benefit." James W. Ely Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 Prob. & Prop. 31, 35 (2003) (citing *99 Cents Only Stores*, *supra*, and *SWIDA*).

The unease of some lower courts in taking a *Midkiff*-style deferential approach to the public use question in the eminent domain context was punctuated by the Michigan Supreme Court's recent decision in *County of Wayne* v. *Hathcock*, *supra*, overruling its earlier decision in *Poletown Neighbor-*

[4] *See, e.g.*, Tiffiny Anne Douglas, Note, *Florida's Take on Takings: An Appeal to Re-Balance the Individual's Rights and the State's Needs*, 4 FLA. COASTAL L.J. 207, 211, 230 (2003) (*Berman* and *Midkiff*, "though clearly defining the standard, are distinguishable from current eminent domain cases involving redevelopment plans. * * * [A]lthough the precedent established thus far emphasizes the broad deference given to the legislative determinations of public use, the court must re-analyze the use of the 'rational basis' test in the context of eminent domain.").



*hood Council* v. *Detroit*, 304 N.W.2d 455 (Mich. 1981).[5] The *Hathcock* court ruled that the use of eminent domain to create a business and technology park projected to create tens of thousands of new jobs and generate hundred of millions of dollars in tax revenues was not a taking for a "public use" because the individual properties within the park eventually would be converted to private ownership. Explaining its decision to overrule *Poletown*, the court stated:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. [*Hathcock*, 2004 WL 1724875, at *15 (emphasis in original).]

The *Hathcock* court stated that "the transfer of condemned property to a private entity * * * would be appropriate in one of three contexts" only: (1) "where public necessity of the extreme sort requires collective action" (as in the construction of highways and railroads); (2) "where the property remains subject to public oversight after transfer to a private entity"; or (3) "where the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred" (as in the clearance of slums). *Id.* at *12 (internal quotation marks omitted).[6]

[5] In *Poletown*, property was conveyed to a private corporation to permit the construction of an assembly plant. For more than 20 years, *Poletown* epitomized the doctrine of judicial deference to legislative judgments of "public purpose" and was a leading case for the proposition that a generalized economic benefit is sufficient to transfer condemned property to a private entity.

[6] Although *Hathcock* is a significant case, the court's decision was based on the Michigan Constitution, not the Fifth Amendment's Public Use Clause. Therefore, that case does not supply grounds for letting the federal issue percolate further.

## IV. THIS COURT'S CASES AND THE HISTORY OF THE PUBLIC USE REQUIREMENT CAST DOUBT UPON GOVERNMENT'S ABILITY TO TRANSFER PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER FOR THE PURPOSE OF ECONOMIC DEVELOPMENT.

This Court's cases have long recognized that the "public use" restriction in the Fifth Amendment was intended to place a limit on the government's ability to take private property. Certainly, that restriction prohibits the taking of private property from one person for the private benefit of another. As early as *Calder* v. *Bull*, 3 U.S. 386 (1798), it was stated that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes property from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. *Id.* at 388 (opinion of Chase, J.).

In *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (1795), Justice Patterson considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." *Id.* at 310. Acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," he stated that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." *Id.* at 310-311.

Similarly, in *Wilkinson* v. *Leland*, 27 U.S. 627 (1829), Justice Story wrote:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [*Id.* at 658.]



And in *Missouri Pacific Railway* v. *Nebraska*, 164 U.S. 403 (1896), this Court concluded that a state court order requiring a railroad to surrender a portion of its land to petitioners to permit them to build an elevator "was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners." *Id.* at 417. This Court held that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States." *Id.*

The principle that government cannot take one person's property and give it to another private individual, even upon the payment of just compensation, was put to the test by the so-called Mill Acts enacted beginning in 1667 and well into the late 1800's by a number of American colonies and states. Some of these Mill Acts authorized the private condemnation of land necessary for the operation of a mill. For example, a miller owning land on one river bank who needed to dam the river in order to power his mill could condemn land on the opposite river bank owned by another person who refused to sell the property.[7]

At first blush, the Mill Acts would seem to violate the notion that private property cannot be transferred from one person to another for the latter's private benefit. Closer examination, however, reveals that the mill owner's exercise of eminent domain was more akin to the taking of land by a public utility than to a taking by a private developer.

In the 18th and early 19th centuries, the flow of water was the primary source of mechanical power in America—not overtaken until the 1860's by the steam engine—and thus was indispensable to the milling of grain in a predominantly

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[7] *See* Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 369-375 (1999); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 71-75 (1996).

agrarian society. *See* Melton, *supra* note 7, at 73. The Mill Acts therefore served a necessary public purpose—the harnessing of a very limited source of power to process food. And like modern-day regulation of public utilities, Mill Acts regulated both price and public access. North Carolina's Mill Act, for example, provided for the designation of "Public Mills" and required mill owners to "grind Wheat and Indian Corn for all such Persons as shall require the same."[8] Additionally, North Carolina, Virginia, Vermont, and other states set maximum rates to be charged for milling service. *See* Sales, *supra* note 7, at 373 & nn.165-166.

That Mill Act condemnations served a public purpose was recognized by the courts. In *Harding* v. *Goodlett*, 11 Tenn. 41, 1832 WL 1095 (Tenn. Err. & App. 1832), the Tennessee Supreme Court of Errors and Appeals stated:

> It is emphatically a public use for which [property condemned for the purpose of building a grist-mill] is required and to which it is appropriated. The grist-mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of those duties; and he is exempted, in consequence of his character of miller, and for the benefit of the public, from performance of certain duties to which other citizens are subjected. [1832 WL 1095, at *7.]

In contrast, said the court, "[t]he saw-mill and paper-mill have no public character; the erection of these mills would be wholly for the private use of these petitioners. To take [a citizen's] land for such use would be unconstitutional." *Id.*[9]

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[8] North Carolina Mill Act art. V, *reprinted in* 1 The Earliest Printed Laws of North Carolina, 1669-1751, at 18-19 (John D. Cushing ed., 1977).

[9] *See also Tyler* v. *Beacher*, 44 Vt. 648, 1871 WL 5994 (1871) ("Decisions from Virginia, North Carolina, Kentucky, Tennessee, and Georgia, are sometimes cited in support of the right to take property in this manner for mills. But in all these States the mills were made public mills, by being required by law to grind for all in due turn for regulated tolls, and in some of them the mills were made public by more explicit provisions.").



Thus, the Mill Acts actually support the early understanding that property can be taken from one private party to serve a public purpose, but not for the mere benefit of another private party.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-108

# In The Supreme Court of the United States

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*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

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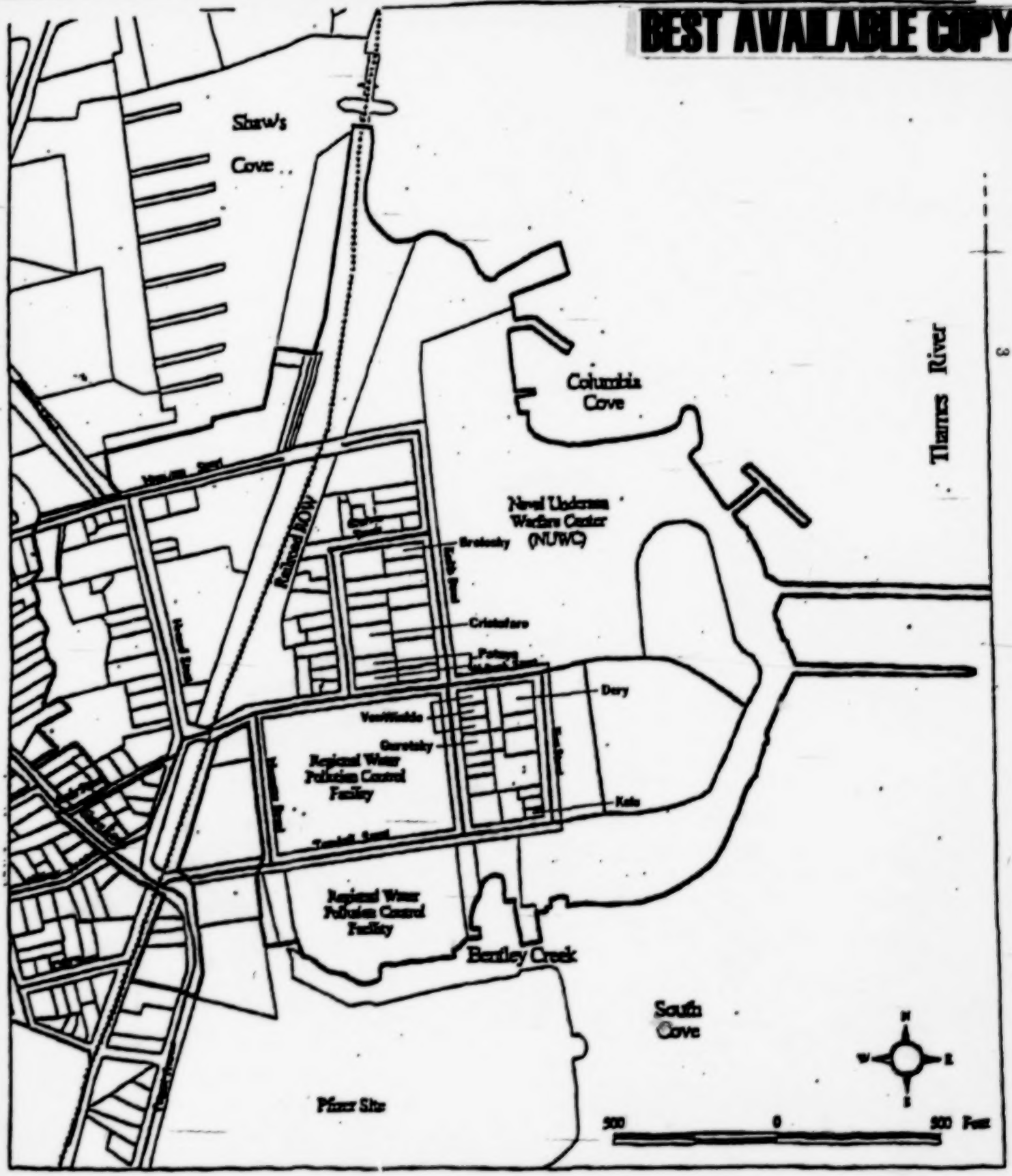
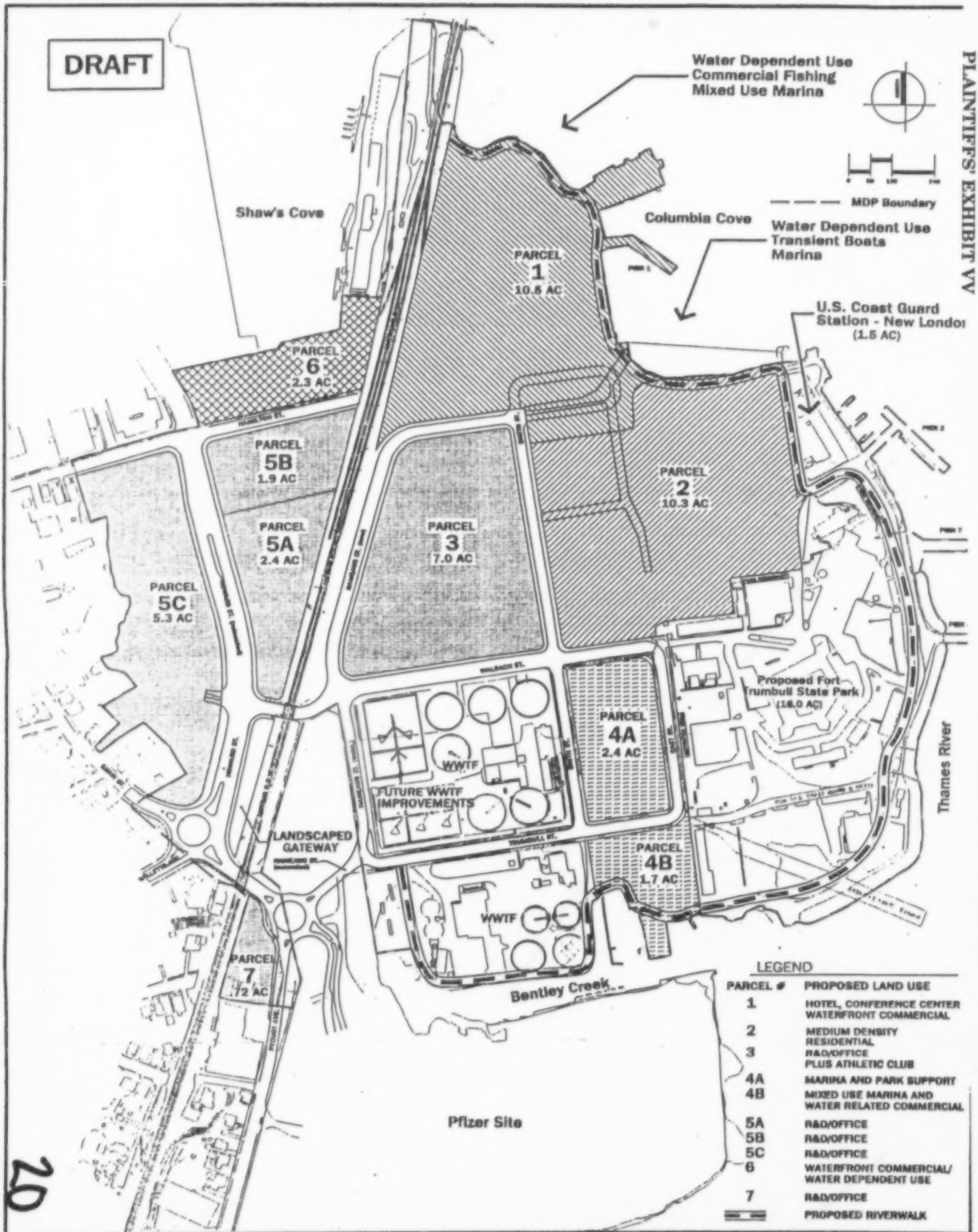



Fort Trumbull MDP Area - New London, Connecticut

Figure 2

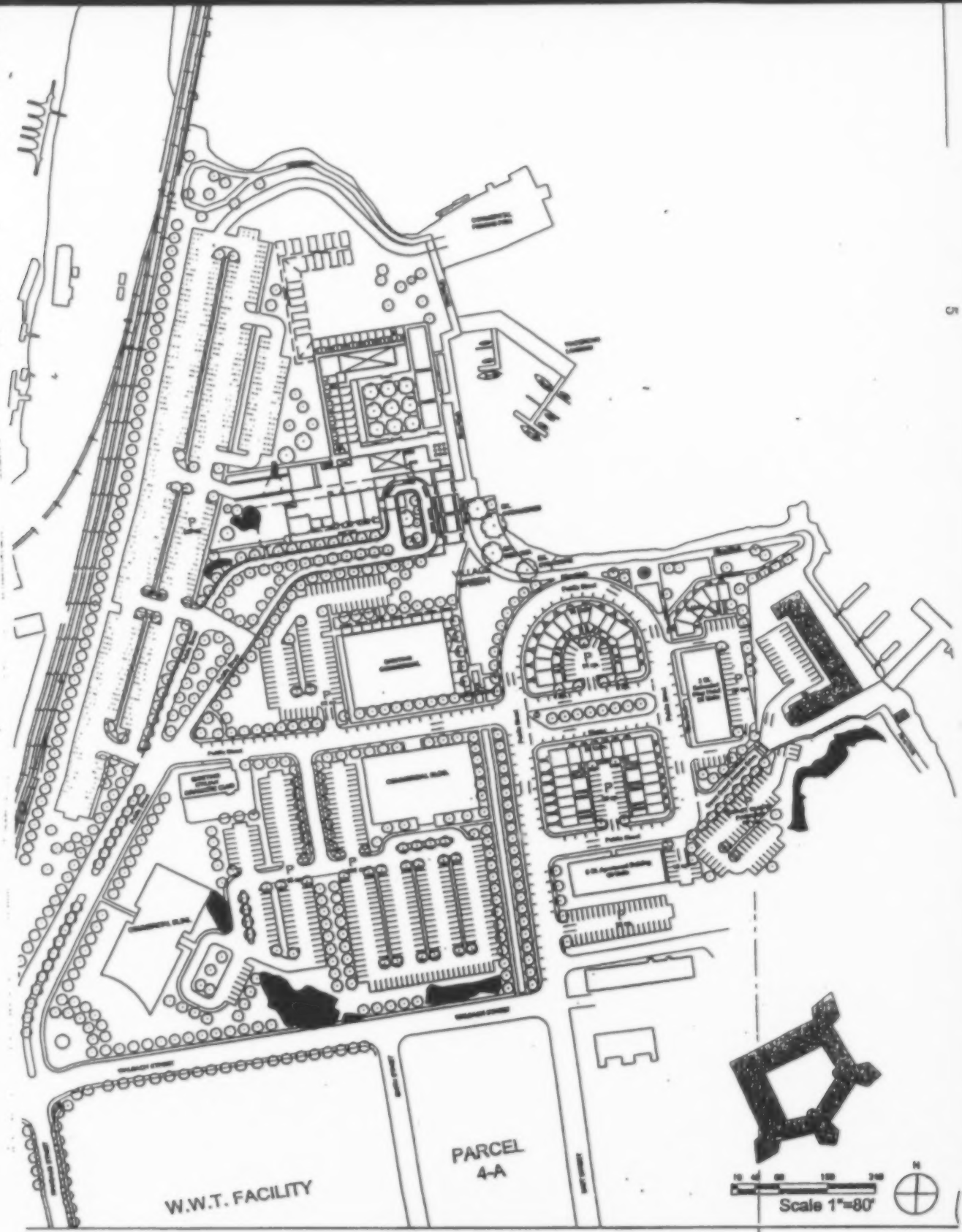
PLAINTIFF'S EXHIBIT
TT
Full

MDP Project Boundary




20

COMPOSITE




Site Plan

# Fort Trumbull Development Plan

October 10, 2000

ilison Companies

Associates, Architects

t

PLAINTIFF'S EXHIBIT
YY Full
NO.

LEGEND

- PROPOSED HOTEL UNITS
- PROPOSED HOTEL SUPPORT
- PROPOSED HOTEL LOBBY
- PROPOSED HOTEL RESTAURANT
- PROPOSED HOTEL FITNESS
- PROPOSED HOTEL MEETING
- PROPOSED HOTEL CIRCULATION
- PROPOSED HOUSING
- PROPOSED COMMERCIAL

**PLAINTIFFS' EXHIBIT B**

| | |
|---|---|
| NO. RED CV 00- | SUPERIOR COURT |
| CITY OF NEW LONDON | JUDICIAL DISTRICT OF |
| V. | NEW LONDON AT |
| ROSE CIAVAGLIA, WILHEMINA J. DERY aka WILHEMINA DERY and CHARLES DERY | NEW LONDON |
| | NOVEMBER 6, 2000 |

STATEMENT OF COMPENSATION

The CITY OF NEW LONDON, acting by and through the NEW LONDON DEVELOPMENT CORPORATION, the Condemner, represents and states:

1. The Condemner is a municipal corporation located in the County of New London and State of Connecticut.

2. The Condemner is acting herein by the NEW LONDON DEVELOPMENT CORPORATION, its duly designated development agency exercising the powers set forth in Chapter 132 of the Connecticut General Statutes.

3. On October 16, 2000, the New London Development Corporation duly voted to acquire the hereinafter described property, and found that the convenience and necessity of the Condemner requires the same, for the purpose and effectuating the Condemner's development project plan.

4. The property to be taken pursuant to this Statement of Compensation is located in the City and County of New London and State of Connecticut, consists of four buildings or residences on one parcel of land known as 28 East Street, 79 Walbach Street, 81-83 Walbach Street and

87 Walbach Street and is more particularly bounded and described in Schedule "A" attached hereto.

5. The names of all persons having a record interest in the property are

ROSE CIAVAGLIA, WILHELMINA J. DERY
aka WILHELMINA DERY and CHARLES DERY
87 Walbach Street
New London, Connecticut

6. The Condemner has determined that the amount of the compensation to be paid to the persons entitled thereto for such property is $506,000.00, and this sum is being deposited with the Clerk of the Superior Court for the Judicial District of New London at New London in accordance with the provisions of Section 8-130 of the Connecticut General Statutes.

CITY OF NEW LONDON, acting by
the NEW LONDON DEVELOPMENT
CORPORATION

By /s/ Edward B. O'Connell
Edward B. O'Connell, of
Waller, Smith & Palmer, P.C.
Its Attorneys

---

SCHEDULE A

A certain piece or parcel of land, with the buildings and improvements thereon, located in the City and County of New London and State of Connecticut, more particularly described as follows:

Beginning at the southwest corner of Walbach and East Streets and running thence southerly



by and along the westerly side of East Street one hundred sixteen (116) feet, more or less, to land now or formerly of Louis Brabander; thence running westerly by said Brabander land one hundred four and two-tenths (104.2) feet to land now or formerly of Eugene Callaghan; thence northerly by and along said Callaghan land one hundred sixteen (116) feet, more or less, to the southerly side of Walbach Street; thence easterly by and along the southerly side of Walbach Street one hundred eight and twenty-five hundredths (108.25) feet to the point and place of beginning.

---

**PLAINTIFFS' EXHIBIT I**

NEW LONDON

---

DEVELOPMENT CORPORATION

RECORD OF VOTE

At its Board meeting on October 16, 2000, the NLDC passed the following resolutions, copies of which are attached:

Resolution 001016-1
Resolution 001016-2
Resolution 001016-3

The board voted in one new member, and will continue to vote on new members at upcoming meetings. The new member is Judge Antoinete Dupont.

Resolution 001016-1

WHEREAS, the New London City Council has designated the New London Development Corporation, a nonprofit development corporation, as its development agency pursuant to the Connecticut General Statutes, and

WHEREAS, the New London Development Corporation has prepared a project plan for The Fort Trumbull Municipal Development Plan Area pursuant to Section 8-189 of the Connecticut General Statutes, and

WHEREAS, the project plan for The Fort Trumbull Municipal Development Plan Area has been duly approved and adopted pursuant to Section 8-191 of the Connecticut General Statutes, and



WHEREAS, it is necessary to acquire certain properties located in the Fort Trumbull Municipal Development Plan Area of New London in order to carry out and administer said project plan, and

WHEREAS, pursuant to Section 8-193 of the Connecticut General Statutes the New London Development Corporation has the approval of the New London City Council to acquire by eminent domain properties within the Fort Trumbull Municipal Development Plan Area.

NOW, THEREFORE, IT IS RESOLVED that the New London Development Corporation, in the name of the City of New London, acquire certain properties located in the Fort Trumbull Municipal Development Plan Area of New London through the exercise of the power of eminent domain as granted to it under Chapter 132 of the Connecticut General Statutes. Said properties are more particularly described as follows:

| *ADDRESS* | *Map* | *Book* | *Lot* | *Owner* |
|---|---|---|---|---|
| 78 Smith Street | 21 | 106 | 1 | Thelma Brelesky |
| 72 Smith Street | 21 | 106 | 2 | Carolyn A. Luzi |
| 41 Goshen Street | 21 | 106 | 8 | Pataya Const. Ltd Partship |
| 49 Goshen Street | 21 | 106 | 9 | Pataya Const. Ltd Partship |
| 54 Goshen Street | 22 | 107 | 24 | Albert P. Anton |
| 42 Goshen Street | 22 | 107 | 28 | Isabelle M. Rogovin |
| 36 Walbach St. | 22 | 107 | 30 | Isabelle M. Rogovin |
| 82 Trumbull Street | 21 | 105 | 13 | Foss & Bourke, Inc |
| 8 East Street | 21 | 105 | 11 | Suzette T. Kelo |

| | | | | |
|---|---|---|---|---|
| 19-23 Smith Street | 21 | 105 | 17 | James R. & Laura A. Guretsky |
| 27 Smith Street | 21 | 105 | 18 | William von Winkle, Trustee |
| 31 Smith Street | 21 | 105 | 19 | William von Winkle, Trustee |
| 33-35 Smith Street | 21 | 105 | 20 | William von Winkle, Trustee |
| 216 Howard Street | 22 | 107 | 32 | William von Winkle, Trustee |
| 189 Howard Street | 22 | 101 | 20 | Antoinette Farrell |
| 195 Howard Street | 22 | 101 | 21 | Lillian M. Del-Grosso, Trustee |
| 53 Goshen Street | 21 | 106 | 10 | Pasquale & Margaerita Cristofaro |
| 79 Walbach Street, 81-83 Walbach St., 87 Walbach Street & 28 East Street | 21 | 105 | 3 | Rose Ciavaglia & Wilhemina & Charles Dery |
| 11-13 Smith Street | 21 | 105 | 14 | Edward & Josephine Johnson |

IT IS FURTHER RESOLVED, that the New London Development Corporation take such steps as are necessary to effectuate such acquisition in the manner provided in Sections 8-128 through 8-133 of the Connecticut General Statutes.

CERTIFICATE

I, Garon Camassar, Secretary of the New London Development Corporation, do hereby certify the above resolution was adopted at a meeting of the Board of Directors of the



New London Development Corporation held on October 16, 2000 and that the said resolution is contained in the minutes of said meeting on file in the New London Development Corporation office, 165 State Street, Suite 313, New London, Connecticut, and that it has not been modified nor rescinded whatsoever.

Attest:

/s/ Garon Camassar — 10/16/00
Garon Camassar, Secretary — Date
New London Development Corporation

---

NEW LONDON

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DEVELOPMENT CORPORATION

**NLDC BOARD RESOLUTION 001016-2**

**Whereas**, the Fort Trumbull Municipal Development Plan was approved on January 18, 2000 by the New London Development Corporation, and subsequently approved by the City Council and the Connecticut Department of Economic and Community Development, and

**Whereas**, the Corcoran Jennison Companies were selected to develop a proposal for Municipal Development Plan Parcels 1, 2, and 3 in accordance with the Municipal Development Plan proposed land uses, and present their proposed plans for the designated parcels, and

**Whereas**, a preliminary plan depicting the layout and uses of the site was presented by Corcoran Jennison Companies on October 10, 2000,

**It is hereby resolved** that the Board of Directors of the New London Development Corporation approves and concurs with the preliminary plan for the layout and uses of Parcels 1, 2, and 3 of the Fort Trumbull Municipal Development Plan as set forth in the Corcoran Jennison Plan dated October 10, 2000.

CERTIFICATE

I, Garon Camassar, Secretary of the New London Development Corporation, do hereby certify the above resolution was adopted at a meeting of the Board of Directors of the New London Development Corporation held on October 16, 2000 and that the said resolution is contained in the minutes of said meeting on file in the New London Development Corporation office, 165 State Street, Suite 313, New London, Connecticut, and that it has not been modified nor rescinded whatsoever.

Attest:

_____ _____

Garon Camassar, Secretary Date
New London Development Corporation

NEW LONDON

DEVELOPMENT CORPORATION

**NLDC BOARD RESOLUTION 001016-3**

**Whereas**, the Fort Trumbull Municipal Development Plan Map 3.8 (Proposed Streets) details proposed streets in the Fort Trumbull Municipal Development Plan Area, and



**Whereas**, the Fort Trumbull Municipal Development Plan Map 5.1 (Proposed Land Uses) details the land uses proposed for the Fort Trumbull Municipal Development Plan area, including the land uses for Parcels 1, 2, and 3 in accordance with that plan, and

**Whereas**, a preliminary plan dated October 10, 2000 was presented by Corcoran Jennison that details land uses consistent with the Fort Trumbull Municipal Development Plan in terms of use, intensity, and location; such plan being received and approved by the Board of the New London Development Corporation on October 16, 2000, and

**Whereas**, the Fort Trumbull Municipal Development Plan states that "More specific traffic and street plans will be developed based upon . . . further refinement of development plans of the MDP area," and

**Whereas**, said refinements are consistent with and not substantial modifications of the Municipal Development Plan,

**Now therefore, It is hereby resolved** that the Board of Directors of the New London Development Corporation approve the attached Map 5.1A and 5.1B as supplemental documents to Map 5. 1 and Map 3.8 which more particularly set forth descriptions of Parcels 1, 2, and 3 and proposed streets.

**It is further resolved**, that the following text changes be made to retain consistency with the plan as modified by the supplemental maps:

**Page 5-1;**

- Proposed Land Uses for Parcel 1: add reference to "***health club and fitness facility***" to description of hotel/conference center complex.

**Page 5-2;**

- Parcel 2; change parcel size to 6 acres. Add reference to "***This parcel will also accommodate approximately 25 extended stay hotel units.***" Delete reference to Coast Guard Museum.
- Parcel 3; change parcel size to 11 acres. Delete reference to health club complex.

**Pages 5-24, 5-28, 5-29, 5-32, and 5-33;**

- Change references describing the principal pedestrian spine, Village Green access, and division between residential and office parcels from "Smith Street" to "***East Street***."

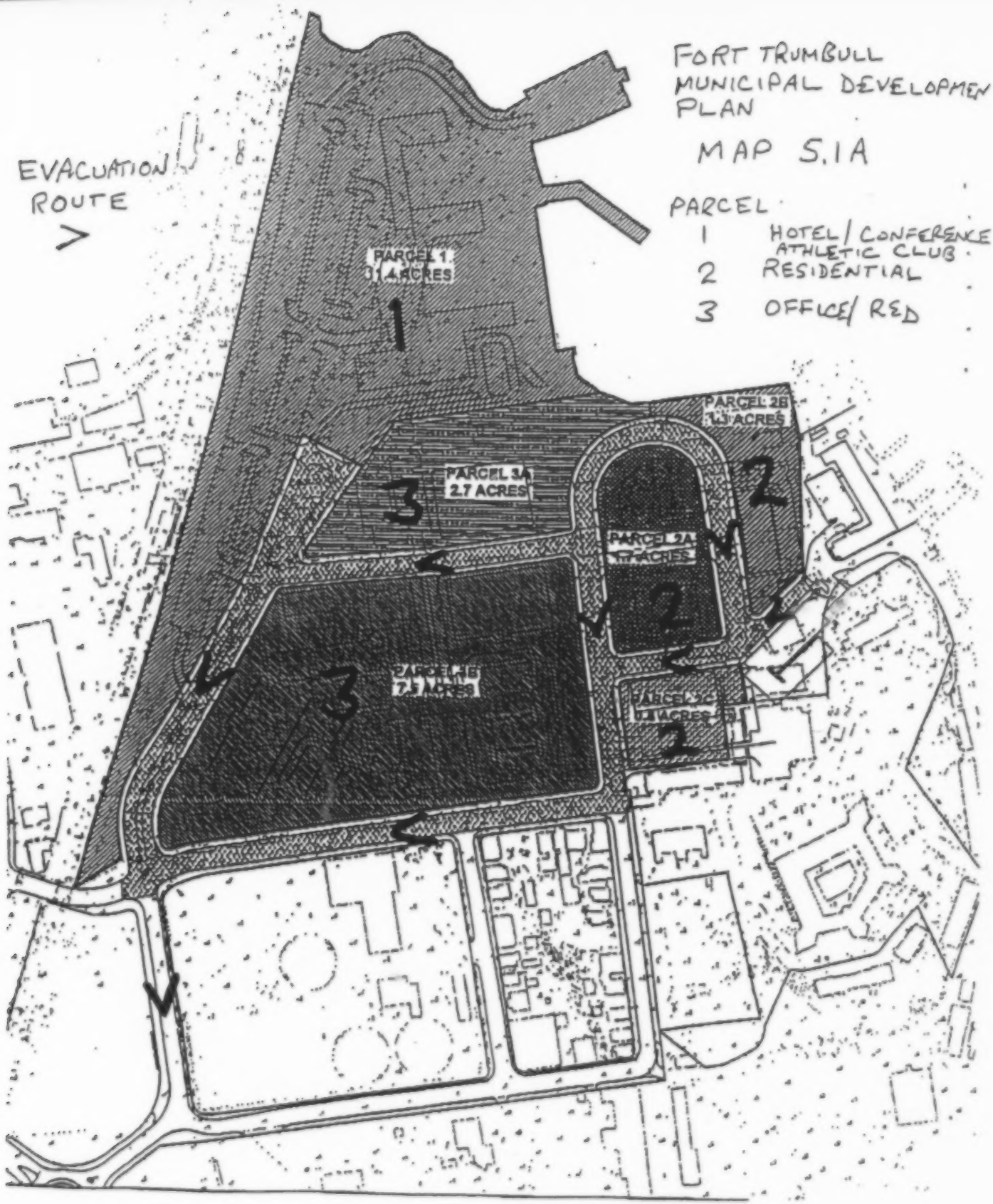
CERTIFICATE

I, Garon Camassar, Secretary of the New London Development Corporation, do hereby certify the above resolution was adopted at a meeting of the Board of Directors of the New London Development Corporation held on October 16, 2000 and that the said resolution is contained in the minutes of said meeting on file in the New London Development Corporation office, 165 State Street, Suite 313, New London, Connecticut, and that it has not been modified nor rescinded whatsoever.

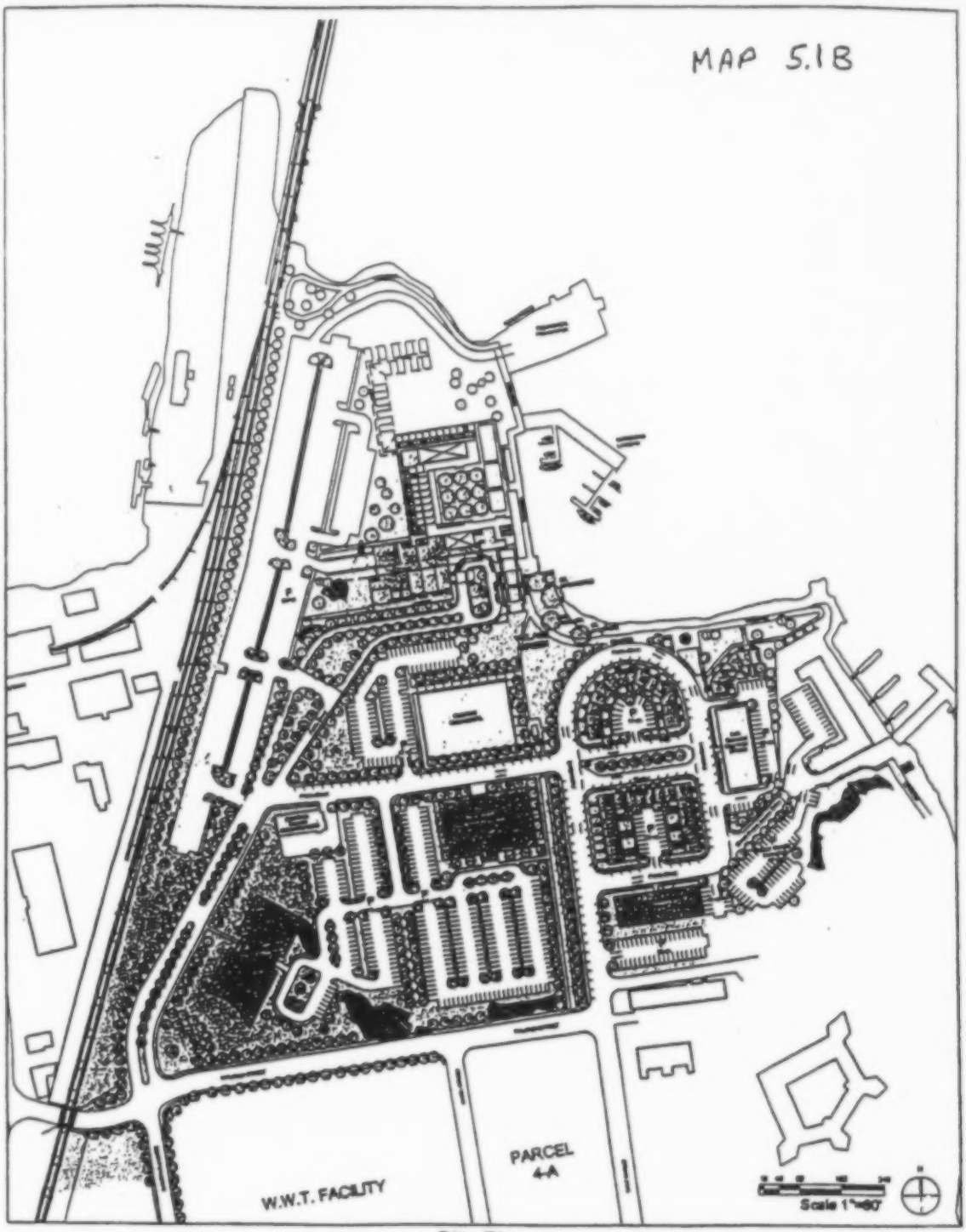
Attest:

_____ _____

Garon Camassar, Secretary Date
New London Development Corporation


FORT TRUMBULL
MUNICIPAL DEVELOPMEN
PLAN
MAP 5.1A
PARCEL
1 HOTEL/CONFERENCE ATHLETIC CLUB
2 RESIDENTIAL
3 OFFICE/RED
EVACUATION ROUTE
PARCEL 1
PARCEL 2B
PARCEL 3A
2.7 ACRES
PARCEL 2A
PARCEL 2C
1
2
3

MAP 5.1B




Site Plan

# Fort Trumbull Development Plan

October 10, 2000

Corcoran Jennison Companies

William Rawn Associates, Architects
101 Tremont Street
Boston, MA
02108

LEGEND

**PLAINTIFFS' EXHIBIT II**

New London Development Corporation
181 Broad Street, New London, CT 06320

December 15, 1997

George M. Milne, Jr.
President
Pfizer Central Research
Groton, CT 06340

Dear George:

The directors of the New London Development Corporation are pleased to make the commitments outlined below to enable you to decide to construct a Pfizer Central Research facility in New London. This commitment is presented in conjunction with the State of Connecticut and the City of New London.

We have been working with the renowned firm of Wallace, Roberts and Todd to design a land plan to ensure that the new Pfizer facility will be the centerpiece of a concentrated reuse of the area surrounding the former New London Mills (see Appendix A). In addition to your facility the project includes the development of the state's fourth biotechnology incubator, the refurbishment of historic Fort Trumbull, the reuse of the vacant Naval Underwater Warfare Center and the development of mixed retail and residential space that will be fully integrated into the surrounding neighborhoods of the City of New London. In order to achieve these goals, it will be necessary to relocate the Calamari Bros. scrap dealer, upgrade utilities and infrastructure, and acquire a number of surrounding properties.

Based on the commitments from the state (see Appendix B) and city (see Appendix C), the New London Development Corporation will:

1. *Calamari Bros.* – Acquire and perform environmental testing on this site which will serve as the entry way to the research facility. The status of negotiations are summarized in Appendix D. Environmental testing would be needed on the current site and would require funding. The cleanup costs of any contaminants found on the site prior to its transfer to Pfizer will be identified as part of the testing program and funds made available subsequent to the conclusion of testing.

2. *Surrounding Properties* – Residential and commercial properties in the area including abandoned buildings and vacant lots will be acquired for integration into the overall design plan. Every effort will be made to ensure the highest and best use of all properties. Consideration will also be given to improvements to the approaches and access points to the site along Howard Street and other roads. Appendix E describes estimated costs and the manner in which options will be acquired and the purchases executed.

3. *Fort Trumbull State Park* – Some of the sites mentioned in paragraph "2" above will be utilized in the development of Fort Trumbull State Park. Appendix F outlines the Connecticut Department of Environmental Protection's timetable and plan.

4. *Utilities and Infrastructure Upgrades* – Utilities and infrastructure in the project area will require upgrades in order to guarantee utilities consistent with the requirements of the new facilities. See Appendix G.



5. *Biotechnology Incubator* – The proximity to the Pfizer research facility creates a tremendous opportunity to create another asset – a new biotechnology incubator facility. The mission of this organization will be to support the early phase development of biotechnology firms until they are successful enough to move to permanent locations elsewhere in Connecticut. The location in the project area will be a significant positive attribute in recruiting startup ventures to this facility. Site acquisition costs and methods are outlined with other properties in Appendix E. Additional funding will be needed for construction or renovation of buildings and relocation of current tenants.

6. *Former Naval Underwater Warfare Center* – The portion of this site, excluding Fort Trumbull State Park and land occupied by the United States Coast Guard Station New London will be acquired from the Department of Defense as described in Appendix I.

Thank you very much for your consideration of this proposal. We will work with you to refine this proposal to meet Pfizer's requirements. We will also work closely with you at the appropriate time to plan an announcement that is befitting the magnitude of this project.

Cordially,

/s/ Claire L. Gaudiani
Dr. Claire L. Gaudiani
President

CLG:dcb
97-667-2

**PLAINTIFFS' EXHIBIT PP1**

Serbia, James

**From:** Serbia, James
**Sent:** Wednesday, October 21, 1998 1:42 PM
**To:** Milne, George M
**Subject:** Ft. Trumbull MDP

**Importance:** High

Dr Milne (Questions shown in red and CAPS)

I have left for you 3 drawings depicting some the latest concept plans that NLDC has put together. There seems to be some confusion regarding the expectation that Pfizer (you in particular) has regarding development of the peninsula (Something I know you have heard before – bear with me). This confusion has caused some friction between NLDC and DECD/DEP.

NLDC indicates that an original conceptual plan put together by Wallace Roberts Todd (WRT) was used at two key meetings – one involving you/state/city/NLDC and the other being the CMC meeting (IS THIS YOUR RECOLLECTION?). NLDC indicates that this plan represents "the commitment" to Pfizer. The State feels that "the commitment" is more along the lines of what is outlined in the letters from DECD to Pfizer.

I think what it boils down to is whether or not Pfizer is flexible regarding the development plans – I believe the answer is yes per all of our previous discussions on this – as long as some key components are included:

– a residential component which would be attractive to professionals

– a hotel/conference component



– treatment plant upgrades/state park/etc and commercial or retail development to make the area an attractive place to visit/work.

DOES THIS SOUND ABOUT RIGHT?

The State, from a public policy perspective, has difficulty in supporting residential areas located in a floodplain, and in condemning/taking an existing residential area and replacing it with a more upscale residential district. They do indicate that they can accomodate an upscale residential component, but that they would have some difficulty if this portion of the development became substantial.

Can you clarify the following:

1. WOULD APPROXIMATELY 70-80 HIGH END RESIDENTIAL UNITS FIT WITH YOUR EXPECTATION?

2. THE LARGEST HOTEL AREA THAT IS CURRENTLY SHOWN ON ANY OF THE PLANS IS FOR 250 UNITS. THIS SEEMS LOW TO ME. HIGH, LOW, OR OK?

3. YOU MENTIONED THAT I SHOULD KEEP AN EYE OUT REGARDING PLANS FOR AN AMPHITHEATER. THE ORIGINAL WRT PLAN SHOWED ONE, BUT IT DOESN'T APPEAR THAT THIS IS STILL IN THE PLANS. IS IT SOMETHING YOU WOULD LIKE TO SEE OR IS IT SOMETHING WE WOULD PREFER NOT BE INCLUDED IN THE DEVELOPMENT?

Thanks for your help and patience.

Jim

**PLAINTIFFS' EXHIBIT PP2**

Central Research Division
Pfizer Inc
Eastern Point Road
Groton, CT 06340
Tel 860 441 4844 Fax 860 441 6204

(LOGO)

**Central Research**

George M. Milne, Jr., Ph.D.
President

March 8, 1999

Dr. Claire Gaudiani
President, New London Development Corporation
Connecticut College
270 Mohegan Avenue
New London, CT 06320

Dear Claire:

On behalf of Pfizer Inc., I am pleased to affirm my support of the New London Development Corporation's application for an Economic Development Conveyance for the Naval Undersea Warfare Center (NUWC) property.

Pfizer Inc is a research-based global health care company that discovers, develops, manufactures, and markets innovative medicines for both humans and animals. This will be the headquarters for Central Research, Pfizer's R&D Division, based in Southeastern, Connecticut. We are building a $270 million Global Development Facility (GDF) in New London to open by October 1, 2000. This facility will employ more than 2,000 Ph.D.s, M.D.s and other scientists, researchers, and clinical specialists. Our New London expansion requires the world class redevelopment planned for the adjacent 90 acres in the Fort



Trumbull Municipal Development plan including the 16 acres of the NUWC property.

The Fort Trumbull area is integral to our corporate facility and to the plan for the revitalization of New London to a world class standard. The Amended Reuse Plan will provide a waterfront hotel with about 200 rooms, a conference center and physical fitness area, extended-stay residential units and 80 units of housing. We will use the proposed hotel and conference facility as an extension of our facility committing to 100 of those rooms on a daily basis for visiting international staff and other professionals. In addition we require conference space and are exploring a "virtual" Pfizer University to keep our researchers up to date on the most recent breakthroughs in biotechnology. The extended stay housing will provide for researchers who often stay for periods of up to 3-6 months. Year round quality housing is also crucial to recruiting top scientists. The waterfront residential neighborhood envisioned provides a one-of-a-kind housing option desired by many of our employees. As a result, the NUWC property is and has been key to our investment in the area.

We are prepared to enter into agreements with the NLDC and developers to build the type of facilities we require, but this is not just about Pfizer. The plan developed by the NLDC is intended to transform New London and is destined, we believe, to become a model for high impact, high value public/private partnerships. We have also requested the NLDC to expedite the development as quickly as possible to meet our schedule and the OpSail 2000 target for the unveiling of the new, New London. The transfer of NUWC and the completion of the developments proposed in the Amended Reuse Plan are fundamental to the

success of these efforts and of our Global Development Facility in New London.

We greatly appreciate the assistance of the Department of the Navy in making the Fort Trumbull and NUWC redevelopment a national example of which we may all be proud.

Sincerely,

/s/ George M. Milne, Jr., Ph.D.

cc: Governor John G. Rowland, State of Connecticut
Timothy West, Mayor City of New London

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**DEFENDANTS' EXHIBIT 12**

**MINUTES OF THE CITY COUNCIL OF NEW LONDON**

1/18/00 – 6

**7.8 Fort Trumbull Municipal Development Plan**

Upon motion of Councilor Burdick, seconded by Councilor Curtin, it was voted 6-1: To approve resolution number 011800-3 concerning the New London City Council approving the Fort Trumbull Municipal Development Plan and making certain findings. The Clerk reads the resolution by title only, all Councilors having copies, and the subject resolution is adopted by Roll Call Vote. Those voting in favor: Burdick, Pero, West, Curtin, Nossek, Hewett. Those voting against: Beachy.

**RESOLUTION NUMBER 011800-3**

Certified Resolution

By the **NEW LONDON CITY COUNCIL** approving the Fort Trumbull Municipal Development Plan and making certain findings.

**WHEREAS,** it is desirable and in the public interest that the **New London Development Corporation** prepare a Development Plan for a Municipal Development Project for purposes of contributing to the economic welfare of the municipality and the state pursuant to the provisions of Chapter 130, Chapter 132 and Chapter 588(1) of the Connecticut General Statutes as amended; and

**WHEREAS,** the **New London Development Corporation** prepared a Development plan for the project known

as the **Fort Trumbull Municipal Development Plan**; and

**WHEREAS,** the Fort Trumbull Municipal Development plan was referred to the **Planning and Zoning Commission of the City of New London** and the regional planning agency known as the **Southeastern Connecticut Council of Governments Regional Planning Commission**; and

**WHEREAS,** thereafter the **New London Redevelopment Agency** held a public hearing on the Fort Trumbull Municipal Development Plan on January 13, 2000, pursuant to the provisions of local law, state statutes, Chapter 130 of the Connecticut General Statutes, as amended, and thereafter approved said Plan; and the **New London Development Corporation** held a public hearing on the Fort Trumbull Municipal Development Plan on January 13, 2000, pursuant to the provisions of local law, state statues, Chapter 132 and Chapter 588(1) of the Connecticut General Statutes, as amended, and thereafter, approved said plan;

**NOW THEREFORE**, the New London City Council hereby resolves:

(1) That the Fort Trumbull Municipal Development Plan is hereby approved;

(2) That the land and buildings within the Fort Trumbull Municipal Development Plan project area will be used principally for industrial, business, housing and recreational uses; that the land and buildings within the boundaries of the Project Area will be used primarily for economic base business purposes or business support services; and that the Plan is essential to the purpose of redevelopment of the area;



(3) That the Fort Trumbull Municipal Development Plan is in accordance with the City of New London Plan of Conservation and Development, and that it is in accordance with the Plan of Development for the Southeastern Connecticut Council of Governments Regional Planning Commission;

(4) That the Fort Trumbull Municipal Development Plan is not inimical to any statewide planning program objectives of the state or state agencies as coordinated by the Secretary of the Office of Policy and Management;

(5) That the Fort Trumbull Municipal Development Plan project will contribute to the economic welfare of the City of New London and the State of Connecticut; and

(6) That to carry out and administer the project, public action under Chapters 130, 132 and 588(1) of the Connecticut General Statutes as amended is required; and, for the purposes of carrying out this project, that the New London City Council approves and bestows upon the New London Development Corporation all rights and powers that are permitted to accrue to a development agency or implementing agency under Chapters 130, 132, and 588(1) of the Connecticut General Statutes as amended, including the power of eminent domain with the project area in the name of the City of New London per Chapter 130, Section 8-128, and Chapter 132, Section 8-193.

(7) That all properties in the Fort Trumbull Municipal Development Plan listed as "to be acquired" shall be acquired prior to December 31, 2002, unless this date is extended by the City Council.

(8) That the Chief Operating Officer of the New London Development Corporation is hereby authorized to submit the resolution of approval of the Fort Trumbull Municipal Development Plan as approved by the New London City Council to the Connecticut Department

of Economic and Community Development for approval.

Upon motion of Councilor Pero, seconded by Councilor Curtin, it was unanimously voted: To recess the meeting at 12 midnight.

Attest: /s/ Michael J. Tranchida
Michael Tranchida, Assistant City Clerk

grm



**PLAINTIFFS' EXHIBIT HHH**

**MEMO**

**CORCORAN JENNISON COMPANY, INC.**

**DATE:** **JANUARY 12, 2001**

**TO:** **JOSEPH E. CORCORAN**
**GARY JENNISON**
**SCOTT DUMONT**
**HARRY NASH**
**ELIZA EDELSBERG**

**FROM:** **MARTY JONES**

**RE:** **COMMERCIAL OFFICE STUDY ON NEW LONDON**

Here is the commercial office study prepared by Jay Hooper on New London. We need a document for NLDC to show we are working on this. Please give me your comments. We plan to seek brokers in February to keep the community aware the deal is moving forward.

Harry is working on a detailed analysis of Building 2 systems which will be added to update the cost side of the proforma.

CORCORAN JENNISON COMPANIES, INC.

**MARKETING PLAN**

**FOR**

**COMMERCIAL DEVELOPMENT SPACE**

***Fort Trumbull Development***

***New London, CT***

*Corcoran Jennison Companies, Inc.*
*150 Mount Vernon Street, Suite 500*
*Boston, MA 02125*

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4. Financial Feasibility Study of Commercial Development
5. Conclusions of Financial and Market Study
6. Target Market for Commercial Space
7. Marketing Strategy
8. Marketing Execution Plan
9. Project and Marketing Schedule
10. Marketing Budget
11. Addenda
    - Sample Draft of Broker Request for Proposals
    - New London Office Absorption History (Miner & Silverstein Appraisal Company)
    - Comparable Office Lease Data

## Project Description

### Background

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), has undertaken a municipal planning project targeting an area adjacent to the Thames River in New London, Connecticut. Known as the Fort Trumbull Municipal Development Plan (MDP), the MDP area encompasses approximately 90 acres immediately south of downtown New London and adjacent to historic Fort Trumbull, which has been developed into a



state park. The principal catalyst for development in this area is the construction of Pfizer Inc.'s 790,000-square-foot Global Development Facility immediately south of the MDP area. This facility is the headquarters for Pfizer's worldwide research operations.

The NLDC selected Corcoran Jennison Companies as the developer of a 30-acre waterfront parcel adjacent to Fort Trumbull. The majority of the parcel consists of the U.S. Navy's closed Naval Undersea Warfare Center (NUWC). The balance is made up of an aging working class neighborhood and an Amtrak rail yard.

### Project Description

Corcoran Jennison Companies has proposed a mixed-use development, to include a four-star hotel, housing, and commercial space, for the 30-acre parcel. The attached site plan, labeled the Fort Trumbull Development Plan, depicts the latest proposed development plan for the Fort Trumbull site. New public roadways and infrastructure will be built to support the development. Total development costs are projected to be approximately $100 million.

The hotel will be situated on the northernmost section of the site. The residential development will be located on the southeastern portion of the site, adjacent to the existing Coast Guard rescue station facility and north of Fort Trumbull. The commercial development will be located on the southwestern portion of the site; an existing Italian Dramatic Club located here will be kept and incorporated into the development plan. Plans also include the "Riverwalk" a waterfront park along the shoreline. It will connect to the Fort Trumbull State Park, and provide

opportunities for the general public to walk, bike and picnic along the water.

### *Hotel/Conference Center*

The proposed hotel development is a key component to the overall transformation of the Fort Trumbull area. An extension of Nameaug Street, to be built as a tree-lined boulevard, will be the gateway to the hotel, leading guests from Walbach Street to the hotel. The planned hotel will be built in two phases and will consist of 225 rooms, a 12,000 square foot of conference/meeting facility, and a restaurant when completed. Construction will commence on the first phase of 100 rooms as soon as possible, which is anticipated to be August 2001. The hotel will be designed with considerable green space around it, as well as lots of glass to take advantage of sweeping views of the Thames River, Long Island Sound, and downtown New London.

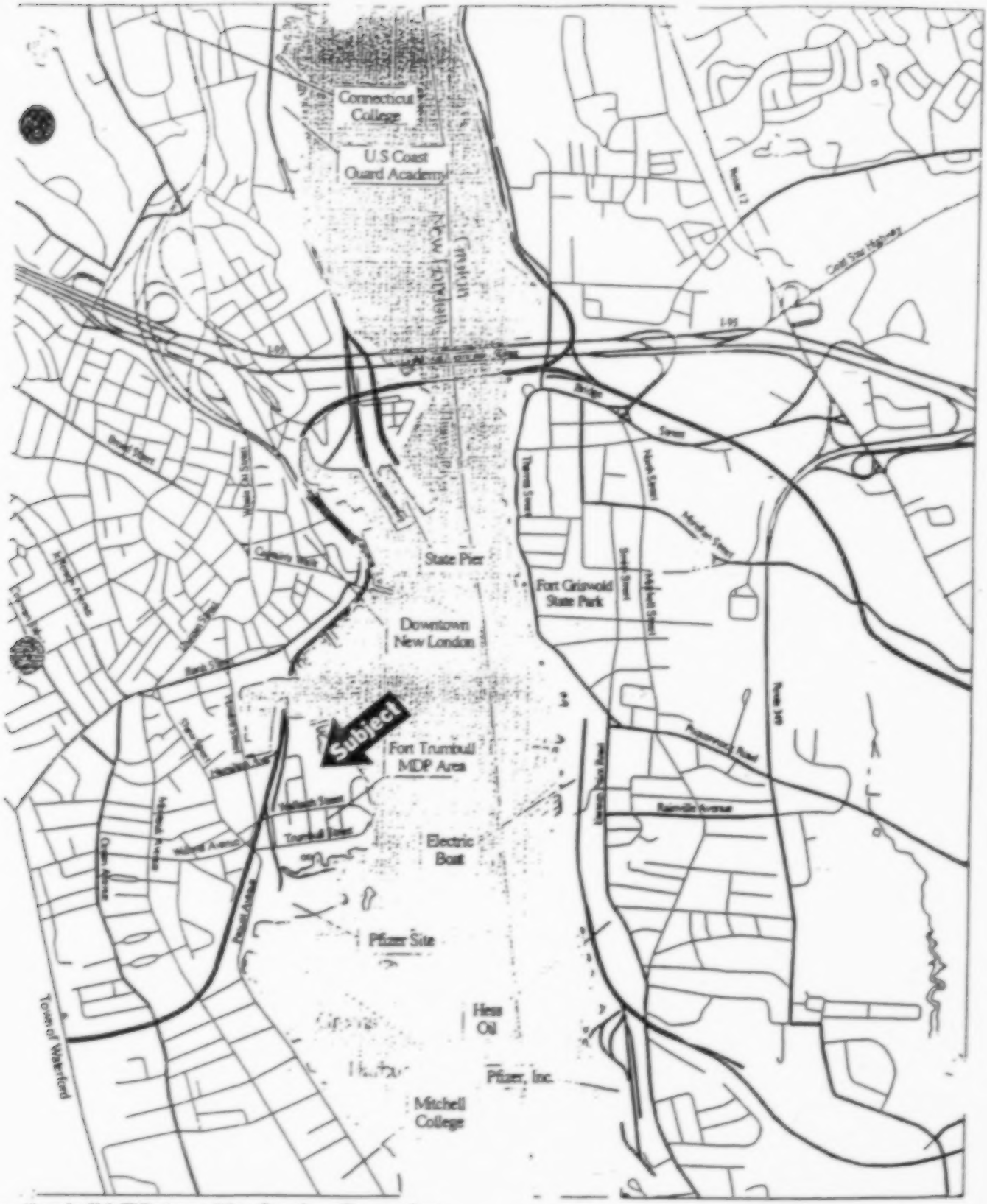
### *Residential*

The proposed residential development consists of a three-story, 24-unit extended stay inn with furnished apartments; a six-story, 48-unit apartment building; and 40 two- and three-story townhouses arranged in three traditional urban clusters near the cove. The residential development will be used to focus activity toward the water. The Riverwalk, which will be a dedicated public pedestrian and bicycle path that runs along the water's edge and connects the Fort Trumbull development with Fort Trumbull State Park and the Pfizer development, will be a valuable amenity for the residential development.



### *Commercial*

At present, approximately 300,000 square feet of commercial space is envisioned for the site. This will be comprised of an existing commercial building containing approximately 91,000 gross square feet, identified as Building 2 by the U.S. Navy, and two proposed buildings of 100,000 square feet each. The MDP called for the inclusion of office or bioscience-related commercial space. While the new buildings could be developed for either use depending upon market conditions, the existing Building 2 is best utilized for office use given its current construction. Building 2 is a four-story, steel frame, brick and glass structure completed in 1991 as sonar research and development space for the Navy. It is in reasonably good condition and can be easily renovated to Class A office space for the New London market. The new buildings will be sited between Building 2 and Walbach Street and will be developed as market conditions warrant.




rt Trumbull MDP Area - New London, Connecticut
raft Environmental Impact Evaluation - November 1998

as GIS coverages developed by Milone & MacBroom, --
, and HMA, Inc. Sources include Connecticut DEP,
ty of New London, FEMA, and US Navy. Intended for planning

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Figure 1.1-2
Project Location Map

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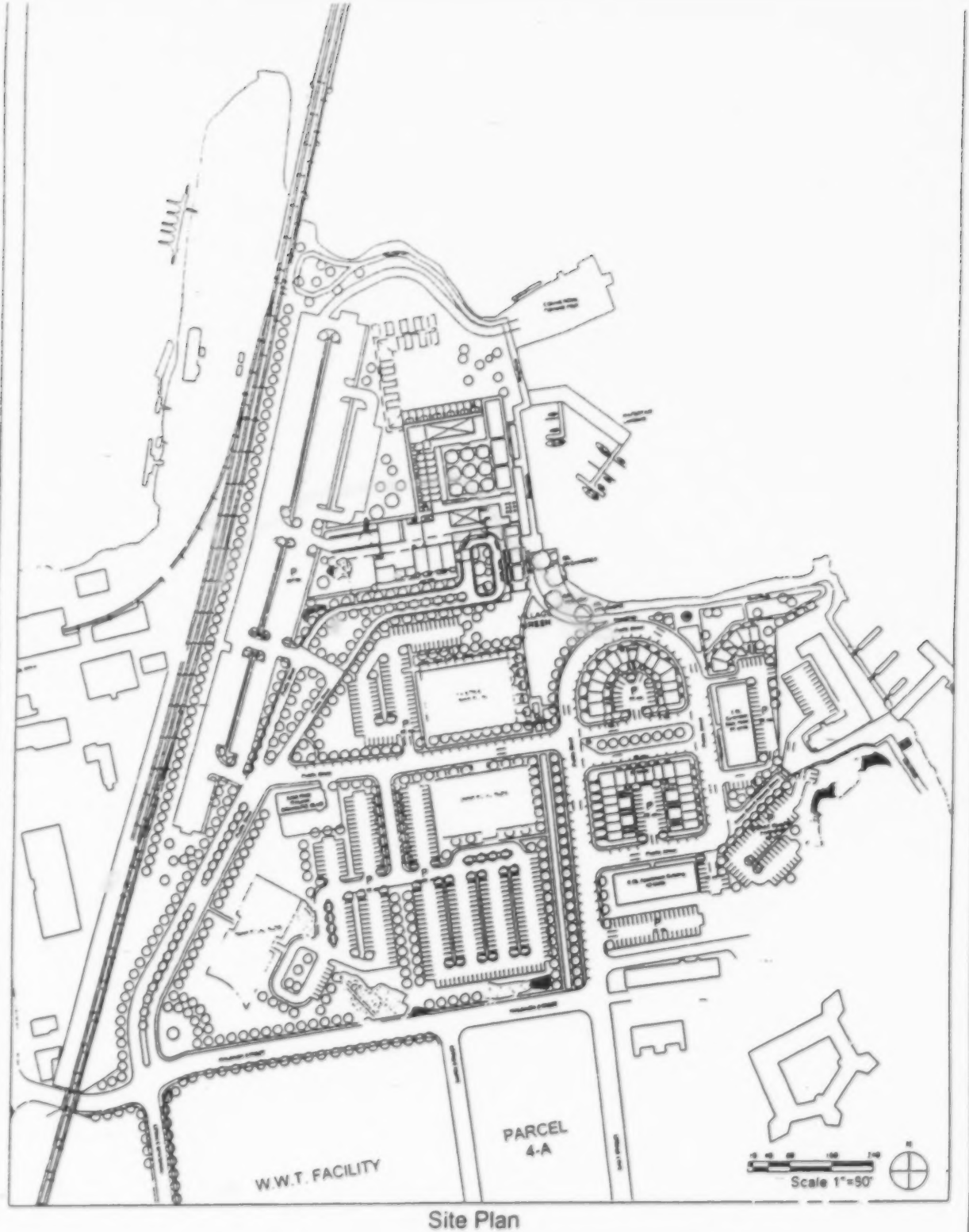



Site Plan

# Fort Trumbull Development Plan

October 10, 2000

Corcoran Jennison Companies

William Rawn Associates, Architects
101 Tremont Street
Boston, MA
02108

LEGEND

- PROPOSED HOTEL UNITS
- PROPOSED HOTEL SUPPORT
- PROPOSED HOTEL LOBBY
- PROPOSED HOTEL RESTAURANT
- PROPOSED HOTEL FITNESS
- PROPOSED HOTEL MEETING
- PROPOSED HOTEL CIRCULATION
- PROPOSED HOUSING
- PROPOSED COMMERCIAL

## Market Study Summary

### OFFICE MARKET

The New London commercial real estate market is continuing its recovery from the last recession of the early 1990s. While rental rate and occupancy trends have been generally positive over the past few years, market values are still well below replacement cost and new construction is generally not feasible. As a result, little new construction has taken place over the last decade in the New London area. The following discussion provides a summary of the New London commercial/office market. The chart on the following page presents a snapshot of the New London office market as of October 2000.

### Supply

New London contains approximately 815,000 square feet of Class A and B office space, with approximately 545,000 square feet considered Class A and approximately 270,000 considered Class B. Most of New London's Class A space was built in the 1980s. Roughly one-half of the Class A space is located in Shaw's Cove Business Park, which currently consists of six buildings containing approximately 275,000 square feet. Shaw's Cove is located between downtown New London and the Fort Trumbull development. The vast majority of the Class B space is located in downtown New London.

New construction activity in the market has been minimal and generally limited to end-user/owner-occupant facilities, such as the new space under construction for Pfizer. There are two proposed developments of Class A space that are commonly mentioned in the marketplace, one in

New London and one in nearby Groton. These developments are as follows:

*Shaw's Cove 7 & 8, New London*

- Proposed 60,000 to 70,000 s/f in 2 buildings
- Developer – Julian Enterprises
- No pre-leasing activity to date
- Asking $20.00 Gross
- Considering ground floor retail due to greater demand
- U.S. Properties, Inc. – marketing/leasing agent

*Mystic Executive Park, Groton*

- Proposed 104,000 s/f
- 4 Stories (26,000 s/f floorplates)
- Located at Exit 88 off Rt. 95 adjacent to Marriott Hotel under construction
- Developer – Wolman's/Waterford Hotel Group
- No pre-leasing activity to date
- Asking $23.00 Gross (includes basic tenant improvements)
- CB Richard Ellis – marketing/leasing agent

NEW LONDON OFFICE MARKET SURVEY
October 2000
Source: U.S. Properties, Inc.

| | | Property | Address | Built | Size (S/F) | Available S/F | Vacancy | Rate | Comments |
|---|---|---|---|---|---|---|---|---|---|
| **Class A** | **1** | Shaw's Cove One | | 1984 | 12,492 | - | 0.0% | | |
| | **1** | Shaw's Cove Two | | 1986 | 31,228 | 790 | 2.5% | $20.00 Gross | |
| | **1** | Shaw's Cove Three | | 1988 | 70,286 | 8,300 | 11.8% | $20.00 Gross | |
| | **1** | Shaw's Cove Four | | 1988 | 32,731 | - | 0.0% | | Medical Building |
| | **1** | Shaw's Cove Five | | 1989 | 37,114 | 2,155 | 5.8% | $20.00 Gross | |
| | **1** | Shaw's Cove Six | | 1990 | 89,000 | 2,841 | 3.2% | $20.00 Gross | |
| | **2** | Columbus Corner | 470 Bank Street | 1989 | 21,632 | - | 0.0% | | |
| | **3** | Mariner Square | 125 Eugene O'Neill Dr. | 1982 | 84,000 | 1,000 * | 1.2% | $20.00 Gross | 26,000 s/f for sublease |
| | **4** | Citizens Bank | 63 Eugene O'Neill Dr. | | 37,414 | 1,400 | 3.7% | $14.00 NNN | |
| | **5** | 194 Howard Street | | 1984 | 47,000 | - | 0.0% | | |
| | **6** | Union Plaza 1 & 2 | | 1968 | 52,480 | 4,000 | 7.6% | | |
| | **7** | 400 Bayonet Street | | 1987 | 30,617 | 4,800 | 15.7% | $19.00 + Elec. | |
| | | **Subtotal** | | | **545,994** | **25,286** | **4.6%** | | |
| **Class B** | **8** | A & T Technical | 238-258 Bank Street | | 58,518 | 21,000 | 35.9% | $12.00 NNN | |
| | **9** | Columbus Park | Howard Street | 1988 | 25,000 | 1,300 | 5.2% | $13.50 Gross | |
| | **10** | Harris Place | 165 State Street | 1885 | 66,354 | 13,985 | 21.1% | $14.00 + Elec. | |
| | | Manwaring Building | 225 State Street | | 25,848 | 25,848 | 100.0% | $14.00 + Elec. | |
| | | Exchange Building | 190 Governor Winthrop | 1935 | 41,000 | 26,950 | 65.7% | $11.00 + Elec. | |
| | | Dewart Building | State Street | 1914 | 43,896 | 43,896 | 100.0% | N/A | Temporarily off market |
| | | 19 Jay Street | | | 9,300 | 9,300 | 100.0% | $14.00 NNN | |
| | | **Subtotal** | | | **269,916** | **142,279** | **52.7%** | | |
| **Class A & B Totals** | | | | | **815,910** | **167,565** | **20.5%** | | |

* - Excludes sublease space

Another proposed development that could impact the New London market is the planned development of the former Norwich State Hospital, located north of New London in Norwich, CT. A master plan was recently unveiled for turning the 470-acre site into a 3 million square foot office park. No prospective tenants have been announced, although discussions reportedly have occurred in the past with Pfizer. Spaulding & Slye Colliers is marketing this site.

While New London has limited land available for new commercial construction, some additional parcels will be made available in the Fort Trumbull MDP area for development subsequent to the development of the Fort Trumbull site. Additionally, the surrounding region has abundant land available for commercial development should future market conditions warrant it.

Based on conversations with people connected with the proposed office developments, replacement cost for new office development is estimated to be between $120 and $150 per square foot, depending upon construction, type of parking, etc.

**Demand**

As can be seen in the preceding chart, although the overall market exhibits a 20.5% vacancy rate, the Class A market is quite healthy, with only 4.6% of the Class A space not leased. If the 26,000 square feet available for sublease in Mariner Square were included, then the Class A vacancy rate would rise to 9.4%, which is still not an unhealthy level for the market.

The Class B market, on the other hand, is clearly struggling with over half of the space presently unoccupied. Brokers, however, report that much of the Class B space is functionally obsolete and has inadequate and/or inaccessible parking, which exacerbates the vacancy level.

A report published by Miner & Silverstein Appraisal Company (see Addenda) indicates that there has been positive demand for Class A & B office space over the past four years. Between October 1996 and October 1999, approximately 185,000 square feet were absorbed in New London. As of November 1999, Miner & Silverstein had forecast additional absorption of approximately 25,000 square feet through mid-2000; based on market information provided by U.S. Properties, actual absorption through October 2000 appears to have exceeded this projection.

Brokers indicate that typical tenants in the market require between 3,000 and 7,500 square feet of space. While there are some requirements between 10,000 and 20,000 square feet, reportedly there are relatively few above 20,000 square feet. Given the relative size of the New London market, this would appear reasonable.

Typical office tenants in the New London market include the "Main Street" mix of lawyers, accountants, and medical practitioners, as well as other service-oriented companies, community organizations, and government agencies. Some of the larger users in New London are Pfizer, General Dynamics, CSC (Computer Science Corp.), and Ortronics. Ortronics, which reportedly recently tripled in size to 36,000 square feet, is in the telecommunications and structured cable industry.



It should be noted that over the past few years, Pfizer has represented one of the largest sources of demand in the southeastern Connecticut region, buying or leasing large blocks of space outside of its Groton campus and its New London campus that is under construction. Reportedly, Pfizer will remain in the vast majority of this space as it occupies its new Global Development Facility being built in New London.

According to local brokers and business people, New London has experienced limited organic growth, aside from Pfizer, in recent years. In addition, the region has experienced very limited growth as a result of companies relocating to the area to be proximate to Pfizer or other companies. Nonetheless, one source of future demand for commercial space may be the result of companies doing business with Pfizer that desire proximity to the new Global Development Facility. Brokers have noted a few inquiries from companies representative of Pfizer-related demand, but no significant demand has been evidenced over the past several years.

## Rental Pricing

Recent leases for Class A office space in New London show rents ranging between $18.00 and $21.00 per square foot, on a gross basis with the tenant only paying for the additional cost of janitorial cleaning within the leased premises. A summary of comparable lease data over the past three years has been included in the Addenda for reference purposes. Lease terms are typically between 5 and 10 years, with smaller tenants sometimes wanting 1- to 3-year terms and larger tenants sometimes executing 15-year terms.

Tenant improvement allowances vary based on recent deals. With the market tightening, some deals have been done with no or minimal (painting and carpet cleaning) tenant improvements. On the other hand, some deals in Shaw's Cove Business Park have had tenant improvement allowances around $15.00 to $17.00 per square foot.

## Operating Expenses

Brokers indicate that operating expenses, including real estate taxes and utilities, for office buildings in New London generally vary between $6.00 and $7.00 per square foot. Of this amount, real estate taxes generally range between $1.00 and $2.00 per square foot. Typical real estate taxes for buildings in Shaw's Cove are between $1.70 and $2.00 per square foot. Utilities usually comprise between $1.50 and $2.00 per square foot, with the balance reflecting common area and other operating expenses.

## Sale Prices

Recent sales of office buildings in New London have ranged between roughly $40 and $70 per square foot. The two most recent sales of larger Class A buildings sold for prices ranging between approximately $57 and $67 per square foot. The only office buildings currently being marketed for sale are Class B properties with asking prices ranging between $26 and $63 per square foot.

## BIOTECH/BIOSCIENCE MARKET

The biotech/bioscience market is in its infancy in Connecticut. Aside from Pfizer, a biotech/bioscience market does not really exist in the New London area. Connecticut



is promoting a bioscience cluster concept, with New Haven, Hartford, and New London being the three locations targeted for developing the cluster concept. Although New Haven is making some progress in attracting bioscience companies, New London and Hartford have not had any meaningful success to date.

New Haven has two major developments either underway or proposed. One is Science Park, an 80-acre master planned site that will include renovation and new construction of office, laboratory, and research and development space. Lyme Properties has recently been selected to take over development of the project, which will be in excess of 1 million square feet. The other development is the Hamden Bioscience Campus, a proposed 1 million square foot park for biotech/bioscience companies.

The general impression in the market is that, at this time, it is difficult for New London to compete with New Haven for biotech/bioscience users. New London has a competitive disadvantage in that it lacks a major university that grants post-graduate degrees and a major research hospital, as well as significant venture capital money to support emerging companies. SECTER, a southeastern Connecticut business recruitment organization, indicates that they have been unable to generate any interest for bioscience in the New London area for the past few years.

With development costs for bioscience space generally in a broad range between $250 and $350 per square foot, depending on the tenant improvements required, it is not economically feasible to develop this space at this time without an end user in hand that will pay the rent necessary to support the cost. Ultimately, corporate or government sponsorship will be required to create a feasible

environment for development of biotech/bioscience space in New London. Connecticut Innovations, a state-sponsored agency, has a $40 million Bioscience Facilities Fund to support development of biotech, wet laboratory space. To date, reportedly $20 million have been committed, almost entirely for companies in the New Haven area. Funds are mainly for tenant improvement loans and residual balance guarantees for lenders, and have yet to be used to fund speculative real estate development.

### Commercial Development Program

The commercial development program for the Fort Trumbull development will consist of at least two phases, and possibly more depending upon the amount and type of demand that is generated for the 200,000 square feet of proposed commercial space. The first phase of commercial development will involve the renovation and redevelopment of the existing Navy Building 2 into a multi-tenant Class A office building for the New London market. Future phases will involve new construction of either Class A office space or biotech/bioscience space, as demand warrants. The present plan for the proposed commercial space includes the development of two 100,000 square foot buildings along Walbach Street, south of the existing Building 2.

#### Phase 1 – Office

Building 2 was built in 1991 and consists of a four-story, steel-frame brick and glass office building containing 91,000 gross square feet. Preliminary analysis indicates an approximate net rentable area of 86,000 square feet. The building was constructed for single-tenant occupancy



and will require renovation to accommodate multi-tenant occupancy as appropriate for the New London office market. A first-floor lobby will need to be added, as well as common area on each floor depending upon the space requirements of future tenants. Also, the entrance to the building is currently on the east side and most likely will need to be relocated to orient it to the street grid planned for the Fort Trumbull development. In designing the space for multi-tenant occupancy, it should be kept in mind that loss factors for common area, as generally accepted and paid for by tenants, typically do not exceed 15%.

Building systems will need to be evaluated to determine their appropriateness for reuse. It is known that a heating system will need to be added because Building 2 was previously heated by a system supporting several other Navy buildings. Also, analysis will need to be completed to determine whether the existing elevator and rest rooms are adequate for multi-tenant office use in the current market, or whether additions are required.

Parking will be provided around the building, with excess parking for the near future provided on the adjacent land that will support the future commercial development. It is anticipated that parking will be provided at market-oriented levels, approximately 3.5 spaces per 1,000 square feet of rentable area.

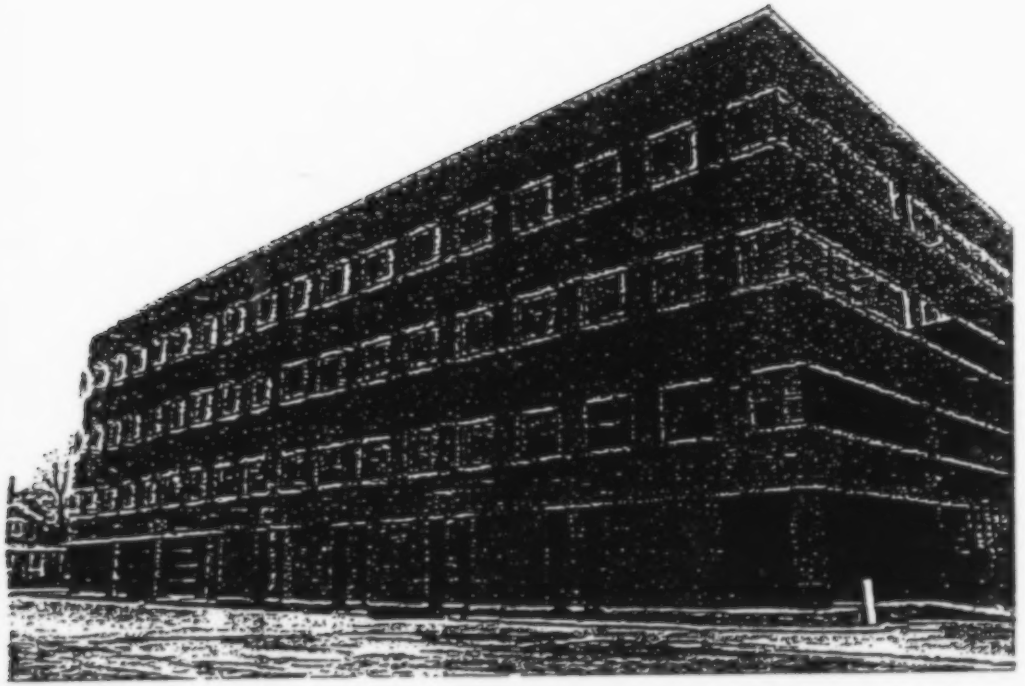
#### Future Phases – Office and/or Bioscience

The program for the future phases is uncertain and will depend upon the type and quantity of demand that is generated through marketing efforts. It is currently envisioned that there will be two 100,000 square foot buildings, most probably multi-story buildings. Given the

uncertainty regarding the demand/feasibility of biotech/bioscience space, as well as the fact that any additional office development, in all likelihood, will be subsequent to completion of Building 2, any design should be kept flexible to accommodate various types of demand.

If biotech/bioscience space is programmed, the typical product type involves single or multi-story space with floor heights between 18 and 20 feet, wet lab improvements (sinks, cabinets, and hoods), animal areas, filtration systems, a small amount of office area, high HVAC capacity, and heavy floor load capacity.

Consideration should be given to initially programming a good quality "flex"-type building that could be expanded in phases as demand warrants. This building would most likely be one story and would have the look and feel of an office building. However, it would have high floor heights (20 +/- feet) to accommodate a variety of uses, such as office, research and development, laboratory, and assembly. Depending upon the interest generated through broker marketing efforts, a small initial phase of 15,000 to 20,000 square feet could be built to test the market. This strategy would allow for less upfront investment than pure biotech/bioscience space, enhancing the potential feasibility, and would help compensate for the uncertain demand at this time.



Navy Bldg. 2.

## Financial Feasibility Study Of Commercial Development

In analyzing the feasibility of the commercial development space at Fort Trumbull, we have focused on the renovation of Building 2. Considering market conditions, as well as anticipated development costs and net operating income levels, new construction of office and/or biotech/bioscience space is not feasible at this time.

On the following pages, three scenarios are presented for the renovation of Building 2. Each scenario involves a different level of cost for the rehabilitation. A summary of the major assumptions for each scenario is as follows:

| | Minor Rehab | Moderate Rehab | Major Rehab |
|---|---|---|---|
| Total Development Cost | $5,094,339 | $6,737,530 | $8,664,291 |
| Per S/F | $59.24 | $78.34 | $100.75 |
| Hard Costs (Per S/F) | $38.22 | $51.95 | $70.63 |
| Soft Costs (Per S/F) | $18.06 | $22.48 | $25.08 |
| Construction Period | 4 months | 6 months | 6 months |
| Lease-up Period | 20 months | 18 months | 18 months |
| Market Rent | $16.00 | $20.00 | $20.00 |
| Equity Required | $652,310 | $105,581 | $2,032,342 |
| Unleveraged | | | |
| Return on Development Cost | 13.9% | 16.1% | 12.0% |
| IRR (3-year Hold) | 20.7% | 30.3% | 12.0% |
| Leveraged | | | |
| Return on Equity | 33.8% | 318.7% | 16.6% |
| IRR (3-year Hold) | 46.1% | 95.0% | 10.2% |

As illustrated, all three scenarios indicate the general economic feasibility of redeveloping Building 2 given current and anticipated future market conditions. This analysis presupposes that the remainder of the Fort Trumbull development proceeds as planned and that Building 2 is not an isolated development.

FORT TRUMBALL
Building 2 Feasibility Analysis
Development Assumptions

**MINOR REHAB**

| | | | | | |
|---|---|---|---|---|---|
| Gross Area | 91,000 | s/f | Market Rent | $16.00 | Per s/f |
| Rentable Area | 86,000 | s/f | Operating Expenses | $7.25 | Per s/f (base year) |
| | | | Capital Reserve | $0.30 | Per s/f |
| Initial Equity | $500,000 | | Stabilized Vacancy | 10.0% | |
| Permanent Equity | $652,310 | | | | |
| | | | Permanent Financing | | |
| Construction Period | 4 | Months | Mortgage Interest Rate | 9.25% | |
| Lease-up Period | 20 | Months | LTV Ratio | 70% | |
| | | | Amortization | 25 | Years |
| Valuation at Sale | | | Cap Rate – Financing | 11.5% | |
| Cap Rate | 12.0% | | | | |
| Sale Costs | 5.0% | | | | |

**Preliminary Development Cost Budget**

| | Amount | Per S/F | % | Comments |
|---|---|---|---|---|
| **Hard Costs** | | | | |
| Building | $ 1,820,000 | $20.00 | | On Gross Area |
| Site | $ 450,000 | | | |
| Tenant Improvements | $ 860,000 | $10.00 | | On Rentable Area |
| Contingency | $ 156,500 | | 5.0% | |
| **Subtotal** | **$ 3,286,500** | **$38.22** | | |
| **Soft Costs** | | | | |
| Design/Engineering | $ 180,000 | | | |
| Permits/Insurance | $ 49,298 | | 1.5% | |
| Legal/Professional | $ 75,000 | | | |
| General, Admin. & Overhead | $ 100,000 | | | |
| Taxes/Fees | $ 20,000 | | | |
| Financing Costs | $ 72,000 | | 2.0% | $3,600,000 Loan Estimate for Calculation |
| Marketing/Leasing | $ 430,000 | $5.00 | | |
| Concessions/Free Rent | $ - | | | |
| Construction Interest | $ 462,500 | | | $2,500,000 Average Balance for 24 Months |
| Miscellaneous/Contingency | $ 164,325 | | 5.0% | |
| Subtotal | $ 1,553,123 | $18.06 | 47.3% | |
| **Development Fee** | **$ 254,717** | | **5.0%** | |
| **Total Development Cost** | **$ 5,094,339** | **$59.28** | | |
| Development Period NOI | $ 856,203 | | | |
| **Net Development Cost** | **$ 4,238,136** | **$49.28** | | |

**Capital Sources**

| | | | |
|---|---|---|---|
| Permanent Financing | $ 3,585,826 | | 70.4% |
| Equity | $ 652,310 | | 12.8% |
| Development Period NOI | $ 856,203 | | 16.8% |
| **Total Development Cost** | **$ 5,094,339** | **$59.24** | **100.0%** |

FORT TRUMBULL
Building 2
Pro Forma – Commercial Development Feasibility **MINOR REHAB**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 | Comments |
|---|---|---|---|---|---|
| Development Costs | $ (254,717) | $ (3,820,755) | $ (1,018,868) | | |
| | 5% | 75% | 20% | | |
| Development Period NOI | | $ 181,303 | $ 674,900 | | |
| Net Development Cost | $ (254,717) | $ (3,639,451) | $ (343,968) | $ | |
| Gross Potential Rent | | | | $ 1,376,000 | Level Rent for First 5 Years of Lease |
| Allowance for Vacancies | | | | $ (137,600) | |
| Effective Gross Rent | | | | 1,238,400 | |
| Operating Expenses | | | | $ (623,500) | Pass Through Increases Over Base Year |
| Capital Reserve | | | | $ (25,800) | |
| Net Operating Income | | | | $ 589,100 | |
| **Return on Development Cost** | | | | **13.9%** | |
| Add Back Constr. Int. & Financing | | $ 267,250 | $ 267,250 | | |
| Net Sale Proceeds | | | | $ 4,868,478 | |
| Unleveraged Development Cash Flow | $ (254,717) | $ (3,372,201) | $ (76,718) | $ 5,455,578 | |
| Internal Rate of Return | 20.7% | | | | |

**Leveraged Analysis**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 |
|---|---|---|---|---|
| Initial Equity Investment | $ (254,717) | $ (245,283) | | |
| Cash Out (In) – Perm. Financing | | | $ (152,310) | |
| Net Operating Income | | | | $ 589,100 |
| Permanent Debt Service | | | | $ (368,500) |
| Debt Coverage Ratio | | | | 1.60 |
| Cash Flow after Debt Service | | | | $ 220,600 |
| **Return on Equity** | | | | **33.8%** |
| Net Sale Proceeds after Debt | | | | $ 1,319,065 |
| Net Equity Cash Flows | $ (254,717) | $ (245,283) | $ (152,310) | $ 1,539,665 |
| Equity IRR | 46.1% | | | |

FORT TRUMBULL
Building 2
Supporting Calculations **MINOR REHAB**

**Stabilized Value Estimate**

| | Amount | Per S/F |
|---|---|---|
| Stabilized NOI | $ 589,100 | $ 6.85 |
| Cap Rate | 11.5% | |
| Value Estimate | $ 5,122,609 | $ 59.57 |

**Permanent Financing**

| | | |
|---|---|---|
| Estimated Value for Financing | $ 5,122,609 | |
| LTV Ratio | 70% | |
| Permanent Loan | $ 3,585,826 | $ 41.70 |
| Interest Rate | 9.25% | |
| Amortization | 25 | |
| Annual Debt Service | $ 368,500 | |
| Debt Coverage Ratio | 1.60 | |

**Excess Cash Flow from Permanent Financing**

| | |
|---|---|
| Permanent Loan | $ 3,585,826 |
| Net Development Costs | $ 4,238,136 |
| Cash Flow from Financing | $ (652,310) |
| Initial Equity | $ 500,000 |
| Cash Out (In) from Financing | $ (152,310) |

FORT TRUMBALL
Building 2
Occupancy/Absorption Projections

**MINOR REHAB**

| Floor | Tenant | Rentable Square Feet | Lease Term | Year 1 – Month 1 | 2 | 3 | 4 | Building Opening 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | Year 2 – Month 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1 | 7,600 | 7 | | | | | | | 7,600 | | | | | | | | | | | | | | | | | |
| | 2 | 7,500 | 6 | | | | | | | | | | | | 7,600 | | | | | | | | | | | | |
| | 3 | 7,750 | 7 | | | | | | | | | | | | | | | | 7,750 | | | | | | | | |
| 2 | 4 | 22,750 | 10 | | | | | | | | | | 22,750 | | | | | | | | | | | | | | |
| 3 | 5 | 4,500 | 6 | | | | | | | | | | | | | 4,500 | | | | | | | | | | | |
| | 6 | 4,500 | 6 | | | | | | | | | | | | | | | | | | | | 4,500 | | | | |
| | 7 | 4,500 | 7 | | | | | | | | | | | | | | | | | | | | | | | | 4,500 |
| | 8 | 4,800 | 7 | | | | | 4,500 | | | | | | | | | | | | | | | | | | | |
| | 9 | 4,750 | 6 | | | | | | | | | | | | | | | | 4,750 | | | | | | | | |
| 4 | 10 | 10,000 | 10 | | | | | | | | | | | | | | | | | | | | | 10,000 | | | |
| | 11 | - | 7 | | | | | | | | | | | | | | | | | | | | | | | | 4,000 |
| | 12 | 4,000 | 6 | | | | | | | - | | | | | | | | | | | | | | | | | |
| | 13 | 3,750 | 5 | | | | | 3,760 | | | | | | | | | | | | | | | | | | | |
| Totals | | $80,000 | | - | - | - | - | 8,260 | - | 7,600 | - | - | 22,750- | | 7,600 | 4,500 | - | - | 12,600 | - | - | 4,500 | - | 10,000 | - | - | 8,600 |
| Cumulative | | | | - | - | - | - | 8,260 | 8,260 | 16,750 | 15,750 | 15,750 | 38,600 | 38,500 | 46,000 | 50,500 | 50,500 | 50,500 | 63,000 | 63,000 | 63,000 | 67,500 | 67,500 | 77,500 | 77,500 | 77,500 | 80,000 |
| Occupancy Rate | | | | 0.0% | 0.0% | 0.0% | 0.0% | 9.6% | 9.0% | 10.3% | 10.3% | 10.3% | 44.8% | 44.8% | 53.6% | 58.7% | 58.7% | 80.7% | 73.3% | 73.3% | 73.3% | 78.5% | 78.5% | 90.1% | 90.1% | 90.1% | 100.0% |

| | | |
|---|---|---|
| Average Occupancy Year 1 | 27.1% | 8 Months |
| Average Occupancy Year 2 | 70.0% | 12 Months |
| Average Occupancy During Lease-Up | 87.0% | 20 Months |

**Development Period NOI**

| [Illegible] | Year 1 | Year 2 | |
|---|---|---|---|
| Market Price | $16.00 | $16.00 | Per s/f |
| Operating Expenses (Stabilized) | $7.25 | $7.25 | Per s/f |
| Expense Percentage in Lease-Up | 60% | 80% | |
| Operating Expense (Lease-Up) | $4.36 | $6.80 | Per s/f |
| Net Market Price | $11.05 | | |
| Net Market Price – Monthly | $0.97 | $0. 6 | |
| Average S/F Occupied | 23,344 | 66,167 | |
| Number Months of Occupancy | 8 | 12 | |
| Development Period NOI | $181,303 | $874,900 | |
| Total Development Period NOI | | $856,203 | |

FORT TRUMBALL
Building 2 Feasibility Analysis
Development Assumptions

**MODERATE REHAB**

| | | | | | |
|---|---|---|---|---|---|
| Gross Area | 91,000 | s/f | Market Rent | $20.00 | Per s/f |
| Rentable Area | 86,000 | s/f | Operating Expenses | $7.25 | Per s/f (base year) |
| | | | Capital Reserve | $0.30 | Per s/f |
| Initial Equity | $500,000 | | Stabilized Vacancy | 10.0% | |
| Permanent Equity | $105,581 | | | | |
| | | | Permanent Financing | | |
| Construction Period | 6 | Months | Mortgage Interest Rate | 9.25% | |
| Lease-up Period | 18 | Months | LTV Ratio | 70% | |
| | | | Amortization | 25 | Years |
| Valuation at Sale | | | Cap Rate – Financing | 11.5% | |
| Cap Rate | 12.0% | | | | |
| Sale Costs | 5.0% | | | | |



**Preliminary Development Cost Budget**

| | Amount | Per S/F | % | Comments |
|---|---|---|---|---|
| **Hard Costs** | | | | |
| Building | $ 2,730,000 | $30.00 | | On Gross Area |
| Site | $ 450,000 | | | |
| Tenant Improvements | $ 1,075,000 | $12.50 | | On Rentable Area |
| Contingency | $ 212,750 | | 5.0% | |
| **Subtotal** | **$ 4,467,750** | **$51.95** | | |
| **Soft Costs** | | | | |
| Design/Engineering | $ 250,000 | | | |
| Permits/Insurance | $ 67,016 | | 1.5% | |
| Legal/Professional | $ 75,000 | | | |
| General, Admin. & Overhead | $ 100,000 | | | |
| Taxes/Fees | $ 20,000 | | | |
| Financing Costs | $ 120,000 | | 2.0% | $6,000,000 Loan Estimate for Calculation |
| Marketing/Leasing | $ 430,000 | $5.00 | | |
| Concessions/Free Rent | $ - | | | |
| Construction Interest | $ 647,500 | | | $3,500,000 Average Balance for 24 Months |
| Miscellaneous/Contingency | $ 223,388 | | 5.0% | |
| Subtotal | $ 192,904 | $22.48 | 43.3% | |
| **Development Fee** | **$ 336,877** | | **5.0%** | |
| **Total Development Cost** | **$ 6,737,530** | **$78.34** | | |
| Development Period NOI | **$ 1,161,601** | | | |
| **Net Development Cost** | **$ 5,575,929** | **$64.84** | | |

**Capital Sources**

| | | | |
|---|---|---|---|
| Permanent Financing | $ 5,470,348 | | 81.2% |
| Equity | $ 105,581 | | 1.6% |
| Development Period NOI | $ 1,161,601 | | 17.2% |
| **Total Development Cost** | **$ 6,737,530** | **$78.34** | **100.0%** |

FORT TRUMBULL
Building 2
Pro Forma – Commercial Development Feasibility **MODERATE REHAB**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 | Comments |
|---|---|---|---|---|---|
| Development Costs | $ (336,877) | $ (5,053,148) | $ (1,347,506) | | |
| | 5% | 75% | 20% | | |
| Development Period NOI | | $ 222,034 | $ 939,567 | | |
| Net Development Cost | $ (336,877) | $ (4,831,113) | $ (407,939) | $ - | |
| Gross Potential Rent | | | | $ 1,720,000 | Level Rent for First 5 Years of Lease |
| Allowance for Vacancies | | | | $ (172,000) | |
| Effective Gross Rent | | | | 1,548,000 | |
| Operating Expenses | | | | $ (623,500) | Pass Through Increases Over Base Year |
| Capital Reserve | | | | $ (25,800) | |
| Net Operating Income | | | | $ 898,700 | |
| **Return on Development Cost** | | | | **16.1%** | |
| Add Back Constr. Int. & Financing | | $ 383,750 | $ 383,750 | | |
| Net Sale Proceeds | | | | $ 7,424,043 | |
| Unleveraged Development Cash Flow | $ (336,877) | $ (4,447,363) | $ (24,189) | $ 8,322,743 | |
| Internal Rate of Return | 30.3% | | | | |

**Leveraged Analysis**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 |
|---|---|---|---|---|
| Initial Equity Investment | $ (336,877) | $ (163,123) | | |
| Cash Out (In) – Perm. Financing | | | $ (394,419) | |
| Net Operating Income | | | | $ 898,700 |
| Permanent Debt Service | | | | $ (562,165) |
| Debt Coverage Ratio | | | | 1.60 |
| Cash Flow after Debt Service | | | | $ 336,535 |
| **Return on Equity** | | | | **318.7%** |
| Net Sale Proceeds after Debt | | | | $ 2,012,296 |
| Net Equity Cash Flows | $ (336,877) | $ (163,123) | $ 394,419 | $ 2,348,832 |
| Equity IRR | 95.0% | | | |

FORT TRUMBULL
Building 2
Supporting Calculations **MODERATE REHAB**

**Stabilized Value Estimate**

| | Amount | Per S/F |
|---|---|---|
| Stabilized NOI | $ 898,700 | $ 10.45 |
| Cap Rate | 11.5% | |
| Value Estimate | $ 814,783 | $ 90.87 |

**Permanent Financing**

| | | |
|---|---|---|
| Estimated Value for Financing | $ 7,814,783 | |
| LTV Ratio | 70% | |
| Permanent Loan | $ 5,470,348 | $ 63.61 |
| Interest Rate | 9.25% | |
| Amortization | 25 | |
| Annual Debt Service | $ 562,165 | |
| Debt Coverage Ratio | 1.60 | |

**Excess Cash Flow from Permanent Financing**

| | |
|---|---|
| Permanent Loan | $ 5,470,348 |
| Net Development Costs | $ 5,575,929 |
| Cash Flow from Financing | $ (105,581) |
| Initial Equity | $ 500,000 |
| Cash Out (In) from Financing | $ (394,419) |

FORT TRUMBALL
Building 2
Occupancy/Absorption Projections

**MODERATE REHAB**

| Floor | Tenant | Rentable Square Feet | Lease Term | Year 1 – Month 1 | 2 | 3 | 4 | Building Opening 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | Year 2 – Month 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1 | 7,600 | 7 | | | | | | | 7,500 | | | | | | | | | | | | | | | | | |
| | 2 | 7,500 | 6 | | | | | | | | | | | | 7,600 | | | | | | | | | | | | |
| | 3 | 7,750 | 7 | | | | | | | | | | | | | | | | 7,750 | | | | | | | | |
| 2 | 4 | 22,750 | 10 | | | | | | | | | | 22,750 | | | | | | | | | | | | | | |
| 3 | 5 | 4,500 | 6 | | | | | | | | | | | | | 4,500 | | | | | | | | | | | |
| | 6 | 4,500 | 6 | | | | | | | | | | | | | | | | | | | 4,500 | | | | | |
| | 7 | 4,500 | 7 | | | | | | | | | | | | | | | | | | | | | | | | 4,500 |
| | 8 | 4,800 | 7 | | | | | | | 4,500 | | | | | | | | | | | | | | | | | |
| | 9 | 4,750 | 6 | | | | | | | | | | | | | | | | 4,750 | | | | | | | | |
| 4 | 10 | 10,000 | 10 | | | | | | | | | | | | | | | | | | | | | 10,000 | | | |
| | 11 | - | 7 | | | | | | | - | | | | | | | | | | | | | | | | | |
| | 12 | 4,000 | 6 | | | | | | | | | | | | | | | | | | | | | | | | 4,000 |
| | 13 | 3,750 | 5 | | | | | | | 3,750 | | | | | | | | | | | | | | | | | |
| Totals | | $80,000 | | - | - | - | - | - | - | 15,750 | - | - | 22,750 | - | 7,600 | 4,500 | - | - | 12,600 | - | - | 4,500 | - | 10,000 | - | - | 8,600 |
| Cumulative | | | | - | - | - | - | - | - | 15,750 | 15,750 | 15,750 | 38,500 | 38,500 | 46,000 | 50,500 | 50,500 | 50,500 | 63,000 | 63,000 | 63,000 | 67,500 | 67,500 | 77,500 | 77,500 | 77,500 | 80,000 |
| Occupancy Rate | | | | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 10.3% | 10.3% | 10.3% | 44.8% | 44.8% | 53.6% | 58.7% | 58.7% | 80.7% | 73.3% | 73.3% | 73.3% | 78.5% | 78.5% | 90.1% | 90.1% | 90.1% | 100.0% |

| | | | |
|---|---|---|---|
| Average Occupancy Year 1 | 33.0% | 6 | Months |
| Average Occupancy Year 2 | 70.0% | 12 | Months |
| Average Occupancy During Lease-Up | 62.3% | 18 | Months |

**Development Period NOI**

| [Illegible] | Year 1 | Year 2 | |
|---|---|---|---|
| Market Price | $20.00 | $20.00 | Per s/f |
| Operating Expenses (Stabilized) | $7.25 | $7.25 | Per s/f |
| Expense Percentage in Lease-Up | 60% | 80% | |
| Operating Expense (Lease-Up) | $4.35 | $8.80 | Per s/f |
| Net Market Price | $15.55 | $14.20 | Per s/f |
| Net Market Price – Monthly | $1.30 | $1.18 | Per s/f |
| Average S/F Occupied | 20,375 | 66,167 | |
| Number Months of Occupancy | 8 | 12 | |
| Development Period NOI | $222,034 | $830,607 | |
| Total Development Period NOI | | $1,161,601 | |

FORT TRUMBALL
Building 2 Feasibility Analysis
Development Assumptions

**MAJOR REHAB**

| | | | | | |
|---|---|---|---|---|---|
| Gross Area | 91,000 | s/f | Market Rent | $20.00 | Per s/f |
| Rentable Area | 86,000 | s/f | Operating Expenses | $7.25 | Per s/f (base year) |
| | | | Capital Reserve | $0.30 | Per s/f |
| Initial Equity | $500,000 | | Stabilized Vacancy | 10.0% | |
| Permanent Equity | $2,032,342 | | | | |
| | | | Permanent Financing | | |
| Construction Period | 6 | Months | Mortgage Interest Rate | 9.25% | |
| Lease-up Period | 18 | Months | LTV Ratio | 70% | |
| | | | Amortization | 25 | Years |
| Valuation at Sale | | | Cap Rate – Financing | 11.5% | |
| Cap Rate | 12.0% | | | | |
| Sale Costs | 5.0% | | | | |

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**Preliminary Development Cost Budget**

| | Amount | Per S/F | % | Comments |
|---|---|---|---|---|
| **Hard Costs** | | | | |
| Building | $ 3,185,000 | $35.00 | | On Gross Area |
| Site | $ 450,000 | | | |
| Tenant Improvements | $ 2,150,000 | $25.00 | | On Rentable Area |
| Contingency | $ 289,250 | | 5.0% | |
| **Subtotal** | **$ 6,074,250** | **$70.63** | | |
| **Soft Costs** | | | | |
| Design/Engineering | $ 250,000 | | | |
| Permits/Insurance | $ 91,114 | 1.5% | | |
| Legal/Professional | $ 75,000 | | | |
| General, Admin. & Overhead | $ 100,000 | | | |
| Taxes/Fees | $ 20,000 | | | |
| Financing Costs | $ 110,000 | | 2.0% | $5,500,000 Loan Estimate for Calculation |
| Marketing/Leasing | $ 430,000 | $5.00 | | |
| Concessions/Free Rent | $ - | | | |
| Construction Interest | $ 777,000 | | | $4,200,000 Average Balance for 24 Months |
| Miscellaneous/Contingency | $ 303,713 | | 5.0% | |
| **Subtotal** | $ 2,156,826 | $25.08 | 35.5% | |
| **Development Fee** | **$ 433,215** | | **5.0%** | |
| **Total Development Cost** | **$ 8,664,291** | **$100.75** | | |
| Development Period NOI | **$ 1,161,601** | | | |
| **Net Development Cost** | **$ 7,502,690** | **$87.24** | | |

**Capital Sources**

| | | | |
|---|---|---|---|
| Permanent Financing | $ 5,470,348 | | 63.1% |
| Equity | $ 2,032,342 | | 23.5% |
| Development Period NOI | $ 1,161,601 | | 13.4% |
| **Total Development Cost** | **$ 8,664,291** | **$100.75** | **100.0%** |

FORT TRUMBULL
Building 2
Pro Forma – Commercial Development Feasibility **MAJOR REHAB**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 | Comments |
|---|---|---|---|---|---|
| Development Costs | $ (433,215) | $ (6,498,218) | $ (1,732,858) | | |
| | 5% | 75% | 20% | | |
| Development Period NOI | | $ 222,034 | $ 939,567 | | |
| Net Development Cost | $ (433,215) | $ (6,276,184) | $ (793,291) | $ | |
| Gross Potential Rent | | | | $ 1,720,000 | Level Rent for First 5 Years of Lease |
| Allowance for Vacancies | | | | $ (172,000) | |
| Effective Gross Rent | | | | 1,548,000 | |
| Operating Expenses | | | | $ (623,500) | Pass Through Increases Over Base Year |
| Capital Reserve | | | | $ (25,800) | |
| Net Operating Income | | | | $ 898,700 | |
| **Return on Development Cost** | | | | **12.0%** | |
| Add Back Constr. Int. & Financing | | $ 443,500 | $ 443,500 | | |
| Net Sale Proceeds | | | | $ 7,424,043 | |
| Unleveraged Development Cash Flow | $ (433,215) | $ (5,832,684) | $ (349,791) | $ 8,322,743 | |
| Internal Rate of Return | 12.0% | | | | |

**Leveraged Analysis**

| | Year 0 | Year 1 | Year 2 | *Stabilization* Year 3 |
|---|---|---|---|---|
| Initial Equity Investment | $ (433,215) | $ (66,785) | | |
| Cash Out (In) – Perm. Financing | | | $ (1,532,342) | |
| Net Operating Income | | | | $ 898,700 |
| Permanent Debt Service | | | | $ (562,165) |
| Debt Coverage Ratio | | | | 1.60 |
| Cash Flow after Debt Service | | | | $ 336,535 |
| **Return on Equity** | | | | **16.0%** |
| Net Sale Proceeds after Debt | | | | $ 2,012,296 |
| Net Equity Cash Flows | $ (433,215) | $ (66,785) | $ (152,342) | $ 2,348,832 |
| Equity IRR | 10.2% | | | |

Note: Short analysis period distorts IRR. IRR will increase with longer holding period because ROE > IRR.

FORT TRUMBULL
Building 2
Supporting Calculations **MAJOR REHAB**

## Stabilized Value Estimate

| | Amount | Per S/F |
|---|---|---|
| Stabilized NOI | $ 898,700 | $ 10.45 |
| Cap Rate | 11.5% | |
| Value Estimate | $ 7,814,783 | $ 90.87 |

## Permanent Financing

| | | |
|---|---|---|
| Estimated Value for Financing | $ 7,814,783 | |
| LTV Ratio | 70% | |
| Permanent Loan | $ 5,470,348 | $ 63.61 |
| Interest Rate | 9.25% | |
| Amortization | 25 | |
| Annual Debt Service | $ 562,165 | |
| Debt Coverage Ratio | 1.60 | |

## Excess Cash Flow from Permanent Financing

| | |
|---|---|
| Permanent Loan | $ 5,470,348 |
| Net Development Costs | $ 7,502,690 |
| Cash Flow from Financing | $ (2,032,342) |
| Initial Equity | $ 500,000 |
| Cash Out (In) from Financing | $ (1,532,342) |

FORT TRUMBALL
Building 2
Occupancy/Absorption Projections **MAJOR REHAB**

| Floor | Tenant | Rentable Square Feet | Lease Term | Year 1 – Month 1 | 2 | 3 | 4 | 5 | 6 | Building Opening 7 | 8 | 9 | 10 | 11 | 12 | Year 2 – Month 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1 | 7,600 | 7 | | | | | | | 7,500 | | | | | | | | | | | | | | | | | |
| | 2 | 7,500 | 6 | | | | | | | | | | | | 7,500 | | | | | | | | | | | | |
| | 3 | 7,750 | 7 | | | | | | | | | | | | | | | 7,750 | | | | | | | | | |
| 2 | 4 | 22,750 | 10 | | | | | | | | | | 22,750 | | | | | | | | | | | | | | |
| 3 | 5 | 4,500 | 6 | | | | | | | | | | | | | 4,500 | | | | | | | | | | | |
| | 6 | 4,500 | 6 | | | | | | | | | | | | | | | | | | 4,500 | | | | | | |
| | 7 | 4,500 | 7 | | | | | | | | | | | | | | | | | | | | | | | | |
| | 8 | 4,800 | 7 | | | | | | | 4,500 | | | | | | | | | | | | | | | | | 4,500 |
| | 9 | 4,750 | 6 | | | | | | | | | | | | | | | | 4,750 | | | | | | | | |
| 4 | 10 | 10,000 | 10 | | | | | | | | | | | | | | | | | | | | | 10,000 | | | |
| | 11 | - | 7 | | | | | | | - | | | | | | | | | | | | | | | | | |
| | 12 | 4,000 | 6 | | | | | | | 3,750 | | | | | | | | | | | | | | | | | |
| | 13 | 3,750 | 5 | | | | | | | | | | | | | | | | | | | | | | | | 4,000 |
| Totals | | $80,000 | | - | - | - | - | - | - | 18,750 | - | - | 22,750 | - | 7,500 | 4,500 | - | - | 12,500 | - | - | 4,500 | - | 10,000 | - | - | 8,500 |
| Cumulative | | | | - | - | - | - | - | - | 15,750 | 15,750 | 16,750 | 38,500 | 38,500 | 46,000 | 50,500 | 50,500 | 50,500 | 63,000 | 63,000 | 63,000 | 67,500 | 67,500 | 77,500 | 77,500 | 77,500 | 80,000 |
| Occupancy Rate | | | | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 18.3% | 18.3% | 18.3% | 44.0% | 44.0% | 83.6% | 58.7% | 58.7% | 58.7% | 73.3% | 73.3% | 73.3% | 78.5% | 78.5% | 90.1% | 90.1% | 90.1% | 100.0% |

| | | | |
|---|---|---|---|
| Average Occupancy Year 1 | 33.3% | 6 | Months |
| Average Occupancy Year 2 | 78.9% | 12 | Months |
| Average Occupancy During Lease-Up | 62.3% | 18 | Months |

**Development Period NOI**

| [Illegible] | Year 1 | Year 2 | |
|---|---|---|---|
| Market Price | $20.00 | $20.00 | Per s/f |
| Operating Expenses (Stabilized) | $7.25 | $7.25 | Per s/f |
| Expense Percentage in Lease-Up | 60% | 80% | |
| Operating Expense (Lease-Up) | $4.36 | $6.80 | Per s/f |
| Net Market Price | $15.05 | $14.20 | Per s/f |
| Net Market Price – Monthly | $1.30 | $1.18 | Per s/f |
| Average S/F Occupied | 26,378 | 66,167 | |
| Number Months of Occupancy | 6 | 12 | |
| Development Period NOI | $222,034 | $838,587 | |
| Total Development Period NOI | | $1,141,801 | |

## Conclusions of Financial and Market Study

Based on the market and feasibility analyses presented, an opportunity exists to renovate the existing Building 2 at Fort Trumbull into Class A office space for the New London market. While new office construction is not feasible at this time, as evidenced by the inability of Shaw's Cove 7 & 8 and Mystic Executive Park to get off the ground, the lower cost basis required to renovate Building 2, coupled with relatively tight market conditions for Class A space, create a feasible environment for redeveloping Building 2 at Fort Trumbull.

Except for the sublease space at Mariner Square, there is currently only one option available for a tenant requiring more than 5,000 square feet of Class A space. Brokers report that a few tenants, Kendall Corp. for example, have had to leave New London because sufficient Class A space was not available recently to accommodate their growth.

At this time, however, market conditions do not justify construction of new commercial space at Fort Trumbull on a speculative basis. Financing will not be available unless there is significant pre-leasing activity, on the order of 65% to 70%, but tenants in the marketplace are generally reluctant to commit to space 18 to 24 months out, as is required for new construction. The Major Rehab scenario for Building 2 illustrates the general feasibility parameters for new multi-story office construction. As office rents for new construction would not be expected to appreciably exceed the economic terms specified under this scenario, the maximum development cost for feasibility would be approximately $100 per rentable square foot, which is below the estimated development cost range of $120 to $150 per square foot for new construction.

Consideration should be given though to the possibility of developing a small "flex" building capable of being built out for office or biotech/bioscience space, and capable of being expanded to accommodate future demand. This flex building should be of good quality construction with an attractive facade, and should have a floor height of at least 18 feet to 20 feet to accommodate the tenant improvement requirements of potential biotech/bioscience users that might demand space as a result of Pfizer's Global Development Facility. Flex space would appear to be marginally feasible in the current market. With hard costs estimated to be approximately $75 to $80 per square foot based on brokers in the market, total development costs could conceivably be kept around $100 per square foot.

### Target Market For Commercial Space

For the existing Building 2, which will be redeveloped into Class A office space, the target market will include the following:

- Existing New London companies seeking to relocate, particularly companies in Class B space that desire more modern office space with easily accessible parking
- Existing New London companies seeking to expand that are unable to be accommodated due to the limited amount of available Class A space
- Existing southeastern Connecticut companies seeking relocation or expansion facilities
- Pfizer-related demand from outside the southeastern Connecticut region
- Newly recruited companies from outside the region



For the future commercial development space, the primary target market is expected to be newly recruited companies evidencing Pfizer-related demand, whether it is for general office use or biotech/bioscience use. This demand will most likely come from out-of-region companies that contract with Pfizer and value proximity to Pfizer's Global Development Facility.

### Marketing Strategy

The key objectives of the marketing strategy are:

- To successfully position the commercial development space in the market
- To fully lease Building 2 as quickly as possible
- To complete renovation and begin occupancy of Building 2 the opening date of the hotel
- To execute leases for Building 2 on terms that meet or exceed pro forma
- To further develop and refine the target market for the future commercial development space

In order to achieve these objectives, a brokerage firm should be hired to develop, implement, and execute the marketing and leasing campaign. Assuming a 6-month renovation period, and considering the tenant profile anticipated for Building 2, marketing efforts should begin 10 to 12 months prior to the commencement of construction. To minimize tenant leasing and occupancy issues, initial occupancy for Building 2 should be targeted to coincide with substantial completion of the site and

infrastructure work for the whole Fort Trumbull development, which is presently slated for August 2002. Hence, assuming the current schedule is maintained, marketing efforts should commence in April 2001.

In engaging a brokerage firm, approximately two months should be budgeted to solicit proposals from targeted brokerage firms, review the proposals, interview the firms, and select the best firm or firms. Thus, the brokerage firms identified herein (see Marketing Execution Plan) should be contacted in early February 2001 to solicit proposals for brokerage services.

Once a brokerage firm is selected, a more detailed marketing strategy should be developed and the firm should prepare marketing and advertising materials. Preliminary marketing materials, including conceptual schemes, should be prepared for the future commercial development space in the event that sufficient excess demand is generated that cannot be accommodated in Building 2, and/or an end user is identified for a build-to-suit development. This information should also be disseminated to the various state and local resources identified herein (see Marketing Execution Plan).

In addition to hiring a brokerage firm, consideration should be given to establishing a web site for the entire Fort Trumbull development. This would need to be coordinated with the various marketing/brokerage firms for the different development components, and could conceivably be paid for by these firms as part of their assumed marketing and advertising responsibilities. For Building 2, a virtual tour, renderings, images of water views from the upper floors, and other marketing information could be placed on the site, thus providing prospective tenants with



instant access to information to help them evaluate the property.

Once construction has started for Building 2, an on-site marketing center should be established as soon as possible to allow prospective tenants the opportunity to see the space as they might occupy it. The fourth floor would be the ideal location in order to take advantage of the sweeping views of the water.

Targeted leasing milestones for Building 2 would be as follows:

- 50% pre-leased before commencement of renovation
- 75% leased upon completion of renovation
- 100% leased 6 months after completion of renovation

In addition, early in the marketing campaign, a draft office lease agreement should be prepared for future tenants.

Depending upon the level of rehabilitation ultimately selected by Corcoran Jennison Companies, the standard tenant improvement package should generally not exceed the amount specified under the hard cost section of each scenario. Several recent leases have been done with all tenant improvements paid for by the tenant. However, some leases have been done with improvement allowances of up to approximately $17 per square foot. The amount of tenant improvements provided is a negotiating point and will depend upon market conditions at the time of lease negotiation, if tenants require additional improvements over the standard package, then the cost over and above that amount should either be amortized over the lease

term (typically with credit tenants only), or paid for by the tenant up front.

## Marketing Execution Plan

### Broker Selection

There are four local brokerage firms and one national firm, CB Richard Ellis, which are active in the New London market. There is another national firm, Cushman & Wakefield, with a Hartford office that could potentially service the New London market. In addition, a Boston-based firm, Thompson Doyle Hennessey & Everest has experience with both office and biotech/bioscience space – they are currently marketing BioSquare, which is adjacent to the Boston University Medical Center. These firms should be contacted in January/February 2001 and asked to submit Proposals to provide brokerage services for the commercial space. A sample draft of a Request for Proposals (RFP) for brokerage services has been included in the Addenda. The table below identifies these firms and the appropriate contact information.

| FIRM | CONTACT | PHONE # |
|---|---|---|
| 1. **U.S. Properties, Inc.**<br>Three Shaw's Cove,<br>Suite 202<br>New London, CT 06320 | Susan Howard<br>Jim White | 860-437-0101 |
| 2. **New England Real Estate Group, Ltd.**<br>12 Masonic Street<br>New London, CT 06320 | Jim Bach<br>Steve Percy<br>Jane Walsh | 860-444-7800 |
| 3. **Pequot Commercial**<br>711 Broad Street Ext.<br>Waterford, CT 06385 | John Jensen<br>Norm Peck | 860-447-9570 |



| | | |
|---|---|---|
| 4. **Connecticut Commercial Realty**<br>229 Howard Street<br>New London, CT 06320 | Robert Zabarsky | 860-444-7704 |
| 5. **CB Richard Ellis**<br>100 Pearl Street<br>Hartford, CT 06103 | Dan Barber | 860-987-4781 |
| 6. **Cushman & Wakefield of Connecticut**<br>280 Trumbull Street,<br>25th Floor<br>Hartford, CT 06103-3599 | Thomas Collins | 617-204-4100 |
| 7. **Thompson Doyle Hennessey & Everest**<br>101 Federal Street<br>Boston, MA 02110 | Cathy Thompson | 617-330-6900 |

To be sensitive to community issues, it would be appropriate to include all four local firms in the Broker RFP process. The preliminary recommendation would be to utilize a local brokerage firm to market Building 2, or a joint venture, if possible, between a local firm and a national or regional firm. The typical tenant anticipated to occupy Building 2 would likely be a local company looking to relocate or expand its offices.

The inclusion of ar national or regional firm may be appropriate though as the Pfizer-induced demand anticipated for construction of the proposed 200,000 square feet might include uses other than office – e.g., biotech or bioscience – for which these firms have greater experience. For broker incentive reasons, and because it might be appropriate to begin initial marketing of the proposed commercial space simultaneously with the Building 2, it might be warranted to use one of the non-local firms solely for the marketing of all Fort Trumbull commercial space.

It should be noted that U.S. Properties, Inc. is the agent for most of the space in Shaw's Cove Business Park, and while due consideration should be given to them, they may have potential conflict of interest issues in representing Corcoran Jennison Companies to lease the Fort Trumbull commercial space.

## State and Local Resources

There are several state and local resources that should be made aware of and that could provide assistance in the marketing of the Fort Trumbull commercial development space. These resources are as follows:

| Resource | Contact | Number |
|---|---|---|
| New London Office of Development & Planning | Ned Hammond Economic Development Coordinator | 860-447-5203 |
| Connecticut Department of Economic & Community Development | Kevin Crowley Director, Business Recruitment | 860-270-8069 |
| SECTOR | John Markowitz | 860-701-6054 |
| Connecticut Innovations | Carolyn Kahn Managing Director, Bioscience | 860-563-5851 www.ctinnovations.com |
| Connecticut United for Research Excellence (CURE) | Debra Pasquale President | 860-679-1550 www.curenet.org |
| Connecticut Economic Resource Center (CERC) | Susan Winkler | 800-392-2122 www.cerc.com |



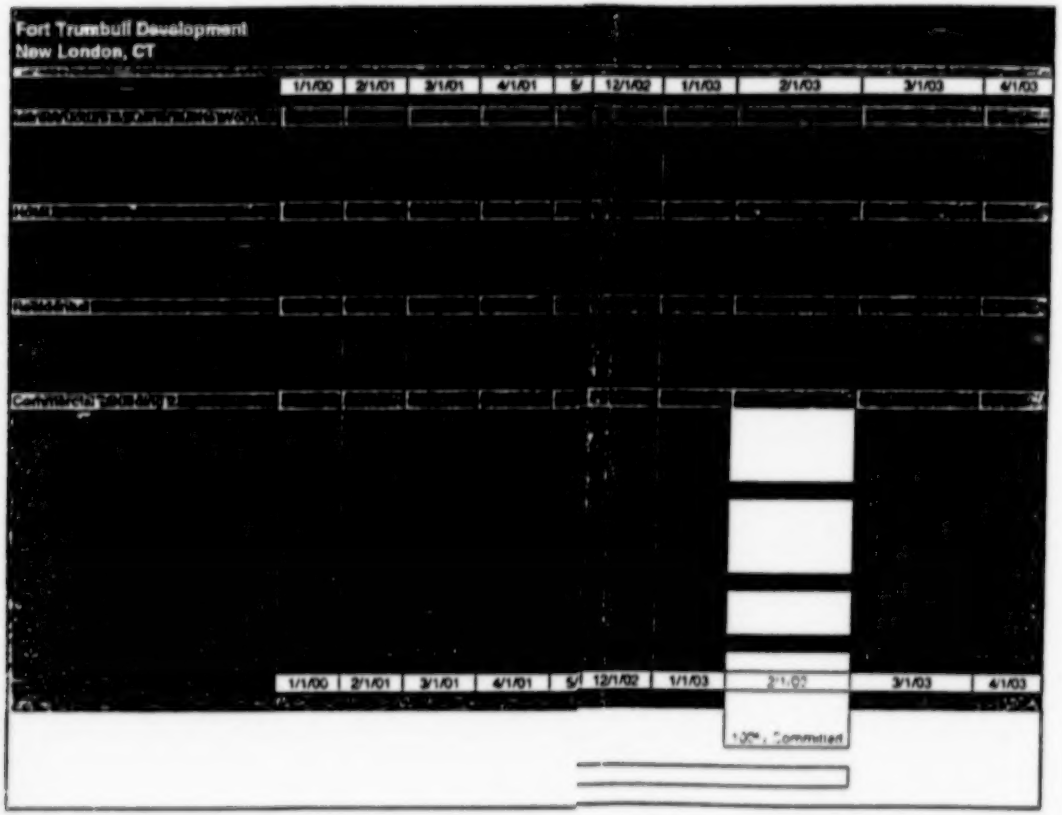
In addition, Pfizer's real estate representative should be made aware of the commercial development program in case the company has a need, or in case a contractor doing business with them might have a need for a local presence.

## Project and Marketing Schedule

With respect to the renovation of Building 2. Corcoran Jennison Companies' goal is to complete construction and have initial occupancy at the same time as the infrastructure and site work is completed for hotel and residential space. The current Fort Trumbull development project schedule calls for commencement of site and infrastructure work in August 2001, with completion scheduled for August 2002.

Working back from this date, construction for Building 2 should commence no later than March 2002 to allow for an estimated 6 months of rehab work. The broker marketing and leasing campaign should start no later than April 2001 to allow for sufficient exposure in the marketplace to execute leases for as much of the space as possible prior to completion of construction. Initial requests for proposals from brokerage firms should occur in late January or early February 2001.

On the following page, a Project and Marketing Timeline is presented which illustrates the key dates and milestones for the Fort Trumbull development, as well as Building 2 renovation.

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## Marketing Budget

Brokerage fees will comprise the vast majority of the marketing budget for the Fort Trumbull commercial development space. Most marketing and advertising costs are included in the brokerage fee and are the responsibility of the broker. Based on conversations with several brokers in the market, brokerage fees have been estimated at $5.00 per square foot of rentable office space, which is equivalent to $430,000 based on an estimated 86,000 rentable square feet. The brokerage fee will vary depending upon the length of the lease that is executed for each tenant. Typically, brokerage fees are paid 50% at lease execution and 50% at tenant occupancy.

Conceivably, some miscellaneous marketing expenses could be incurred that would not be paid for by the brokerage firm. In addition, although it is not feasible to develop the proposed additional 200,000 square feet of commercial space at this time, it would be beneficial to develop some preliminary marketing materials for circulation simultaneously with Building 2's marketing campaign. Moreover, a brokerage firm might not be willing to pay for marketing materials for the future commercial development space at this juncture.

A budget of $50,000 would seem reasonable to cover miscellaneous expenses associated with Building 2 and the other preliminary marketing materials. This would be exclusive, however, of any cost associated with the development of a Fort Trumbull web site, if that option is pursued.

It is important to note the need for high quality marketing materials and architectural services associated with marketing. Image and identity are key components for a

successful marketing plan. Marketing materials should include, but not be limited to:

- A building photo and/or rendering
- An aerial photo after demolition of all improvements not being retained
- A sample floor plan for each floor
- Sample module layouts

Hopefully, preparation of some marketing materials can be coordinated with the marketing of the hotel and residential portions of the Fort Trumbull development to possibly enable efficiencies and cost savings.

---

DRAFT

CORCORAN JENNNISON COMPANIES REQUEST FOR PROPOSALS

For

REAL ESTATE BROKERAGE / LEASING SERVICES

FORT TRUMBULL COMMERCIAL SPACE NEW LONDON, CONNECTICUT

FEBRUARY 2001

**Introduction**

Corcoran Jennison Companies is seeking Proposals from real estate brokerage companies to provide marketing and leasing services for the commercial development space to be included in its Fort Trumbull mixed-use development. Corcoran Jennison Companies intends to select a brokerage firm no later March 31, 2001 and to commence the



marketing of the commercial space as soon as possible thereafter.

Corcoran Jennison Companies is a diversified real estate company with five main operating companies – Development, Property Management, Construction, Hospitality, and Exposition Center Management Services. Since its founding in 1971, Corcoran Jennison Companies has successfully developed in excess of $1.8 Billion of real estate, including apartments, hotels, nursing homes, municipal facilities, exposition centers, schools, health facilities, golf courses, restaurants, resort facilities, marinas, and office centers. The company's corporate offices are located in Boston, Massachusetts.

**Background**

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), has undertaken a municipal planning project targeting an area adjacent to the Thames River in New London, Connecticut. Known as the Fort Trumbull Municipal Development Plan (MDP), the MDP area encompasses approximately 90 acres immediately south of downtown New London and adjacent to historic Fort Trumbull, which will be developed into a state park. The principal catalyst for development in this area is the construction of Pfizer Inc.'s 790,000-square-foot Global Development Facility immediately south of the MDP area.

The NLDC selected Corcoran Jennison Companies as the developer of a 30-acre waterfront parcel adjacent to Fort Trumbull. The majority of the parcel consists of the U.S. Navy's closed Naval Undersea Warfare Center (NUWC).

The balance is made up of a number of residential and commercial properties between NUWC and the Amtrak rail.

## Fort Trumbull Project Description

Corcoran Jennison Companies has proposed a mixed-use development, to include a four-star hotel, housing, and commercial space, for the 30-acre parcel. The attached site plan, labeled the Fort Trumbull Development Plan, depicts the latest proposed development plan for the Fort Trumbull site. New roadways and infrastructure will be built to support the development. Total development costs are projected to be approximately $100 million.

The hotel will be situated on the northernmost section of the site. The residential development will be located on the southeastern portion of the site, adjacent to the existing Coast Guard facility and north of Fort Trumbull. The commercial development will be located on the southwestern portion of the site; an existing Italian Dramatic Club located here will be kept and incorporated into the development plan. Plans also include a paved, half-mile riverwalk, which will connect to the Fort Trumbull State Park, and a village green that will be accessible to the public.

## Commercial Development Program

At present, approximately 300,000 square feet of commercial space is envisioned for the site. This will be comprised of an existing commercial building containing approximately 91,000 gross square feet, identified as Building 2 by the U.S. Navy, and two proposed buildings of 100,000 square feet each. The MDP called for the inclusion of office



or bioscience-related commercial space. While the new buildings could be developed for either use depending upon market conditions, the existing Building 2 is best utilized for office use given its current construction.

The commercial development program for the Fort Trumbull development will consist of at least two phases, and possibly more depending upon the amount and type of demand that is generated for the 200,000 square feet of proposed commercial space. The first phase of commercial development will involve the renovation and redevelopment of the existing Navy Building 2 into a Class A office building for the New London market. Building 2 is a four-story, steel frame, brick and glass structure completed in 1991 as sonar research and development space for the Navy. It is in reasonably good condition and can be easily renovated to Class A office space for the New London market.

Because the building was constructed for single-tenant occupancy, it will require renovation to accommodate multi-tenant occupancy as appropriate for the New London office market. A first-floor lobby will need to be added, as well as common area on each floor depending upon the space requirements of future tenants. Also, the entrance to the building is currently on the east side and most likely will need to be relocated to orient it to the street grid planned for the Fort Trumbull development.

Building systems are being evaluated to determine their appropriateness for reuse. It is known that a heating system will need to be added because Building 2 was previously heated by a system supporting several other Navy buildings. In addition, analysis will need to be completed to determine whether the existing elevator and

rest rooms are adequate for multi-tenant office use in the current market, or whether additions are required. Parking will be provided around the building, with excess parking for the near future provided on the adjacent land that will support the future commercial development.

Future phases will involve new construction of either Class A office space or biotech/bioscience space, as demand warrants. The present plan for the proposed commercial space includes the development of two 100,000 square foot buildings along Walbach Street, south of the existing Building 2. The new buildings will be developed as market conditions warrant.

## Submittals

Interested parties should submit a Proposal to provide marketing/leasing services for the commercial development space at Fort Trumbull. Respondents should outline their general approach to providing marketing/leasing services and should demonstrate capacity and expertise to develop and implement a marketing program that will minimize lease-up periods, maximize rents, and enhance project values.

In the Proposal, respondents are encouraged to propose and/or provide recommendations relative to the proposed commercial space at Fort Trumbull, both the existing Building 2 and the planned 200,000 square feet, with respect to:

- Marketing Strategy
- Project Identity
- Marketing Timeline
- Type and Frequency of Advertising/Marketing
- Target Market for Tenants



- State and Local Resources for Attracting Tenants
- Pricing – Rent, Lease Term, Tenant Improvements
- Credit Quality of Tenants
- Specifications for Tenant Improvements
- Projected Absorption/Occupancy Milestones

In addition, respondents should provide:

- A company overview/business history (description of business organization, date founded, number of years providing services requested, etc.)
- Resumes of key personnel who will be actively involved in the project, including identification of relevant professional licenses
- References and contact information (at least two for each key personnel)
- Sample marketing materials, including brochures, advertisements, etc.
- A sample lease proposal for a prospective tenant
- Examples of comparable firm experience as owner's agent for commercial space

Respondents are also encouraged to provide information on current market conditions for commercial space in the New London market area, including an overview of supply and demand trends, comparable lease and sale information, competitive projects planned and/or under construction, etc.

## Fee Structure

Respondents should include in their submittals a proposed fee structure for the services to be provided. Respondents should be specific as to what marketing materials and

advertising expenses are included as part of the services provided.

**Insurance**

Respondents should include in their Proposal a brief description of the firm's general liability insurance coverage, including limits and deductibles.

**Selection Schedule**

| | |
|---|---|
| Request for Proposals available | February 1, 2001 |
| Pre-submission Meetings & Tours (To be scheduled individually) | Between February 5 – 16, 2001 |
| Proposals Due | February 28, 2001 (5:00 p.m.) |
| Corcoran Jennison Companies Review/Inquiry | Between March 1 – 15, 2001 |
| Selection of Brokerage Company | No later than March 31, 2001 |
| Commencement of Marketing/ Leasing Campaign | April 1, 2001 |

**Evaluation Criteria**

Corcoran Jennison Companies shall consider the following criteria in evaluating Proposals (not listed in any specific order of importance):

- Responsiveness to Request for Proposals
- Company/Broker Experience
- Approach to Marketing Project
- Pricing and Fee Structure



**Time and Place of Submission**

Respondents must submit five (5) copies of their Proposal to Corcoran Jennison Companies. Proposals must be received by 5:00 p.m. on Wednesday, February 28, 2001. Proposals should be addressed to:

Marty Jones
President
Corcoran Jennison Companies
Bayside Office Center
150 Mount Vernon Street
Boston, MA 02125

Corcoran Jennison Companies reserves the right to modify or withdraw this Request for Proposals at any time and to reject any and all Proposals.

**DEFENDANTS' EXHIBIT 38**

**FORT TRUMBULL**
**MUNICIPAL DEVELOPMENT PLAN**
**New London, Connecticut**

**August 1999**

**Revised Administrative Draft**

***Prepared on behalf of:***
The City of New London
***by:***
New London Development Corporation
New London, Connecticut

*Sponsoring Agency:*
State of Connecticut
Department of Economic and Community Development

*Implementing Agency:*
New London Development Corporation
New London, Connecticut

*Administrative Contributors:*
The Downes Group – Program Management
Milone & MacBroom, Inc. – Plan Coordination

*Technical Contributors:*
Diversified Technology Consultants, Inc. – Civil Engineering
Harrall-Michalowski Associates, Inc. – Neighborhood Relocation and Land Use Planning
HRP Associates, Inc. – Hazardous Waste and Contamination Assessment
Milone & MacBroom, Inc. – Environmental Impact Evaluation
RKG Associates, Inc. – Economic Analysis
Wallace Roberts and Todd – Land Use Planning



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## 1.0 INTRODUCTION

### 1.1 MDP Process

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), is undertaking a municipal development planning project adjacent to the Thames River in New London, Connecticut. NLDC is a nonprofit, private economic development organization originally formed in 1978. The corporation was established with the authority to raise and borrow funds, manage projects, acquire and sell properties, and engage in any activity related to the progress and general welfare of the community.

This Municipal Development Plan (MDP) has been prepared under Chapters 130, 132, and/or 588(1) of the Connecticut General Statutes. The New London City Council gave authority to NLDC to prepare the MDP for the Fort Trumbull area in a resolution passed in May of 1998. The resolution also established the boundaries of the planning area.

Prior to initiating the municipal development planning process, an Environmental Assessment (EA) and



an Environmental Impact Evaluation (EIE) were completed in accordance with the Connecticut Environmental Policy Act (CEPA), established in Sections 22a-1 through 22a-lh of the Connecticut General Statutes and Sections 22a-1 through 22a-1a-12 of the Regulations of Connecticut State Agencies.

In June of 1998, the Connecticut Department of Economic and Community Development issued an Environmental Assessment for the Fort Trumbull MDP area which concluded that the project could potentially have a significant effect on the environment. Several major areas of concern were identified in the EA, including the possible acquisition of residential properties and relocation of residents; adequacy of the existing water supply; congestion and traffic safety issues; historic importance and archaeological significance of the project area; flooding; and stormwater management. As a result of DECD's finding, an Environmental Impact Evaluation was undertaken.

The EIE process began in late June 1998. Numerous consultations were engaged to assist in specific phases of the work. Preliminary findings were discussed at numerous neighborhood meetings. Input and review comments were solicited from the community and interested public on the Draft EIE. Input was also solicited from local, state and federal agencies.

Following completion of a 45 day public comment period of the Draft EIE, the Connecticut Department of Economic and Community Development forwarded to the Office of Policy and Management the Final EIE and Record of Decision (dated March 1999), consisting of all public notice documentation, comments received from all interested parties, the agency decision relative to proceeding with the proposed action, and a discussion of the intentions for initiation of actions for

minimizing impacts, for determination of the adequacy of the evaluation.

The CEPA process concluded with the review of the Final EIE and Record of Decision by OPM and their April 20, 1999 determination that regulatory requirements were satisfied, with several conditions. Appendix A contains a copy of selected relevant correspondence and documentation from the Record of Decision and the April 20, 1999 OPM approval letter.

The Final EIE and Record of Decision is the basis for the implementation of the project. The subject Municipal Development Plan has been developed to be consistent with the findings of the CEPA process.

A mandatory public hearing will be held prior to local adoption of the MDP by the City of New London. Procedures for the adoption of the MDP are set forth in Section 32-224(c) of the Connecticut General Statutes. This process must include a finding by the OPM that the plan is not inimical to the overall goals and objectives of the state. Upon obtaining such a finding, the plan would then be legally adopted by the city and approved by DECD.

## 1.2 Project Background

The City of New London is a waterfront community along the tidal estuary of the Thames River and Long Island Sound in southeastern Connecticut. Figure 1 is a location map of the City of New London. New London is only 5.79 square miles in size, making it geographically the second smallest municipality in the State of Connecticut. Nearly 54% of the total land area of New London is exempt from local property taxes.

The Fort Trumbull MDP area is approximately 90 acres in size and includes residential and commercial areas comprised of approximately 115 parcels. The



project area includes the 32-acre U.S. Navy's closed Naval Undersea Warfare Center (NUWC), the regional Water Pollution Control Facility (WPCF), and the adjacent Fort Trumbull area as shown in Figure 2.

The driving force behind this project is the City of New London's desire to revitalize its economy by focusing on the potential offered in the Thames River corridor. A key catalyst for development of this area is the proposed Pfizer, Inc. Global Development Facility to be located immediately to the south of the MDP boundary. In an effort to induce private investment into the Fort Trumbull area, considerable funding has been committed to this redevelopment project by various offices of the State of Connecticut and the City of New London.

In order to guide the redevelopment of the Fort Trumbull area, the New London Development Corporation, after numerous public meetings and consultation with Federal, State, regional and local organizations, identified four major goals for the redevelopment of the site. These goals are presented below:

- To create a world-class development that will complement the undertakings of Pfizer, Inc. and set a standard for development in New London;
- To create an economic asset for the City of New London that will create jobs, generate tax revenue, and result in spin-off economic activity;
- To maximize public access to the waterfront and, in doing so, encourage uses which are water dependent or which will be enhanced by water access and views; and
- To develop a project which will help build momentum for the revitalization of downtown New London and the balance of the city to the benefit of the City's residents and visitors

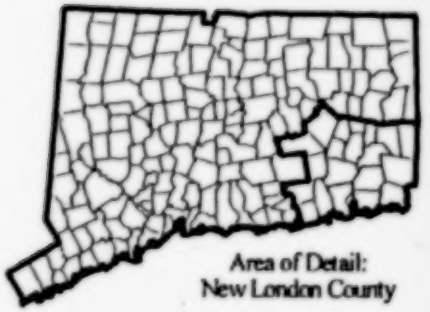
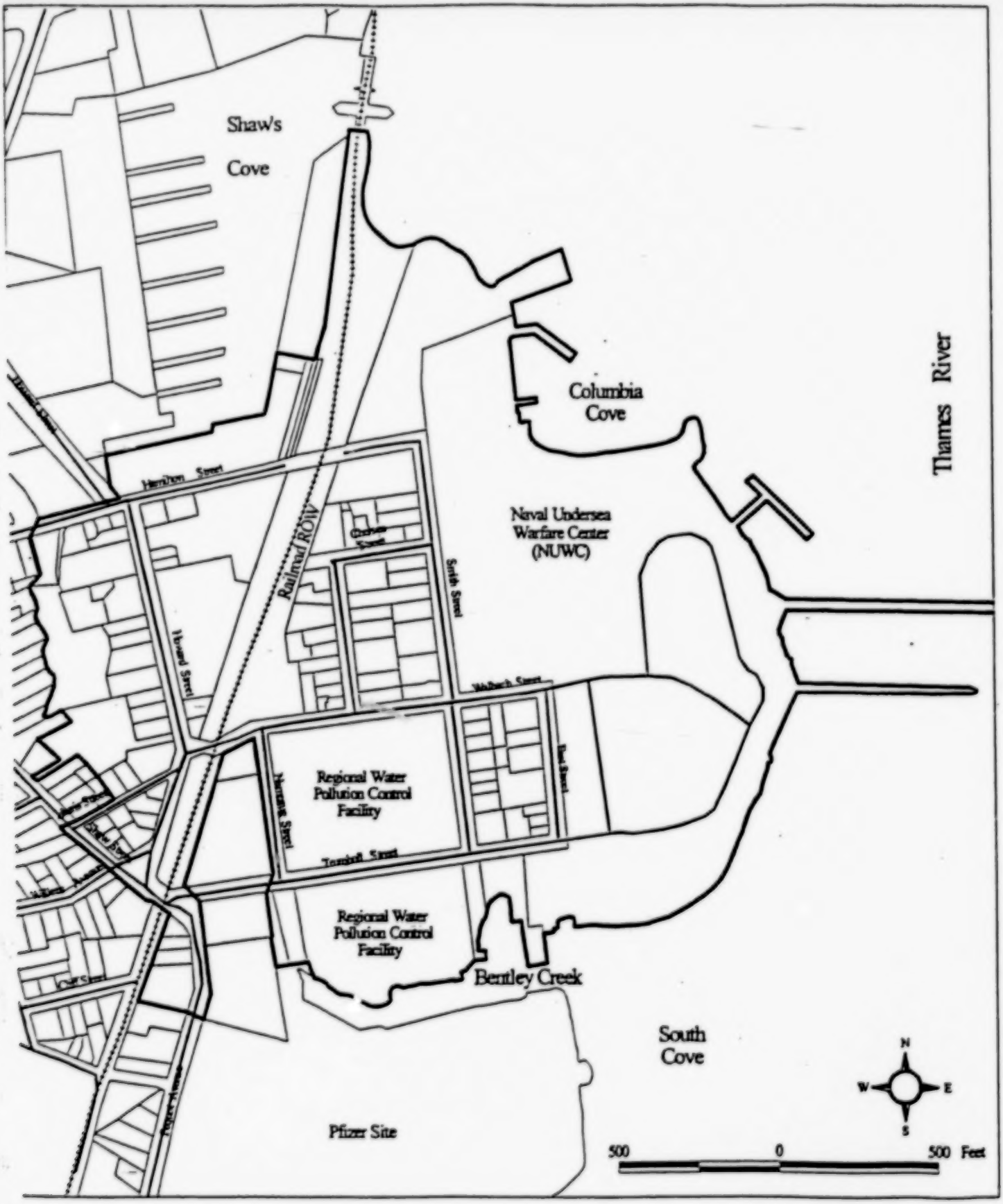


**Figure 1**
**Location Map - City of New London**

Fort Trumbull MDP Area - New London, Connecticut
Draft Environmental Impact Evaluation - November 1998




Fort Trumbull MDP Area - New London, Connecticut

Figure 2

Note: GIS coverages developed by Milone & MacBroom, Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, FEMA, and US Navy. Intended for planning

The Environmental Impact Evaluation evaluated six land use alternatives with an array of land uses. While there is some overlap and common elements in the six land use alternatives, each has a distinct theme as noted below:

Alternative No. 1 – No Action

Alternative No. 2 – Recreation/Tourism

Alternative No. 3 – Residential/Commercial

Alternative No. 4 – Business Campus

Alternative No. 5 – Mixed Use 1

Alternative No. 6 – Mixed Use 2

The analysis contained in the Draft EIE evaluated the impact of the various components associated with the six land use plans. It was recognized that the ultimate preferred land use plan could borrow land use components from any or all of the plans. As stated in the Draft EIE: "The alternative plans represent general land use areas and density of development. They are not intended to be exact geographic limits or configurations. A preferred alternative has not been selected and it is anticipated that the ultimate selected preferred plan may be a hybrid of several alternatives."

Following the 45 day review and comment period of the Draft Environmental Impact Evaluation for the Fort Trumbull MDP area, review of public and state agency comments, and consideration of the administrative record, technical data and other relevant information, the Record of Decision was developed and a preferred composite land use plan was selected as presented in Figure 3. The four goals identified for this project which highlight economic development through the creation of jobs, tax revenues, and spin-off

economic activity, played a major role in the ultimate selection of the preferred composite land use plan. A conditional approval was subsequently issued on April 20, 1999 by the Office of Policy and Management (See Appendix A).

Balancing the competing needs and impacts of this project led to the ultimate selection of a modified mixed use alternative. A compromise of economic development with environmental impacts resulted in an alternative which takes advantage of the economic potential of business development, coupled with the positive aspects of a mixed use community development. The result is a positive outcome with fewer negative impacts.

* * *

## 1.3 Summary of Major EIE Issues

The following discussion briefly summarizes the major issues raised during the Draft EIE review process.

*Regional Water Pollution Control Facility and the Active Amtrak Rail Line* – The western Fort Area supports a sewage treatment plant and the active Amtrak railroad. The adjacency of these land uses to the planned land uses in the MDP area posed a challenge with respect to compatibility and aesthetic issues. Placement of less sensitive land uses in combination with planned improvements to the WPCF have been incorporated into the MDP to lessen the impacts of these utilities.

*Proposed Fort Trumbull State Park* – A 16-acre State Park will be located at the inactive NUWC site along the Thames River. The MDP has been prepared in an effort to complement and be compatible with the proposed park.



*Traffic* – The MDP and other planned projects in the vicinity of the Fort Trumbull area will result in additional traffic. Mitigation measures have been proposed to offset these impacts.

*Cultural Resources* – Several studies have revealed that areas of low, medium, and high archaeological sensitivity exist within the MDP area, both within and outside of the NUWC site. An overview of the recommendations of the Connecticut Historical Commission and related studies can be found in the Final Environmental Impact Evaluation and associated Record of Decision dated March 1999 (EIE/ROD), in section 2.7.3, entitled "Cultural Resources in the MDP Area."

All necessary mitigation will be reviewed by the Connecticut Historical Commission and State Historic Preservation Office, and performed to their standards in areas that will be disturbed due to the implementation of the MDP.

Studies to date include "Cultural Resources Survey: Naval Undersea Warfare Center," prepared by TAMS Consultants, Inc. for the Northern Division Naval Facilities Engineering Command Department of the Navy, April, 1998 and "Archaeological Assessment Survey: The Fort Trumbull MDP Area," prepared by Keegans Associates, LLC, September, 1998 for NLDC. The results of these surveys have been reviewed, and the proposed course of action incorporates their recommendations. Both of these surveys are cited in the composite land use plan recommended in February 1999 "Selection of and Rationale for the Preferred Alternative – Fort Trumbull MDP Area," which noted areas of low, medium, and high archaeological and cultural sensitivity. Certain areas within the MDP will require mitigation work to be completed before these areas are disturbed. This work has already been

initiated with the concurrence of the Connecticut Historical Commission and State Historic Preservation Office.

*Floodplain Issues* – As shown in Figure 5, much of the Fort Trumbull MDP area is located in the flood hazard zone. An exemption from current DEP floodplain policy is required in order to pursue the proposed development within a portion of the MDP area that is currently classified as floodplain. The MDP plan involves the addition of fill to elevate portions of development areas in Parcels 1 and 2 that are currently classified as floodplain, and raise the land in those areas above the 100-year flood plain.

A Floodplain Management Certification exemption is being requested through the Department of Environmental Protection concurrent with the MDP approval process. A copy of the exemption package is included under separate cover to the MDP (see Appendix G for the Executive Summary). The exemption is merited due to the following unique existing conditions at the site:

- Existing flood plain elevations in the hotel and residential development sites are high, within one to three feet of the predicted 100-year flood elevation. A relatively small amount of fill is required to remove these hotel and residential development sites from the flood plain. The hotel site will require approximately 1,700 cubic yards of fill, and the residential site will require approximately 7,700 cubic yards of fill. The cost of fill to raise site to the 100-year base flood elevation of 10.0 feet NGVD will be borne by the private developer. Figure 6 shows the future proposed floodplain.
- Floodplain area is attached to large area of higher ground. Therefore the proposed grade changes will not create "islands" during flooding events.



- The floodplain area in its current state is completely covered with asphalt and buildings which must be demolished. It is likely that site and soil remediation alone will increase elevations on portions of the property, placing them above the 100-year floodplain.
- The completed project will reduce the impervious coverage of the site to approximately one-half of the current coverage.
- The NUWC site, which comprises a large portion of the waterfront land in the MDP area, is a former military base. The existing buildings are not flood proofed and it is economically infeasible to upgrade them to FEMA standards for re-use.
- The project goal is to promote economically viable development that restores this land to the tax base of the City of New London.
- The proposed project has no impact on flood storage or velocity issues because this area of the Thames River is tidally influenced and not subject to riverine flooding.
- A flood evacuation route will be provided on streets that are at elevation 7.1 feet NGVD or higher, as shown in Figure 4. This meets the FEMA flood level standard for a 10-year storm, and is 0.7 feet higher than the U.S. Army Corps of Engineers 10-year flood level of 6.4 feet NGVD.
- During the 100-year design storm, the evacuation route will be impassable to vehicles for only one hour and 35 minutes, and will be impassable to emergency vehicles for only 50 minutes out of the 12 hour cycle.
- Proposed hotel and residential development will comply with the provisions of the National Flood Insurance Program. Finished grades in those

development sites will be at or above 10.0 feet NGVD. The lowest floor of residential structures (including the hotel) will be built at or above 13.4 feet; one foot higher than the 500-year flood level of 12.4 feet NGVD (see Figure 4).

Revisions to FEMA flood maps will be completed prior to the occupancy of any structures within the parcel areas.

*Emergency Evacuation* – An evacuation plan outline has been created, and is included in Section 5.5. Also refer to Figure 4.

*Connecticut Coastal Management Act* – The proposed development of the Fort Trumbull peninsula is intended and committed to providing maximum water access and water dependent uses. The project plan includes a network of public access walkways along the entire waterfront. For boating and water access, the plan includes an improved and enhanced Fort Trumbull marina on Bentley Creek, which will be incorporated into a future marina training center, as well as a site for a future marina (including piers for larger vessels) along the Columbia Cove waterfront. Additionally, Parcel 6 includes a waterfront development site on Shaw's Cove, shorefront that is currently occupied by a non-water dependent use.

An additional marina site, which will be set aside for mixed use (including commercial fishing vessels), is intended for the waterfront portion of Parcel 1 between the Columbia Cove Marina and the Shaws Cove Railroad bridge.

Commercial fishing and lobstering vessels are currently homeported in the MDP area. Some of these vessels will be accommodated at Fort Trumbull Marina. Should any other of the fishing related businesses currently operating in the MDP area need to relocate outside of the MDP area, the Relocation Plan (included herein as Appendix E) anticipates providing



financial and other relocation assistance in accordance with Chapter 135 of the Connecticut General Statutes. This information is highlighted in section 7.4, entitled "Availability of Relocation Facilities."

The MDP is committed to no overall diminishment of water dependent uses. This includes no displacement of water dependent uses without relocation support as indicated above, involving either integration with the development program or finding of an alternative suitable site.

### *Conclusions*

The areawide Phase I environmental site assessment has been completed for the MDP area. Based on conditions encountered, it is believed that environmental contamination of soils and groundwater exists within the project area. The likely contaminant/waste types expected to be encountered during the investigation and remediation of the properties within the MDP area generally include:

- Petroleum products (gasoline, heating oil, waste oils, lubricating oils) associated with a gasoline station, several auto and marine repair facilities, several current and former underground oil tanks and a former oil terminal.
- Commercial/industrial solvents (degreasing, dry cleaning, autobody and painting) associated with auto and marine repair facilities, former dry cleaning operations, wood furniture refinishers and autobody/painting operations.
- Metal-containing wastes associated with former foundry operations and a junkyard
- Polychlorinated Biphenyls (PCBs) associated with a former junkyard, a railroad maintenance facility and a former barrel storage facility.

Further investigations will be required to confirm and define suspected contamination sources, possibly including:

- soil gas analysis to screen for areas of contamination in soils and groundwater;
- a ground penetrating radar survey (GPR) on certain sites where unidentified USTs are suspected;
- collection of surface soil or waste samples to determine if surficial soils are contaminated from operations spillage or disposal;
- installation of borings and sampling of subsurface soils to determine if USTs have leaked and to determine sources and extent of groundwater contamination;
- sampling of waste and debris piles, abandoned and unidentified drums and containers;
- asbestos surveys;
- survey buildings for lead paint using x-ray fluorescence; and
- sampling of stained or potentially contaminated building surfaces.

Phase II Environmental Site Assessments will be performed at the 15 locations in the project area indicated in Table 3-5. These 15 specific areas include multiple land parcels where the current or former use of the property spans two or more defined municipal tax lot designations. Also, although included in the MDP area Phase I review, the following properties are currently being addressed under different state or federal programs in terms of environmental investigation and remediation: The former Naval Undersea Warfare Center (NUWC) and the two parcels adjacent to the south half of the Calamari Brothers Scrap Yard. Additionally, the two parcels within the MDP which are occupied by the Regional Water Pollution



Control Facility (sewage treatment plant) are to be unaffected by the MDP redevelopment and therefore no additional work is anticipated.

**Table 3-5**
**Recommended Phase II ESA**

| Site (Properties) | Address | Development Parcel |
|---|---|---|
| Miner & Alexander Lumber (67) | 150 Howard Street | 6 |
| Former Spinatos Body Shop (80, 81) | 65 Hamilton Street | 5B |
| Former Pequot Foundry (64) | 162 Howard Street | 5B |
| Ron's Autobody (31) | 72 Smith Street | 2 |
| Former Pequot Foundry (78) | 190 Howard Street | 5A |
| Former Junkyard (91-94) | 197 Howard Street | 5C |
| Former Carole Cleaners (65) | 216 Howard Street | 5A |
| Former Barrel Storage (100, 101) | 163 Howard Street | 5C |
| Former Bottling Works (108) | 23 Hamilton Street | 5C |
| Leo's Gasoline Station (97, 98) | 175 Howard Street | 5C |
| Castle Oil Terminal (36) | Smith and Hamilton Streets | 1 |
| Trumbull Building (10) | 82 Trumbull Street | 4A |
| Trumbull Marina (7, 8 60) | 93 Trumbull Street | 4B |
| Former Broach Manufacturer (114) | 21 Pequot Avenue | 7 |
| Amtrak Yard (109) | 30 Walbach Street | 3 |
| (properties) = lot numbers from EIE/ROR Fig. 2.15-1 and Table in Appendix E. | | |

The remaining properties in the MDP area are considered low risk residential, commercial or undeveloped properties.

Based on the results of the pending Phase II investigations, it is anticipated that most of the properties will require one or more of the following:

- Degree and extent of contamination definition (Phase III);
- Preparation of remedial action plans (RAP) based on the type, distribution and severity of contamination and the intended reuse of the property; and
- Remediation of the property pursuant to the RAP.

Some of the properties within the MDP area may be regulated under the Connecticut Transfer Act (CTA) C.G.S. 22a-134a through 134e and therefore subject to CTA guidelines as well as applicable state and federal regulations for remediation. Specifically, those properties identified as definite or potential CTA regulated sites are indicated in Table 3-6.

**Table 3-6**
**Potential CTA Regulated Sites**

| Site | Address | Reasoning |
|---|---|---|
| Former Junkyard | 197 Howard Street | Former junkyard through 1985, possible |
| Amtrak Yard | 30 Walbach Street | Operational Rail Maintenance Facility, possible |
| Former Broach Manufacturer | 21 Pequot Avenue | Wood Stripper Ca. 1985 to present, definite |
| Ron's Autobody | 72 Smith Street | Active Autobody Shop, definite |



For those properties which are determined to be establishments in terms of the CTA, the following additional actions will be necessary upon property transfer:

- Filing of a Form I, II, III or IV with CT-DEP (Form I is for establishments where no release has occurred; Form II where all releases have been remediated and the DEP Commissioner or a Licensed Environmental Professional (LEP) has verified completion; Form III where a release has occurred but investigation/remediation is still being performed, and Form IV where all remedial actions have been performed but post-remedial monitoring has yet to be completed.
- Filing an Environmental Condition Assessment Form (ECAF) concurrent with any Form III or Form IV filing. The ECAF will be reviewed by DEP who will either retain the lead for investigation and remediation or allow assignment to a Licensed Environmental Professional (LEP) to bring the property into and verify compliance with the Remediation Standard Regulation (RSR) RCSA 22a-133k-1 through 133k-3.

Although several of the other high risk sites have some potential for site contamination, they do not meet the CTA regulatory thresholds for hazardous waste generation or specific activity, during the requisite time frames.

Based on the age of most of the buildings in the MDP area, they can be expected to possibly contain both asbestos materials and lead based paint products, as confirmed by initial walkthroughs of accessed properties.

Prior to the demolition of any commercial, industrial or public buildings or buildings containing five or

more residential units, they must be inspected for asbestos-containing material and any such materials must be removed. The National Emissions Standards for Hazardous Air Pollutants – Subpart M also requires that the Federal EPA be notified 10 working days prior to demolition. For further information, contact the EPA at (617) 918-1650.

The disposal of material containing asbestos requires the approval of the Waste Engineering and Enforcement Division pursuant to section 22a-209-8(I) of the Regulations of Connecticut State Agencies. Proper disposal technique requires that the material be bagged and labeled and placed in an approved secure landfill. For further information and to obtain the application for approval, contact the division at (860) 424-3366.

The disposal of demolition waste should be handled in accordance with applicable solid waste statutes and regulations. Clean fill is defined in section 22a-209-1 of the Regulations of Connecticut State Agencies (RCSA) and includes only natural soil, rock, brick, ceramics, concrete and asphalt paving fragments. Clean fill can be used on site or at appropriate off-site locations. Clean fill does not include uncured asphalt, demolition waste containing other than brick or rubble, contaminated demolition wastes (e.g. contaminated with oil or lead paint), tree stumps, or any kind of contaminated soils. Land clearing debris and waste other than clean fill resulting from demolition activities is considered bulky waste, also defined in section 22a-209-1 of the RCSA. Bulky waste is classified as special waste and must be disposed of at a permitted landfill or other solid waste processing facility pursuant to section 22a-208c of the Connecticut General Statutes and section 22a-209-2 of the RCSA. For further information concerning disposal of demolition



debris, contact the solid waste staff of the Waste Engineering & Enforcement Division at (860) 424-3366.

Residue generated by the removal of lead paint is considered to be hazardous waste if it meets the characteristics contained at 40 CFR 261. This must be determined on a case-by-case basis for each abatement project prior to disposal. The disposal of hazardous waste is regulated pursuant to sections 22a-449(c – 11 and 22a-449(c – 100 through 22a-449(c – 110 of the RCSA. Proper disposal procedure is for a permitted hazardous waste hauler to transport the waste to an approved disposal facility. The Bureau of Waste Management has prepared a document, "Guidance for the Management and Disposal of Lead-Contaminated Materials Generated in the Lead Abatement, Renovation and Demolition Industries."" For further information and to obtain the guidance document, contact the Waste Engineering and Enforcement Division at (860) 424-3372.

The removal of underground storage tanks should follow the procedures outlined in the code of the National Fire Protection Association (NFPA 30, Appendix B). Individual soil samples should be obtained from the underlying native soil. A listing of potential contaminants that should be analyzed and suggested analytical methods is included in a DEP fact sheet entitled "Sampling and Analytical Methods for UST Closure." If contaminated soil, ground water, or free product is observed at the site or detected by sample analysis, the DEP must be immediately notified at (860) 424-3338 and corrective action must be undertaken in accordance with section 22a-449(d)-106 of the RCSA. Closure reports, including confirmation of sampling and clean-up, are required by Federal and State law. For further information, contact the Bureau of Waste Management, Underground Storage Tank Program at (860) 424-3374.

If soil and/or groundwater contamination is discovered during the implementation of the project, the Permitting, Enforcement and Remediation Division should be notified in writing. The site will then be placed on the division's database and further assessment will be made to determine the appropriate course of action. In order to achieve proper remediation, the extent of contamination should be clearly defined, a cleanup plan developed, and measures implemented that will clean up the site in accordance with applicable criteria in the Connecticut Remediation Standard Regulations adopted pursuant to section 22a-133k et seq. of the CGS. For further information, contact the Permitting, Enforcement and Remediation Division at (860) 424-3705.

### *3.5.2 Environmental Impact Evaluation*

The Final *Fort Trumbull MDP Area Environmental Impact Evaluation (EIE)* and associated Record of Decision provided under separate cover, is incorporated herein by reference.

* * *

## 5.0 PROPOSED IMPROVEMENTS

### 5.1 Proposed Land Uses

The proposed land uses for parcels within the MDP area are graphically illustrated in appended Map 5.1. The following discussion summarizes opportunities for use of the parcels within the area. The proposed composite land use alternative has been estimated to generate between $680,000 and $1,250,000 in additional property taxes annually.



***Parcel 1 – Village/Hotel Parcel (10.5 acres)***

This parcel will accommodate a combination of uses to create a small urban village. The largest and most prominent feature will be a high-quality conference hotel with between 200 and 250 rooms, meeting space, banquet facilities, restaurants, and boutique retail. This complex will face the Thames River and front on the village green.

Convenient parking with approximately 375 spaces will be provided in an adjacent lot and garages, including a parking deck below the hotel structure (at or above 10.0 feet NGVD).

On the waterfront, across the Riverwalk from the hotel, will be a marina that will cater to transient boaters who want shore access to the sites and activities of the Fort Trumbull area and, particularly, the village center. In season, the marina will offer a variety of facilities to area residents, hotel occupants, and the general public, such as boat rentals, boating lessons, and fishing, thereby adding interest, entertainment, and water-edge activities in front of the hotel and near the Village Green.

An additional mixed use marina site will be available on the waterfront north of the hotel. This marina site is intended to provide additional mooring facilities for commercial fishing vessels. There will be a continuous public walkway along the water's edge of the entire parcel.

***Parcel 2 – Residential Parcel (10.3 acres)***

The residential parcel will provide for a community of approximately 80 new residential units. The parcel is located north of Walbach Street between Smith Street and the proposed Fort Trumbull State Park.

The proposed residences will offer a variety of locations and orientations, including riverfront, river view, park view, and adjacency to the village center. The buildings will be organized to create an urban neighborhood with units that will be immediately adjacent to or near amenities including the river, village shopping and services, and the state park.

The community will be located adjacent to mostly passive uses within the peninsula. Vehicular access will be provided from Smith Street and a network of internal residential streets. The community will adjoin the village to the north, where residents will have easy access to services and conveniences. There will be community and recreational facilities within the development to serve residents. Among them will be a pool complex, sport courts, and a community meeting/club room. Each unit will have parking for residents and guests. A continuous public access walkway will pass through the community along the river's edge linking it to the State Park, the village center, and points beyond.

A site at the southern end of Parcel 2 adjacent to the State Park has been reserved for the development of the National Coast Guard Museum, which will move to this site from the Coast Guard Academy.

### *Parcel 3 – Office/R&D/Health Club (7.0 acres)*

Located between the proposed residential community on Parcel 2 and the railroad right-of-way, this parcel will be used for high-technology office space. It will also include a two story health club complex with pool. This complex will be available to hotel guests, residence owners, and members of the business and residential communities of the city.



The parcel will support a minimum of 90,000 square feet of office space, plus necessary parking. The option exists to build either two or three story buildings. Some parking could be included on parking decks below the structures to reduce the amount of ground space devoted to impervious cover. The remaining surface parking can be located within the interior of the parcel behind the buildings and largely buffered from view.

The location of this development parcel will be close to the improved intersection of Walbach and Nameaug Streets, allowing traffic to have direct access to the development rather than crossing through other uses proposed for the redevelopment area. Landscape enhancements at the intersection and along the length of a new Nameaug Street will help create a distinctive and attractive access corridor to the village center. This location for R&D/office space will provide workers convenient access to support services in the village center. It is also in close proximity to other office and R&D development in the vicinity, including the Pfizer Global Development Facility.

### *Parcel 4 – Park Support/Marina Parcels (2.4/1.7 acres)*

Parcels 4A and 4B will provide land and water renovation of the small marina and development of a unique state-of-the art marina training center. Existing buildings will be used for support and training facilities. The existing marina will be reconfigured and rebuilt to provide between 40 and 50 permanent slips. The riverwalk will be continued from the state park through these development parcels and beyond to the head of Bentley Creek. Pedestrian access through the wastewater treatment facility will be negotiated with

the City to provide a continuous walkway system. A portion of Parcel 4A will be redeveloped for uses that support the state park, such as parking, or for uses such as retail that will serve park visitors and members of the community.

***Parcel 5 – Office/R&D Parcel (2.4/1.9/5.3 acres)***

Parcels 5A, 5B, and 5C will provide space for modern, technology-oriented office/R&D buildings, as well as associated surface parking. The three parcels will accommodate four buildings for a total of approximately 140,000 square feet of building space. The existing building on Parcel 5A, which was recently renovated for office use, will be retained. Some of the parking previously approved for this building in a location west of Howard Street will be retained as well. Parcel 5B will be redeveloped for a two-story building with surface parking. Parcel 5C will be developed for two, two-story buildings and some convenience retail use near the intersection of Howard and Shaw Streets.

Howard Street, which separates Parcel 5C from Parcels 5A and 5B, will be slightly realigned and improved with new sidewalks, curb-cuts, street lighting, landscaping, and signage to provide convenient and safe vehicular access to the development parcels. Improvements to Howard Street and the railroad underpasses will establish a new image and gateway to the entire redevelopment area and will reinforce the City's prior redevelopment efforts along Howard Street south of Bank Street.

***Parcel 6 – Waterfront Commercial Parcel (2.3 acres)***

Parcel 6 will be used for a mix of water-dependent commercial uses. Access for vehicles will be from



upgraded Howard Street and Hamilton Street and for boats from Shaw's Cove. The parcel will accommodate three buildings for a total of between 20,000 and 25,000 square feet, in addition to the required parking.

***Parcel 7 – R&D/Office Parcel (0.72 acre)***

This parcel is located southwest of the intersection of Pequot Avenue and Trumbull Street. This area will be reconfigured for better vehicular and pedestrian circulation and improved access under the rail line. The parcel is small and will be used for office/R&D development.

## 5.2 Proposed Zoning

### *5.2.1 Proposed Zoning Designation Changes*

Appended Map 5.2 presents the proposed zoning classifications for parcels within the MDP area. All of the MDP area east of the Amtrak Railroad right-of-way to the water's edge will be zoned WC-I with special provisions. Please refer to Map 3.2 and Section 3.2 which presents a summary of existing zoning designations.

The following revisions to the zoning classifications for the MDP parcels will be recommended to the City of New London Planning and Zoning Commission:

- Parcel 1 currently has three zoning classifications comprised of a narrow strip of WD zoned land running parallel to the railroad right-of-way, a small portion of C-1 zoned land along the old Hamilton Street right-of-way, and a sizeable waterfront parcel zoned WC-I. Future zoning of Parcel 1 shall be WC-I.

- Parcel 2 shall retain its current zoning classification of WC-I.
- Parcel 3 is currently zoned C-1. This shall change to a WC-I zoning classification.
- Parcel 4A is currently zoned C-1 land. This shall change to a WC-I zoning classification. Parcel 4B shall retain its current zoning classification of WC-I.
- Parcels 5A, 5B and 5C shall retain their current zoning classification of C-1.
- Parcel 6 shall retain its WD classification.
- Parcel 7 shall retain its WC-I classification.
- The area of the regional Water Pollution Control Facility is currently zoned C-1 north of Trumbull Street and WC-I. It should be noted that zoning regulations do not necessarily apply to municipal property owned or leased by the City of New London for public purpose, in accordance with Chapter 124, Section 8-2 of the Connecticut General Statutes. However, site plan approval review by the Planning and Zoning Commission shall be required for any further development on that parcel, as set forth in Article VIII, Section 800 of the Zoning Regulations.
- Fort Trumbull State Park shall retain its current zoning classification of WC-I.

### 5.2.2 *Applicability of Proposed Zoning Amendments*

The City of New London Zoning regulations are proposed to be amended as specifically provided in this Municipal Development Plan. Where controls differ



between the Zoning Regulations and the Municipal Development Plan, the more stringent shall govern.

Approvals shall follow a two-step process. In step one, a detailed land development plan and design will be prepared and agreed upon by DECD and the designated development agency (i.e. New London Development Corporation) and the selected developer. Design guidelines and review procedures as established by the development agency shall be followed. Any deviation from the MDP and the associated design guidelines must be accepted by DECD and the development agency. In step two, the developer shall seek and obtain approvals from the New London Planning and Zoning Commission in accordance with zoning provisions and site plan review requirements.

### 5.2.3 *Proposed Zoning Amendments for the MDP Area*

Amendments set forth below shall be applicable only to those zoning districts located within the MDP area as defined by the adopted Municipal Development Plan. The applicable zoning districts are C-1, WC-I, and WD. Outside the MDP area, all requirements of these districts as set forth in the City's Zoning Regulations and Code shall apply. Amendments for the MDP area for C-1 and WC-I are as stated below. The full regulation is presented. Text which is recommended for deletion is shown as "~~strike-through.~~" Proposed additions are shown in ***"bolded italics."*** No amendments are proposed for the WD district within the MDP.

***Amendment to C-1 district regulations:***

510.1 *Purpose of District.* To provide for a wide range of commercial ~~and limited industrial uses~~ along major arterials; to accommodate uses that benefit from large numbers of motorists, and business that are not intensive central business area type activities. New residential development is discouraged except in certain instances.

510.2 *Permitted Uses.* Uses Permitted shall disallow any use not listed below. Uses permitted shall be limited to those listed below and shall be subject to issuance of a Special Permit by the Planning and Zoning Commission in accordance with the requirements of Article VIII, Section 810 of these zoning regulations. Uses not specifically permitted shall be prohibited.

1) Retail stores and service businesses.

2) Business and professional offices and banks.

3) Restaurants.

4) Buildings and mixed uses subject to the following requirements.

   a) All lot and bulk requirements for each use are satisfied.

   b) Separate entrances and exits shall be provided for residential and non-residential portions of the building.

5) Research and development uses, provided that any manufacturing shall be limited to prototypes and products testing.

~~510.2 Uses Permitted subject to issuance of a Special Permit by the Planning and Zoning Commission in accordance with the requirements of Article VIII, Section 810 of this regulation.~~



~~1) Retail stores and service businesses.~~

~~2) Business and professional offices and banks.~~

~~3) Wholesale businesses, warehouses, and building material storage and sale, but excluding storage of coal, coke, fuel oil, or junk.~~

~~4) Cold storage plant, beverage distributor, baking and other food processing plant that is not offensive, obnoxious, or detrimental to neighboring uses by reason of dust, smoke, vibration, noise, odor, or effluent.~~

~~5) Motor vehicle sales, including the sale of recreation vehicles and trailers and boat sales, with accessory repair facilities subject to the following requirements:~~

   ~~(a) Outdoor area lighting shall be that generally required for security purposes.~~

   ~~(b) Entrance and exit driveways shall not be located closer than 10 feet to any interior property line; and shall be so laid out as to avoid the necessity of any vehicle backing out into any public right of way.~~

   ~~(c) Vehicle lifts or pits, dismantled vehicles, and all parts and supplies shall be located within a building enclosed on all sides.~~

   ~~(d) All services or repair of motor vehicles shall be conducted in a building enclosed on all sides. This requirement shall not be construed to mean that the doors to any repair shop must be kept closed at all times.~~

   ~~(e) Gasoline or flammable oils in bulk shall be stored fully underground, in conformance with applicable codes.~~

6) Auto Washes.

7) Restaurants.

8) Fast food restaurants, provided that eating on the premises of the fast food restaurant shall be permitted only inside the structure or in areas specifically designated and properly maintained outside of the structure.

9) Animal hospitals and boarding and/or breeding of animals, provided that no outdoor runs shall be permitted within 100 feet of an R or NB district.

10) Dry cleaning establishments and laundromats.

11) Funeral parlors.

12) Retail sale and accessory storage and display of garden materials, supplies, and plants, including nursery operations, provided that the outdoor storage of display of plants and material does not obstruct pedestrian flow or vehicular traffic and does not occur within five feet of a property line.

13) Places of worship.

14) Printing plants.

15) Private transportation service including garage and maintenance facilities.

16) Taxi station.

17) Auto rental.

18) Radio, television and recording studio.

19) Arts and craft studios or studios for teaching the performing arts.

20) Motor vehicle service stations or gasoline pumps as part of another use, provided that:



(a) No traffic hazard affecting the public safety will be Present.

(b) No sale of gasoline shall be permitted to be established on any lot within a distance of 500 feet of an existing gasoline or filling station lot, or of any lot for which a building permit has been issued for the erection of such a station or any use which includes gasoline pumps.

(c) No such establishment shall be within a distance of 200 feet of any school, public or private; religious institution, hospital, library, park, nursing home, extended care facility, or any similar institution or other place of public assembly; said distance to be measured in a straight line along or across a street between the nearest points of each of the lots or premises, regardless of the district where either premises is located.

(d) No such establishment shall be within a distance of 70 feet of any abutting R or NB district.

(e) Entrance and exit driveways shall not be located nearer than 10 feet to any interior lot line; and shall be so laid out as to avoid the necessity of any vehicle backing into any public right of way.

(f) Vehicle lifts or pits, dismantled automobiles, all parts or supplies, goods, equipment, materials, refuse, garbage, or debris shall be located within a building enclosed on all sides.

(g) All service or repair of motor vehicles shall be conducted in a building enclosed on all sides. This requirements shall not be construed to

mean that the doors to any repair shop must be kept closed at all times.

21) For structures built prior to November 3, 1983, single family, two family and multi-family dwellings may be permitted in accordance with the density requirements of the R-3 District. Only new multi-family residential dwellings may be permitted in accordance with the R-3 District lot and bulk requirements. (Amended 10/7/93)

22) Buildings with mixed uses subject to the following requirements:

(a) All lot and bulk requirements for each use are satisfied.

(b) Separate entrances and exits shall be provided for residential and non-residential portions of the building.

23) Parking facilities. (Amended 6/4/85)

24) Petroleum and related fuel storage and distribution facilities which were in existence on the effective date of this regulation. (Amended 5/2/96)

25) Public and private utility installations.

26) Research and development uses, provided that any manufacturing shall be limited to prototypes and products for testing.

27) Drinking establishments, including night clubs, provided no music or noise shall be audible in any abutting R or NB District. (Amended 2/10/86)

28) Institutions for higher learning, business, vocational, and training schools, including colleges, universities, junior colleges, business, banking, business management, secretarial and office service schools, computer and data processing



schools, art and drafting schools, barber, beauty, and cosmetology schools, commercial or non-commercial food preparation schools, photography schools, schools for training in the martial arts, dancing, gymnastics, and music, schools for fashion design, under the following conditions:

(a) The curriculum shall satisfy the requirements of the Connecticut State Department of Education; on

(b) No accommodations for resident students shall be permitted.

(c) No music or noise shall be audible in any abutting R or NB district.

29) Membership clubs catering exclusively to members and their guests, and private playgrounds, swimming pools, tennis courts, and recreational buildings, subject to the following conditions:

(a) Exterior lighting other than that which is essential for the safety of users of the premises.

(b) Location of any part of the building nearer than 30 feet to any street or property line unless the property adjoins a non-residential district, in which case the yard requirements of that district shall apply.

30) Commercial entertainment establishments catering primarily to persons below the legal age for drinking alcoholic beverages, subject to the following conditions:

(a) The minimum area devoted to patron use shall be 1,000 square feet.

(b) A drop off and pick up location for vehicles near a well lighted entrance shall be provided.

(c) Off street parking areas shall be illuminated.

(d) No such use shall be located closer than 500 feet to any similar establishment or to any establishment serving or selling alcoholic beverages, except that this provision shall not apply to restaurants which provide alcoholic beverages, only from a service bar. (Amended to add this section on 5/9/85)

31) Private, public, or quasi public rehabilitation facilities to include:

(a) Outpatient, day treatment, or inpatient alcohol counseling, treatment, or rehabilitation clinics or centers;

(b) Outpatient, day treatment, or inpatient drug counseling, treatment, or rehabilitation clinics or centers;

(c) Outpatient, day treatment, or inpatient substance abuse counseling, treatment or rehabilitation clinics or centers;

(d) Non-residential or residential halfway houses for current or former inmates of federal, state, or local correctional facilities; and

(e) Other such similar outpatient or inpatient counseling, treatment, or rehabilitation clinics or centers that the Planning and Zoning Commission shall find to be substantively similar to the uses listed in Section 510.3.7, paragraphs (a) through (d) inclusive.

That any use identified within Section 510.3.7, paragraphs (a) through (e) inclusive shall be subject to the following restrictions and requirements:



(1) That such uses shall obtain all appropriate licenses and permits required by Federal, State and Local laws, statutes and regulations within (1) year of the date of approval unless an extension of the time period is applied for by the applicant prior to the actual expiration date and granted by the Planning and Zoning Commission.

(2) That such uses shall provide a minimum of 15 square feet of inside waiting or seating area space for each patron to be served within any one hour period of operation.

(3) That such uses shall not be located within 500 feet of any nursery, elementary, or secondary school, college, university building or playground.

(4) That such uses which provide residential services, either short term or long term, shall have a minimum of 70 square feet for the first resident and 50 square feet for each additional resident. (Amended 5/1/89)

32) Child Day Care Center, subject to the following requirements.

(a) The applicant shall have obtained all licenses certifications or approvals that may be required by Federal, State or local law.

(b) For each child registered, there shall be a minimum of 35 square feet of floor space exclusive of halls, bathrooms and kitchens.

(c) For each child enrolled, there shall be provided not less than 75 square feet of usable exterior open space. The Planning and Zoning Commission may authorize the substitution of interior space available for recreation

~~purposes if it determines that the aggregate space to be provided is adequate.~~

~~(d) No permanently installed play equipment shall be located in any required front or side yard.~~

~~(e) Any outdoor play area shall be screened in a manner to ensure visual and auditory privacy to adjacent properties. (Amended 8/10/89~~

~~33) Taverns (Amended 10/15/93)~~

~~34) Educational establishment for learning disabled or mentally retarded adults (but excluding adults with mental illness or drug or alcohol dependency) under license or contract with a state, federal, or municipal governmental agency. (Amended 03/02/95)~~

~~35) Microbrewery (Amended 5/2/96)~~

~~36) Structural additions to existing petroleum and related fuel storage and distribution facilities. (Amended 5/2/96)~~

510.3 *Accessory Uses*

1) Off-street parking and loading for uses permitted in this district.

2) Buildings for housing pets; children's playhouses.

3) Garden houses; greenhouse

4) Signs subject to the requirements of Article VI, Section 615.

~~5)~~ Swimming pool, tennis courts, and related recreation facilities



6) Amusement Device.

7) Fully enclosed storage.

8) Dumpster in rear yard only.

9) Accessory uses customary or incidental to a permitted use.

510.4 *Lot and Bulk Requirements*

1) Minimum lot area 5,000 square feet.

2) Minimum yards and setbacks.

   a) front – 10 feet, except new residential development must have 25 feet (see Article VI, Section 605.G.4)

   b) side – six feet; new residential development must have 10 foot side yards.

   c) rear – 10 feet except new residential development must have 20 foot rear yard.

3) Maximum height – ~~40~~ 55 feet, except the maximum height may be increased by special permit, provided that parking is created under, within, or on top of the structure, or the commission finds that the parking requirements are substantially exceeded in some other manner of off-street parking.

4) Maximum lot coverage of principal and accessory building – 80 percent, except new residential development which may occupy 50 percent of the site.

510.5 *Off-Street Parking and Loading*

Off-street parking and loading spaces shall be provided for each lot within this district in accordance

with the provisions of Article VI, Section 614 of these regulations.

***Amendment to WC-I district regulations:***

550.1 Purpose of the Waterfront Commercial-Industrial District. Encourage water dependent and water related industrial and major commercial use and where appropriate and feasible, public access, along appropriate portions of the Thames River waterfront consistent with the objectives of the Connecticut Coastal Management Act, and the New London Municipal Coastal Program and Plan of Conservation and Development (see Purposes of Section 540).

> 540.1 *Purpose of District.* The purpose of the Waterfront Development District is to encourage a mixture of land uses, with emphasis on waterfront access and water dependent and related uses. The City of New London contains a number of valuable waterfront areas along the Thames River, which have potential for waterfront development of different types. In accordance with the City's planning objectives outlined in the Coastal Area Management Plan (CAM) and in the Plan of Development, portions of the waterfront are to be devoted to non-industrial uses and other portions to industrial and port uses. The Waterfront Development District is designed to achieve the most appropriate use of land and structures in the predominantly marine business non-industrial portions of these waterfront areas and consistent with the design guidelines included here and in the Municipal Coastal Program adopted by the Planning and Zoning Commission.



*New residential development contributing to the creation of an active water-related mixed-use district shall be encouraged, as envisioned in the Waterfront Urban Village concept that is to guide the overall development of the Fort Trumbull MDP area.*

550.2 *Permitted uses.* The following water dependent and water related uses are permitted by right:

1) Public and private parks and playgrounds.
2) Yacht clubs and marinas, including uses accessory to them such as swimming pools, tennis courts, racquetball facilities.
3) Boat docks, slips, piers and wharves for fishing, yachts and pleasure boats or for boats for hire carrying passengers on excursions, pleasure, or fishing trips or for vessels engaged in fishery or shell fishery.
4) Boat and marine engine sales and display.
5) Yacht broker, marine insurance broker.
6) Rental of boats.
7) Retail sale or rental of boating, fishing, diving, bathing supplies and rental.
8) Base operations for fishing and lobstering business and the commercial bulk processing of fish and shellfish including as accessory use of such business a store or market for the sale of fish, shellfish, and other related food products.
9) Ferry boat piers and terminals.
10) Water related museums and/or educational facilities. (Amended 10/20/94)

550.3 Uses Permitted subject to the issuance of a Special Permit by the Planning and Zoning, Commission in accordance with the provisions of Article VIII,

Section 810 of these regulations. These specially permitted uses are intended to be allowed in conjunction with the permitted uses cited under Section 550.2 to the greatest extent feasible.

1) Restaurants.

2) Business and professional offices.

3) Hotels, motels and conference facilities.

4) Retail Stores.

5) Amusement Centers.

6) Commercial recreation, such as, but not limited to, tennis clubs, skating rinks, billiard parlors, miniature golf courses, bowling alleys, health clubs and uses normally accessory thereto (lockers, restaurants, retail sale of goods associated with the particular activity).

7) Buildings with mixed uses subject to the following requirements:

   (a) All lot and bulk requirements for each use are satisfied, unless otherwise modified by the Commission as permitted herein. (09/01/98)

8) Port facilities for bulk shipping and storage facilities, indoor and outdoor.

9) Manufacturing, fabrication, processing and assembly of goods and products.

10) Railroad yards, storage, service and repair.

11) A yard of building, storing, repairing, selling or servicing boats which may include the following as an accessory use: office for the sale of marine equipment or products, dockside facilities for dispensing fuel, restroom and laundry facilities to serve overnight patrons. Adequate lanes must



be provided to allow access and egress throughout the yard for fire trucks.

12) Parking facilities and structures. (Amended 6/4/85) (09/01/98)

13) Museums and/or educational facilities.

14) Drinking Establishments/Cafes. (Amended 8/07/97)

15) Laboratories as defined in Section 210 of this ordinance, including but not limited to pharmaceutical research and development facilities, and as part of an overall development plan, accessory uses such as employee fitness centers, cafeterias, helipads and other permitted accessory uses. (09/01/98)

***16) Multi family and single family attached residential uses up to a maximum density as provided for below.***

550.4 Accessory Uses

1) Off-street parking and loading.

2) Signs subject to the requirements of Article VI, Section 615

3) Enclosed storage.

4) Suitably screened dumpster(s).

5) Suitably screened public utility installations.

6) Accessory uses customary or incidental to a permitted use.

7) Uses which provide general public access to the waterfront. Access may be provided by any approved means including, but not limited to, easements, boardwalks, decks or other similar means. Such public access shall be identified on the site plan and shall be provided in the form of

a permanent easement acceptable to the City's Director of Law. Easements along the shoreline shall be at least 15 feet wide from the nearest public street to the water and at least 12 feet wide along the identified portion of the site shoreline. (Amended to 09/01/98)

8) Child daycare center, subject to the requirements of Section 420.3.6 herein. (09/01/98)

~~550.5 Lot and Bulk Requirements Unless otherwise approved by the Commission pursuant to Section 550.8 herein, all development within the WC I district shall comply with the following minimum standards:~~

~~1) Minimum lot area 10,000 square feet.~~

~~2) Minimum lot width 100 feet.~~

~~3) Minimum lot frontage 75 feet.~~

~~4) Minimum setbacks In no case shall new construction at the foundation line be less than 20' from the Thames River at mean high water elevation. (09/01/98)~~

~~Front yard 20 feet (09/01/98)~~

~~Side yard 10 feet (09/01/98)~~

~~Rear yard 20 feet (09/01/98)~~

~~5) Maximum lot coverage of principal and accessory buildings 50%.~~

~~6) Maximum building height 45 feet (Amended 10/20/94) (09/01/98)~~

***550.5 Lot and Bulk Requirements.***

*1) Minimum lot area – For single-family attached residential, 2,500 square feet; for multi-family residential 1,000 square feet for each dwelling unit or rooming unit 10,000 square feet for all other uses.*



*2) Minimum lot width – 25 feet for single-family attached residential. 100 feet for all other uses.*

*3) Minimum lot frontage – 25 feet for single-family attached residential. 75 feet for all other uses. Where the Commission deems it desirable and feasible, it may approve a site plan for a use which does not have frontage on a public street, provided that the lot meets all other requirements and access is assured by covenants or other instrument acceptable to the Planning and Zoning Commission.*

*4) Minimum setbacks. Front Yard – 10 feet, except in no case shall new construction at the foundation line be less than 20 feet from the Thames River at mean high water level elevation.*

*5) Maximum lot coverage of principal and accessory buildings – 80 percent, except new residential development which may occupy 50 percent of the site.*

*6) Maximum building height – 55 feet, except (1) the maximum height may be increased by special permit, provided that parking is created under, within, or on top of the structure, or the commission finds that the parking requirements are substantially exceeded in some other manner of off-street parking, or except (2) as provided in Article V, Section 550.8.1.*

550.6 Off-Street Parking and Loading

Off-street parking and loading spaces shall be provided for each lot within this district in accordance

with the provisions of Article VI, Section 614 of these regulations, unless otherwise approved by the Commission pursuant to Section 550.8 herein. (09/01/98)

550.7 Design Review Guidelines

The following design guidelines shall apply to all development within the WC-I district.

1) *Related Objectives and Requirements.* In reviewing a proposed development within the WC-I zone, the Commission shall consider the following:

   1. Site Plan objectives in Section 800B;
   2. Coastal Site Plan requirements in Section 840F;
   3. Municipal Coastal Program goals and objectives;
   4. if applicable, Special Permit objectives in Section 810B (09/01/98).

2) *Connecticut Coastal Management Act (CCMA)* Development shall be consistent with the applicable resources and use policies, and related goals and objectives of the CCMA. In reviewing a development proposal, in addition to other requirements of this Section, the Commission shall consider the following:

   1. The quality and extent of views from the adjacent public streets through the property to the water.
   2. The design and relationship of development to the waterfront as viewed from the water.
   3. The design and function of any easements or other access provided to and along the shoreline, including new bulkheading or docking facilities.
   4. The environmental impact on the ecosystem and the habitat of Long Island Sound.
   5. The eligibility of proposed development to utilize any of the development incentives set forth in Section 550.8 below. (Amended 10/20/94) (09/01/98)

3) *High Quality Urban Design Features* Developments shall strive to provide high quality design features, consistent with the development's purpose and setting. Landscape, site and building lighting, surface treatments, pedestrian features, walkways, signs and other similar features should all be of the highest quality of materials, installed in accordance with applicable standards and procedures and properly maintained or replaced in kind as necessary. (09/01/98)

4) *Water Quality and Resource Protection* All development shall strive to protect and enhance sensitive natural features and resources. Applicants shall integrate natural features and resources into the development plan where feasible and appropriate, and may employ a variety of measures to achieve this objective, including but not limited to remediation of contaminated soils and groundwater; best management practices to improve the quality of storm water discharge to Long Island Sound and tidal wetlands; and restoration of degraded wildlife habitats. (09/01/98)

550.8 Permitted Modifications to Bulk and Other Requirements

1) *General* In order to achieve the goals and objectives of the Municipal Coastal Program, Plan of

Conservation and Development and WC-I Zone, the Commission may provide a greater degree of flexibility in project design through approval of modifications of the zoning requirements described herein. In approving such modifications, the Commission shall consider the requirements of Section 550.7, as well as the review criteria described below. Approval of modifications is strictly limited to the requirements and provisions of this section, and shall be accomplished through approval of a special permit by the Commission. (09/01/98)

2) *Permissible Modifications and Applicable Review Criteria* The Commission may modify the following in approving a development within the WC-I zone, subject to the criteria for evaluating each proposed modifications. These criteria are in addition to those provided for in Section 840 Coastal Site Plans, Section 800 Site Plans and Section 810 Special Permits. The approval of any modifications shall also be consistent with any and all requirements of Section 800, 810 and 840 as applicable. (09/01/98)

A. Permissible Modifications in all WC-I Developments

(1) *Minimum Lot Frontage (ref Section 550.5.3)* Where the Commission deems it desirable and feasible, it may approve a site plan for a use which does not have frontage on a public street, provided that the lot meets all other requirements and access is assured by covenants or other instrument acceptable to the Planning & Zoning Commission. (09/01/98)



(2) *Minimum Side Yard Setback (ref Section 550.5-4)* The Commission may permit a reduction in the side yard to "0" if in its judgment such a reduction will help to achieve the purposes of the district. If a sideyard is provided however, it must be at least 10 feet. (09/01/98)

(3) *Maximum Building Height (ref. Section 550.5.6)* The maximum height may be increased, provided that parking is created under, within, or on top of the structure, or the Commission finds that parking requirements are substantially exceeded in some other manner of off-street parking. (Amended 12/5/88.) (Amended 10/20/94.) (09/01/98)

B. Permissible Height Modifications for Development on Lots Under 15 Acres (ref Section 550.5.6) The Planning & Zoning Commission has determined that the loss of public views of the Thames River and Long Island Sound contribute: significantly to the destruction of the character of the City as a waterfront community. As a means to protect and enhance the existing and potential, views of the water, the City has created the following incentives to encourage development that works to achieve this policy. In reviewing the special permit applications under this section, the Commission shall take! into consideration the impact of the proposed activity on visual access to the water. This consideration shall be made with the objective that waterfront property shall be developed in a manner to maximize visual access

to and from the water. (Amended 10/24/94.) (09/01/98)

(1) For every reduction of 5 percent in lot coverage below the maximum 50 percent, an additional 10 feet of building; height may be permitted up to a maximum of 90 feet; or (09/01/98)

(2) Maximum building height may be increased by 10 feet for every 10 feet the building as set back from one of the! required setback lines, up to a maximum of 90 feet of building height (09/01/98)

C. Additional Permissible Modifications for Development on Lots of 15 Acres or More. The Commission recognizes the need to provide design and procedural flexibility for complex, large scale developments which may include a mix of uses, or which may be developed in phases over a period of years. Therefore, developments on lots of 15 acres or more may apply for, and the Commission may approve, modifications to the following provisions:

(1) *Lot Coverage (ref. Section 550.5.5)* The Commission may increase maximum lot coverage from 50% to no more than 65% if the additional coverage is devoted exclusively to one or more parking structures. (09/01/98)

(2) *Maximum Building Height (ref. Section 550.5.6)* The Planning & Zoning Commission has determined that the loss of public views of the Thames River and Long Island Sound contribute significantly to the destruction of



the character of the City as a waterfront community. As a means to protect and enhance the existing and potential views of the water, the City has created the following incentives to encourage development that works to achieve this policy. In reviewing the special permit applications under this section, the Commission shall take into consideration the impact of the proposed activity on visual access to the water. This consideration shall be made with the objective that waterfront property shall be developed in a manner to maximize visual access to and from the water. (Amended 10/20/94.) (09/01/98)

a. The Commission may increase building height to a maximum of no more than 150 feet if it finds that such height is appropriate after considering the following: (09/01/98)

1. Physical constraints of the site, including soils, topography, parcel size and shape, neighboring buildings and land uses and other limitations; and (09/01/98)

2. Project design, including proposed building placement and design, grading, landscaping and similar features. (09/01/98)

(3) *Multiple Principal Buildings On One Lot (ref Section 605H)* The Commission may modify the requirements of Section

605H in order to permit a unified arrangement of buildings on one parcel. In reviewing requests for modifications of these provisions, the Commission shall consider provisions for internal vehicular and pedestrian circulation, building designs, heights and separation distances, site and building ownership and control, parking location and design, emergency access and the location and nature of abutting uses. (09/01/98)

(4) *Location of Accessory Structures (ref Section 607)* The Commission may allow accessory structures to be placed in required yards, including front yards, subject to a review of the size and design of the proposed structure, proposed landscaping and screening, the use proposed for the structure, views to the water from adjacent public streets and property, physical site limitations, operational needs of the proposed use and the location and other characteristics of adjacent uses and structures. (09/01/98)

(5) *Parking Requirements (ref Section 614)* The Commission may modify the parking requirements of Section 614, up to but not exceeding a reduction of 20% of the required number of parking stalls for a given use or mix of uses. In reviewing request for modification of these requirements, the Commission shall consider the mix and characteristics of the uses proposed, the nature of traffic anticipated, the availability of



off-site parking and/or shared parking arrangements, and the ability of emergency vehicles to service the site. (09/01/98)

(6) *Fence Heights and Locations (ref. Section 617)* The Commission may waive or modify the requirements of Section 617, to permit fences to be located closer to a property line, but only for fences in proposed commercial and industrial developments which will abut a WC-I, WD, LI-O, C-I, CBD, INST, or OS district. In reviewing such modifications, the Commission shall consider the location and nature of abutting uses, the security and operational needs of the proposed use, fence design, height and materials, maintenance provisions, site topography, views to the water, and access for emergency personnel and vehicles.

## 5.3 Proposed Land Use Controls

### *5.3.1 Overall Framework for Development*

The Fort Trumbull MDP area shall be developed as a dynamic mixed-use urban district that fully develops the opportunities presented by its waterfront location and its adjacency to the developing regional assets of the Fort Trumbull State Park and the Pfizer Global Development Facility. The development of its proposed land uses shall support the formation of a vibrant Waterfront Urban Village, which binds each of its components into a highly cohesive urban district.

The integrated nature of the proposed development shall (a) increase public access and use of the waterfront, (b) maintain a community atmosphere, and (c) enhance the location's attractiveness and desirability. The establishment of strong functional, spatial and physical interrelationships between the district's various buildings, streets, public spaces and the waterfront, shall orient the development of each of the proposed land use components.

The Waterfront Urban Village concept that guides the development of the district originates in the long standing New England tradition of intimately scaled Village Centers that have developed throughout the years. Several design elements shall structure the development of the overall Waterfront Urban Village. Any proposed retail activity in this area will not be of the type that would compete with or be better suited to retail activity in the Commercial Business District of the City.

- The *Village Center*, which shall be developed around the *Village Green*, shall group the bulk of the multiple mixed-uses contained in the development program. These include hotel, retail, health club, and marina. Supporting uses such as short-term and long-term parking will be provided at a location which is conveniently accessible to the uses served. Buildings within the *Village Center* shall be designed in close relationship to each other and to the adjoining public spaces.

- The *Village Green* shall serve as the focus for the Village Center. It shall be designed to serve as the stage for special events as well for the daily life around the square. Activity generating uses such as retail, cafes and news stands shall be developed in close connection to the Village Green.



- The *Riverwalk* shall be developed as the principal means of pedestrian access to the waterfront. This promenade shall tie all the waterfront oriented uses and integrate all access from the water to the village.

- The *Gateway Area* along the spine of Howard Street shall be developed to create a distinctive arrival sequence and lead visitors into the district. It shall bind the two sides of the district together, mitigating the barrier of the existing railroad right-of-way.

- Smith Street shall be developed as an important pedestrian axis and "Main Street" within the village. It shall be the street upon which most buildings entrances within the eastern side of the district develop, and where most internal pedestrian traffic occurs on the site.

- The district's design shall take into special consideration the waterfront character of the site in accordance with the Design Guidelines contained in the current Zoning Regulation's provisions for a Waterfront District.

- The design shall maximize the quality and extent of views from adjacent public streets through the property to the water.

- Special attention shall be given to the design and relationship of development to the waterfront as viewed from the water.

- Special attention shall be given to the design and function of any easements and other accesses provided to and along the shoreline.

### *5.3.2 Design Control Mechanisms and Processes*

In addition to the zoning controls established by the City of New London's Zoning Regulations that are proposed to be amended to include the adoption of the specific provisions which pertain exclusively to the Fort Trumbull MDP area, the district's design shall also be guided by the additional design criteria established through the Design Guidelines presented in Section 5.3.3 of this document.

Compliance with the provisions of the Zoning Regulations shall be enforced by the City Planning and Zoning Commission of the City of New London. Adherence to the development intentions described in the Design Guidelines shall be monitored through a Design Review Process administered by the New London Development Corporation.

The design guidelines are divided into two categories:

- *Category 1 Design Guidelines* – describe a fixed set of design controls that are to guide the design of streets and public spaces.
- *Category 2 Design Guidelines* – describe a flexible set of design objectives that are to guide the private development of each individual parcel.

Design guidelines will be administered by representatives from the City of New London and by representatives from the New London Development Corporation.

### *5.3.3 Design Guidelines*

#### *Category 1 Design Guidelines*

The following Design Guidelines address street and public space design controls that pertain to the publicly funded site infrastructure that defines the overall framework for development. Those controls extend



to the privately developed public open space components that may be contained in a development parcel.

The Design Guidelines for streets and public spaces serve two purposes. They shall:

(1) maximize the ease of access by vehicles and pedestrians to the various components of the site; and

(2) lay the framework that shall provide the most advantageous orientation to each development component.

The streets should also set the general scale and character for the district. As such, they shall be designed to create an inviting and human-scaled pedestrian environment that generates the level of activity that is envisioned to develop throughout the district. This level of activity is closely linked to the overall objectives of providing enhanced access, security, and attractiveness to the district. Streets and public spaces shall be appropriately scaled to meet these dual demands. A hierarchy of street types and designs shall be developed to address the different requirements of each individual development parcel.

The following general and site-specific guidelines address the above stated objectives:

- Curb cuts and other discontinuities in the street pattern shall be kept to a minimum.
- Loading areas, electrical transformers, off-street parking adjacent to the streets, trash storage areas, and other such elements shall be screened appropriately.
- The design of streets shall incorporate a well-developed and consistent set of elements that are

to be applied throughout the district as appropriate. These elements shall include all manner of street furniture, paving materials, plant materials, signs, and the like. They shall be consistently applied throughout streets and public spaces, as well as within each development parcel. These elements shall serve to unify the district and enhance its overall identity.

- The design of streets shall serve to enhance the quality of the pedestrian environment within the district. Special attention shall be paid to the flow of pedestrian circulation through the provision of specially marked crosswalks, sidewalk trees, proper signage, and well-developed walkway connections to the waterfront and other public amenities.

### *Street Classification and Description*

*Arterial Road / Principal Access – Howard Street* – As the principal arterial road serving the entire district, Howard Street shall serve as the main gateway into the site. As a predominantly vehicular environment, the design and furnishings of the street shall develop at a scale large enough to orient the drivers towards their destinations, as well as signal their arrival into the revitalized and transformed district. Building and landscape elements along this spine shall develop the gateway concept to mark the arrival into the district. Of special importance in this respect is the intersection of Howard and Hamilton Streets and the traffic island beneath the railroad right-of-way between Howard and Nameaug Streets. This area shall be handsomely landscaped on both sides of the railroad right-of-way and special consideration shall be given to making the transition under the railroad underpass appear more like an inviting threshold than as a



barrier between the two sides of the district. Generous lighting and landscape elements shall be employed at this "hinge" that shall connect the two sides of the district.

The proposed traffic "roundabouts" (refer to Section 5.4.5) at the intersection of Howard Street at Shaw Street and at the intersection of Pequot Avenue at Trumbull Street also provide an opportunity to make a "gateway" statement. The center of the roundabouts and selected medians and islands will be landscaped to serve as an inviting gateway to MDP development sites and the Pfizer Global Development Facility and to visually soften proposed paved areas.

*Collector Road / Primary Vehicular Spine – Nameaug and Walbach Streets* – As the principal collector roads into the heart of the site, Nameaug and Walbach Streets serve as the primary vehicular spines that provide access to all of the uses within the area.

Nameaug Street has a significant vehicular function as it meets major intersections and develops parallel to the railroad right-of-way. The edges of this street shall be treated unequally to reflect their differing functions. The west side shall be landscaped to soften the impact of the looming embankment adjacent to it and minimal, if any, sidewalk provisions shall be made. The east side, on the other hand, shall contain the street's main sidewalk, and perhaps all its furnishings, including tall lighting elements, such as those on Howard Street. A signature landscape treatment shall be developed along the length of this side of the street. This may consist of low walls, berms, plant material or any other such elements that provide visual interest but do not block the views into the site from the overhead trains or from the cars on the ground. This element shall be developed in coordination with the Pfizer development in order that

it may seamlessly extend along the whole length of the entire site, tying all its uses to an easily recognizable principal "campus" drive.

Walbach Street, on the other hand, shall have a more urban orientation, as it is to serve as the main perpendicular access into the site, and as the gateway into the Fort Trumbull State Park. As such, Walbach Street shall be afforded special paving treatment and furnishings. While a symmetrical treatment of the street section is appropriate for the development of trees and furnishings, the side facing the regional Water Pollution Control Facility shall be heavily landscaped to effectively obscure the view of the plant. Such landscape shall consist of berms, fences, and profuse vegetation that screen the presence of the plant from the street.

*Local Roads /Primary Pedestrian Spine – Smith Street* – This street is the principal pedestrian spine of the district and the "Main Street" along which the district's principal land uses meet. This street will have low vehicular traffic volumes and high pedestrian circulation, as it lies at the center of development and is to lead pedestrians to the Village Green. The street's dimension shall be designed to allow for the creation of a human-scaled pedestrian environment. Building entrances shall be oriented towards the street. Uniform building heights and facade regulating lines shall reinforce the cohesiveness of the street. Sidewalks shall be ample and well appointed, with special paving materials and street furnishings. It is recommended that short-term street parking be provided in pockets on both sides of the street, to allow for a level of activity and security to develop throughout the day. Trees shall be of the appropriate type and spacing as to enhance the street, yet allow the space and its long views to the water to be perceived.



All of the above elements shall be developed in a cohesive manner to integrate the surrounding land uses and create a rich and vibrant streetscape at the heart of the district. South of Walbach Street, however, Smith Street shall have a different character. This portion of the street is to serve more as a secondary street. As in Walbach Street, the west side of Smith Street is bound by the Water Pollution Control Facility, requiring the same intensive landscape screening treatment Street trees and on-street pocket parking shall be part of the street design, as in the northern portion of Smith Street.

*Local Roads – Trumbull and East Streets* – These streets serve as secondary local roads within the district. While both sides of Trumbull Street shall require landscape buffers as they cross the Water Pollution Control Facility, these need not be as elaborate as those required along Walbach and Smith Streets. East Street, whose east side will face Fort Trumbull State Park, is a more important local street, and shall establish a clear edge definition between the district and the park. The eastern side of the street shall develop differently, with taller lighting elements serving a wide sidewalk promenade along the edge of the park. The western edge of the street shall have a smaller neighborhood scale with smaller sidewalks and a dense row of sidewalk trees defining the parcel's edge. View corridors shall be maintained at the ends of East Street to afford unobstructed views of the Thames River beyond.

### *Public Space Classification and Description*

*Village Green* – The Village Green, located within Parcel 1 at the heart of the district, shall be the emblematic space and principal focus of activity in the district. The Village Green provides the common

ground upon which a diverse array of mixed uses meet and function in direct reference to the waterfront upon which the Village Green shall open. These uses include the Conference Center, and retail uses: In addition, the Village Green is located at the confluence of the main pedestrian spine of Smith Street, the Riverwalk pedestrian waterfront access, and the terminus of the predominantly vehicular Nameaug Street. Given the demands of these uses on this limited area, it is important to carefully sort out and appropriately address the varying requirements of each of these land uses and site amenities.

As the principal feature that creates a valuable address for the various uses fronting it, it is important that the Village Green be planned and designed with special attention to its imageability, cohesiveness and relationship to the waterfront. This is necessary in order to achieve the engaging and people friendly environment envisioned. It is important that the vehicular demands of surrounding uses be satisfactorily addressed in order to preserve the overall quality of this environment.

Development shall observe the following guidelines:

- Buildings surrounding the Village Green shall clearly and unambiguously define all edges of the space and face a principal entrance towards it.
- The streetwall of buildings defining the Village Green shall be designed employing common building heights, regulating lines, building materials, and other design elements.
- The geometry, scale, proportion, and furnishings of the Village Green shall be consistent with those of a traditional New England green. Consistency with that tradition shall not lead to mimicry of historic styles. Thoughtful reinterpretation of tradition shall guide the design of buildings and landscape. Special materials shall be employed throughout the Village Green's streets and sidewalks.
- The Village Green's principal orientation shall be to the waterfront. It shall integrate the Riverwalk, and act as an extension of it, tying the Riverwalk to the Village Center.



*Riverwalk* – The Riverwalk is to be the principal means of pedestrian and bicycle access along the waterfront. Each of the parcels with waterfront shall include free public access along the shoreline. In parcels 1 and 2, the Riverwalk shall consist of a 30-foot right-of-way that is to accommodate a 15 to 25-foot pedestrian/bicycle path, with a five to 15-foot landscaped buffer. The Riverwalk shall be appropriately furnished with lighting, seating, and special features. The Riverwalk shall be developed in a manner consistent with the objectives of the Waterfront District to allow for safe, attractive, and convenient access to the waterfront. The Riverwalk will connect with the waterfront walkway in Fort Trumbull State Park, providing direct access to the park waterfront.

In Parcel 4B, access will be provided to the southern terminus of the Fort Trumbull waterfront walkway. A walkway of six to 10 feet in width will provide public access along Bentley Creek on the south side of the regional Water Pollution Control Facility. Bicycle access will be provided via Trumbull Street. Both will connect with the interpretative nature walk being developed by Pfizer alongside their Bentley Creek marsh restoration project. Any future development of Parcel 4B properties will incorporate public access along the waterfront in a similar manner to provide

the greatest extent of public enjoyment of the waterfront by the community.

***Category 2 Design Guidelines***

The following guidelines address the design objectives that shall guide the development of each individual parcel.

The Fort Trumbull MDP area shall be developed as a well-coordinated and mutually reinforcing series of developments. Each development stands to benefit from the synergy that will be generated by each parcel's contribution to the creation of a vibrant and cohesive urban district. This strategy is key to enhancement of the area's overall accessibility, security, and attractiveness. Adherence to the provisions of the guidelines will ensure that the parcels are not developed in isolation to each other.

In general terms, the development of the parcels shall observe the following guidelines:

- The ground floor of buildings shall be oriented toward the major pedestrian streets. Building entrances, retail, and other activity generators shall open directly onto the sidewalks.
- Building massing shall be generally developed to define major streets and create streetwalls to define and enclose public spaces and demarcate the limits of the parcels.
- Where building massing is not employed to define streets, landscape, walls, fences, and street furnishings shall help define the streetscape and establish a human scale for pedestrians.



- Vehicular entrances, loading docks, and parking shall be located away from principal pedestrian areas and screened from view.
- Standard building heights, cornices, and regulating lines shall be employed in the design of buildings fronting Smith Street and the Village Green.

The following specific guidelines pertain to each parcel within the MDP:

*Parcel 1* is intended to accommodate a variety of uses relating to the development of a 200- to 250-room conference hotel. The development of the hotel and its associated uses will form the nucleus of the Waterfront Urban Village. The development of these uses shall be organized around the Village Green, whose design shall follow the public space guidelines. The major building, which consists of the hotel, shall face the waterfront to the east and north of the site to take advantage of the river views and engage the adjacent marina at ground level. The hotel shall present a formal entrance to the south, with a facade facing the Village Green, to play a key role in the definition of that space. Service function and other back-of-house spaces shall be located away from the waterfront. Parking facilities (for an estimated 375 cars) shall develop between the hotel and the railroad right-of-way to the west. Access to the parking shall be provided directly from Nameaug Street, without the need to circulate through the Village Green. Adequate drop-off areas may be developed within the Village Green proper, however, additional drop-off and passenger loading may develop between the hotel and the parking so as to minimize the impact of traffic on the Village Green.

The waterfront perimeter of the site shall be reserved for the development of the Riverwalk and marina space. These elements shall engage the hotel's outdoor public areas and connect directly to the Village Green.

*Parcel 2* is intended to ~~a~~accommodate the development of a community of new residential units. This residential component will be the most important element in guaranteeing around-the-clock activity and the stability of the district. It shall be designed as an integral part of the Urban Village at the same time that it is designed to ensure the privacy and security of its residents. The development shall actively engage the district's public streets and spaces, particularly those along Smith Street and the Village Green. Building entrances shall face the street to the greatest extent possible. Vehicular access shall be avoided or minimized along these streets, and parking garage entrances shall not be allowed along them.

The overall development of the residential units shall place special emphasis on its relationship with the waterfront. View corridors shall be developed within the site to allow as many views of the water as possible from adjoining streets and from major common spaces within the development. The East Street view corridor shall extend to the site uninterrupted. The best views of the water; occurring to the north of the site, shall be maximized through these view corridors.

Access to the Coast Guard facility located east of the site shall be provided through the parcel in the manner that is least intrusive to the development.

*Parcel 3* is intended to accommodate the development of 90,000 square feet of office/R&D space, in addition to the site designated for the Health Club.



Office/R&D space shall ~~be~~ oriented as to be highly visible from the railroad right-of-way and Nameaug Street. Development shall avoid a southern orientation that faces the wastewater treatment plant. The building massing shall be employed to clearly define the parcel's corners, and whenever possible to define as much of the parcel's perimeter as practicable. Particular attention shall be paid to the development of the corner of Nameaug and Walbach Streets, which marks the entrance into the eastern side of the district.

Special consideration shall be given to the integration of the office buildings with the ~~Smith~~ Street streetscape. The differing scales of the residential and office buildings that may develop on both sides of the street shall be adjusted to create a balanced urban streetscape along both sides of this important axis. The pedestrian scale of the street shall be recognized by the orientation of building entrances towards the street, by the provision of space defining elements such as walls and vegetation to define the street edges, and by the thoughtful placement and massing of the office buildings.

*Parcel 4A* is intended to accommodate the development of support facilities for a marina, or a marina training facility, to be developed to the south on Parcel 4B and the Fort Trumbull State Park to the east. Any development of ancillary buildings that may be located on these two parcels shall be oriented to help define their edges, in particular those of Walbach and East Street. Surface parking developed on either of these parcels shall be appropriately screened.

*Parcel 4B* is intended to accommodate a mix of water-dependent uses centered around the rehabilitated Fort Trumbull Marina, which will provide boat slips and upland support. The Marina may be developed as

a working marina training center, with facilities designed in conjunction with improvements made to Parcel 4A.

*Parcels 5A, 5B and 5C* are intended to accommodate the development of office/R&D space. Development along these parcels shall be oriented along Howard Street, maximizing the street frontage of buildings along the street. At the intersection of Howard and Hamilton Streets, where the district begins, the massing of buildings shall be developed to form a gateway that appropriately marks the district's entrance. Development of landscape and any other features on the parcels shall serve to visually reinforce the Howard Street corridor.

*Parcel 6* is intended to accommodate the development of water-dependent commercial uses. The overall parcel development shall place special emphasis on its relationship with the waterfront. View corridors shall be developed within the site to allow as many through views to the water as possible from adjoining streets.

*Parcel 7* is intended to accommodate the development of Office/Research and Development space. The development of this parcel shall be oriented along Pequot Avenue and maximize its street frontage. It shall also be designed in relation to the adjacent Pfizer Global Development Facility.

## 5.4 Proposed Public Utilities, Services, and Roadway Network

### *5.4.1 Water*

Please refer to Section 4.7.1 of the Final EIE as well as Section 3.3.1 of the subject document for additional information on water supply to the MDP area. Also note that modeling of the water distribution system



within the project limits has concluded that the system capacity must be improved. The existing and proposed water system is shown on appended Map 3.3. Meetings have been held with representative of PSG to discuss the system. The City of New London/PSG recognizes the need for improvement in this area. They have delayed any improvement in this area due to uncertainty of the course of proposed development.

### *Analysis of Proposed Improvements*

Proposed improvements to increase pressure, fire flow, and overall water supply performance to the peninsula were analyzed. In order to improve flows at the Smith Street location, the following three options were identified:

- *Smith Street Option 1* – Installation of a new water main to replace the existing 8-inch water main within Smith Street;
- *Smith Street Option 2* – Installation of a new water main located within the new access roadway (Nameaug Extension) to the proposed hotel; or
- *Smith Street Option 3* – Similar to Option 2 except with the addition of an 8-inch water main connection from the access roadway to existing Smith Street 8-inch water main near the existing Goshen Street intersection.

Only the latter two options were computer analyzed since their proximity to the water supply source will provide for the best results. However, replacing the 8-inch water main within Smith Street would produce comparable results.

Fire flow simulations (3.000 gpm) for Option 2 were performed for different size piping ranging from eight

to 12 inches and for different pipe roughness coefficients to predict flows for newly constructed and 25 year-old pipe ($C_{HW}$ = 130 and $C_{HW}$ = 80, respectively). The following results were observed:

**Table 5-1**
**Smith Street Option 2**
**Proposed Pressure (psi) for**
**Maintaining 3,000 gpm Fire Flow**

| *Street Component* | *Option 2* | |
|---|---|---|
| | $C_{HW}$ = 130 | $C_{HW}$ = 80 |
| 8-inch | 10 | -50 |
| 10-inch | 38 | 15 |
| 12-inch | 50 | 38 |

Results for Option 3 did not provide significant improvements to those observed for Option 2. Therefore, Option 2 is preferable, with a 12-inch diameter pipe.

To improve conditions at the East Street and Trumbull Street intersection, two options were analyzed. These options are as follows:

- *East Street/Trumbull Street Option 1* – Installation of a new water main loop on East Street, Trumbull Street, and Smith Street connected to the existing 12-inch water main at Walbach Street; or
- *East Street/Trumbull Street Option 2* – Installation of a new water main within East Street connected to the existing 12-inch water main at Walbach Street.

Fire flow simulations at 3,000 gpm for both options were performed for different size piping ranging from eight to 12 inches and for different pipe roughness coefficients to predict flows for newly constructed and



25 year-old pipe ($C_{HW}$ = 130 and $C_{HW}$ = 80, respectively). The following results were observed:

**Table 5-2**
**East Street and Trumbull Street Intersection**
**Proposed Pressure (psi) for Maintaining**
**3,000 gpm Fire Flow**

| *Street Component* | *Option 1* | | *Option 2* | |
|---|---|---|---|---|
| | $C_{HW}$ = 130 | $C_{HW}$ = 80 | $C_{HW}$ = 130 | $C_{HW}$ = 80 |
| 8-inch | 58 | 45 | 40 | 10 |
| 10-inch | 64 | 60 | 54 | 45 |
| 12-inch | 66 | 64 | 60 | 55 |

***Recommendations***

Improvement of pressure, fire flow, and overall water supply performance to the Smith Street area near the proposed hotel will require the installation of a 12-inch water main. This new water main should be installed within the new access roadway, Nameaug Extension, or as a replacement of the existing 8-inch water main within Smith Street.

Installation of an 8-inch water main loop within East Street, Trumbull Street, and Smith Street will provide adequate results for improving conditions at the East Street and Trumbull Street intersection. In addition, the existing water mains serving the latter location are undersized and should be replaced. For provision of adequate pressure and flow to fire hydrants, a generally accepted practice in design and construction of water supply systems is to maintain distribution main piping eight inches or greater in diameter.

The MDP area includes portions of the Fort Trumbull peninsula that were occupied by NUWC. Water service in this area is operated by the federal

government. Once the NUWC property has been conveyed for development purposes and the utility services are upgraded or reconstructed to serve private development sites (portions of Parcel 1 and all of Parcel 2 as shown on Map 5.1), water service will be provided to those sites via existing or reconstructed water mains located in Smith Street and operated by the City of New London. In addition, a utility easement will be created between Smith Street and the existing Coast Guard station at Fort Trumbull. Municipal water and sewers as well as other private utility lines will be extended to serve the Coast Guard.

### *5.4.2 Sanitary Sewer*

The existing and proposed sanitary sewer systems are shown on appended Map 3.4. Please note that Section 42.1 of the Final EIE is hereby replaced in its entirety with the following discussion.

Sanitary sewers are located on almost all streets within the MDP area, including the NUWC property. The City of New London operates its regional Water Pollution Control Facility on Trumbull Street within the project area. Flows from the MDP area are expected to decrease and plant capacity is not a concern. Furthermore, plans are underway to improve the plant. It is anticipated that all discharges to the sewers will be domestic waste. It is assumed that any industrial waste generated will either be minimal, or will be contained in a closed loop system and treated internally.

Capacity of the sewer network is not expected to be a problem in the 8-inch to 10-inch diameter sewers east of the railroad, because these sewers only convey flow from the MDP area. The total daily flow from the project is estimated at 0.08 million gallons per day



(mgd). The existing pipe with the least capacity is the 8-inch diameter pipe in Goshen Street at a 0.5 percent slope and a capacity of 0.5 mgd.

It is anticipated that the 10-inch diameter main in Smith Street, installed in 1914, will be replaced. This pipe is constructed of clay and, given its condition, connection of new services would be difficult. The cost to repair the road after installation of the sewer will be minimal, since other utility work is planned and the road is slated for reconstruction. This pipe will serve as the main sewer line to which laterals will be connected. Short segments of existing sewers on Walbach Street, East Street and Trumbull Street can remain. These will be reconnected to the new sewer in Smith Street.

The existing sewers throughout the NUWC property will be removed. These sewers meander around the buildings that they serve, with numerous manholes and pipe segments that would require significant future maintenance efforts. Additionally, their locations would not be compatible with the proposed building layout. Upon development of parcels, new sanitary sewers will be constructed that will connect to the sewer system in Smith, Walbach, or Trumbull Streets. Service will need to be maintained to the Coast Guard facility, as it will remain. The Coast Guard is presently in the process of acquiring a right-of-way around the entire peninsula for use as access to their facility, as well as utility services. Other routes for utilities through the development, as well as a new sanitary sewer service, are also being investigated.

The 30-inch gravity sewer in Howard Street from Hamilton Street to Walbach Street is a main sewer line that receives sewage from a network of collector sewers in the northern portion of New London. Records of the actual daily flow in this sewer could not be

obtained. The stretch of 30-inch diameter sewer through the project has a slope of 0.16 percent and a capacity of 10.5 mgd. The total daily sewage from the project area is expected to decrease from 0.11 mgd to 0.08 mgd. The total flow from the project area east of the railroad is estimated at 0.012 mgd, which is 0.1 percent of the capacity of the 30-inch sewer. It is therefore anticipated that sewers from the development parcels can be connected to this sewer.

Planned improvements to the New London Wastewater Treatment Facility (WWTF) include both operational improvements and aesthetic enhancements, which have been designed by consulting engineers Camp, Dresser & Mckee Inc. The funding designated for these WWTF enhancements is not included in the MDP project cost total identified in Chapter 8, and contracts for this work will not be administered by the NLDC.

Phase I of the WWTF enhancement includes Nitrification/Denitrification, sludge pumping building equipment, electrical service equipment, and site improvements to the southern portion of the facility, including modifications to the retaining wall and fencing boundaries. Phase II of the enhancement project includes sludge pumps, clarifier covers, and odor control improvements, as well as landscaping and fencing along Smith, Nameaug, and Trumbull Streets. Over $9,000,000 is required for accomplishing both phases of this project.

### *5.4.3 Storm Sewer*

The existing and proposed storm sewer systems are shown on appended Map 3.5. Please note that the Section 4.7.1 of the Final EIE is hereby replaced in its entirety with following discussion.



Conventional engineering design and current "best management practices" have been used to derive the information in this document and will also be used to design the storm drainage systems. In general, stormwater discharges from construction sites where five or more acres are to be disturbed require a permit pursuant to 40 CFR 122.26. The DEP Bureau of Water Management has issued a general permit that will cover these discharges.

Registration, describing the site and the construction activity, must be submitted to the DEP prior to the initiation of construction. A stormwater pollution control plan, including measures such as erosion and sediment controls and post construction stormwater management. must be prepared. For sites where more than 10 acres will be disturbed, the plan must be submitted to the DEP. A goal of 80 percent removal of total suspended solids from the stormwater discharge shall be used in designing and installing stormwater management measures. Another requirement of this permit is that stormwater discharges located less than 500 feet from a tidal wetland must be discharged through a system designed to retain the volume of stormwater runoff generated by 1 inch of rainfall on the site.

Appropriate controls, designed to remove sediment and oil or grease typically found in runoff from parking and driving areas, will be included in any stormwater collection system to be installed at the site. Non-structural measures to dissipate and treat runoff are encouraged, including infiltration using pervious paving, sheetflow from uncurbed pavement and vegetated swales. If a stormwater collection system is installed, potential controls include gross particle separators, deep sump catch basins with oil-grease traps and/or detention/retention basins.

The DEP typically recommends that any catch basins installed in conjunction with roadway or parking lot paving should have deep sumps to trap sediments and hoods to trap oil and grease. Ideally, all catch basins should be equipped with hoods. However, at a minimum, the last catch basin in a series will be equipped with a hood.

If more than one acre of pavement drains to a common discharge point, a gross particle separator should also be installed. Advanced designs for gross particle separators have been developed, such as Vortechnics, Downstream Defender and Stormceptor, that the DEP believes are very effective in removing contaminants. The Stormceptor is designed to treat runoff from areas up to approximately one acre in size, while the Vortechnics and Downstream Defender can be sized to accommodate flow from larger areas. It is recommended that the appropriate variety of this or similar type of unit with a cyclonic design be installed in conjunction with each outfall, depending on the size of the drainage area. Provisions should be made for the periodic maintenance that will be required to insure continued effectiveness of these control measures.

Stormwater management for any potential parking garages typically should involve two separate collection systems designed to treat the runoff from different types of parking areas. Any exposed parking lots will produce a high volume of runoff with relatively low concentrations of pollutants. Runoff from such areas should be directed to the storm sewer system and the collection system should include controls to remove sediment and oil or grease. A gross particle separator at each outfall as discussed in the preceding paragraph is recommended for this purpose. Interior levels of parking garages will produce a low volume of runoff with relatively high concentrations of pollutants. Runoff from such areas should be directed to the



sanitary sewer system, again with appropriate treatment. An oil separator tank with a capacity of at least 100 gallons is required. A licensed waste oil hauler must clean the tank at least once a year.

The proposed stormwater management for the project area consists of the following:

- Installation of a new trunk line that originates at the low point in Smith Street to replace the existing storm sewer trunk line(s) that outlets into Columbia Cove;
- Installation of a new storm sewer that originates in Walbach Street at Goshen Street, into Nameaug Street Extension, along Hamilton Street with an outfall into Columbia Cove;
- Installation of a stormwater pump station for the Walbach Street railroad underpass that discharges to a new storm sewer;
- Improvements to the Pequot Avenue storm sewer to accommodate the new roadway geometry and relocate the outfall segment of the storm sewer between Pequot Avenue and Bentley Creek;
- Improvements/adjustments to existing storm sewers at those locations where the existing systems have adequate capacity and can remain; upgrades and outfall improvements may be necessary at all existing storm sewer outfall locations.
- Construction of new storm sewers where new roadway alignments require abandonment of the existing systems;
- Installation of deep sump catch basins with hoods and gross particle separators that incorporate the "swirl" or cyclonic technology to remove 80 percent of the suspended solids at each parcel in the future

as each is developed. The systems will be located on the individual parcel and be designed at the same time as the individual site development plans. The design of these private systems will be in accordance with applicable state, federal and local regulations and requirements and will require adherence to current "Best Management Practices" for sedimentation and erosion control as well as control of suspended solids and other potential pollutants (such as sediment, oil and grease typically found in runoff from parking lots) from stormwater runoff from parking lots and other impervious surfaces; and

- Installation of infiltration systems in the future at those parcels that will drain into a storm sewer discharging within 500 feet of a tidal wetland to retain the volume of runoff generated by one (1) inch of rainfall. The systems will be designed at the same time as the individual site development plans. The design of these private systems will be in accordance with applicable state, federal and local regulations and requirements.

The proposed Smith Street system will have the same drainage area as existing, however, the percentage of impervious area is estimated to decrease from approximately 70 to 65 percent. This will reduce the ten-year peak discharge to 48 cfs. The two parallel lines, 18-inch and 21-inch, will be replaced with a single 48-inch pipe approximately 450 feet in length. At the upstream end of the 48-inch pipe, a 36-inch pipe will replace the 15-inch pipe to the low point in Smith Street. Both pipes will require easements for the City of New London to maintain the main trunk line as they will not be in the public right-of-way and they drain a low point in a public road.



The proposed storm sewer for Nameaug Extension will have a drainage area of 14 acres, including the 5-acre drainage area of the pump station proposed for the Walbach Street low point at the railroad underpass. The peak ten-year frequency storm event discharge for this system is estimated at 29 cfs. A 36-inch pipe will extend from the outfall to the new pump station. The portion of pipe through the Village Green will require an easement. Routing the pipe around the extended-stay facility would increase the length of the system and subsequently the diameter of the pipe.

In the interim, before the parcels are fully developed, existing catch basins will have to be connected to new trunk lines. It is therefore recommended that the alignment of new pipes follow the alignment of existing drainage as much as possible unless new catch basins are installed.

The storm sewer at Pequot Avenue has adequate capacity. However, exact location and arrangement of piping of the outfall from Pequot Avenue to Bentley Creek is unknown. All available as-built records were gathered and City maintenance staff were contacted to try to determine the location. A last resort, the services of the former City Engineer were retained. Unfortunately, the outfall could not be located. As a result, it is assumed that, as a minimum, some improvements to the outfall will be necessary.

The existing drainage area to the low point in the vicinity of Howard and Walbach Streets is approximately 10 acres, with much of this area located east of the Amtrak line. The existing drainage facilities within this area are minimal and in fact this area typically floods several times each year. Since the low point in the road is only at elevation 4.5 feet NGVD, it is not possible to remedy this situation by means of a

gravity system. Therefore a limited storm water pumping station was pursued to facilitate access to the peninsula. Much of the stormwater that collects at the low point occurs as surface runoff. In order to minimize the size and associated cost of a proposed pump station, the amount of runoff collected at the low point needs to be reduced.

Proposed development of the project area east of the railroad line will include installing a new storm sewer system to serve much of this area. The primary new stormwater system will be installed along the new access road, Nameaug Extension, to the proposed hotel. This system will intercept and convey a substantial portion of stormwater runoff formerly collected at the low point, and discharge it into Columbia Cove north of the NIJWC site. The resulting drainage area to the low point would be therefore reduced to approximately five acres.

***Pump Station Design***

The pump station for the low point at the Walbach Street under Amtrak will be designed in accordance with the FHWA (Federal Highway Authority) design manual for "Stormwater Pumping Stations" and should meet the requirements of the Connecticut, Department of Transportation (DOT). The following provides highlights of these requirements:

- Inflow hydrology based on the 50-year storm event (HEC-1), and checked for a 100-year storm;
- Allowable high water elevation one foot below frame of lowest stormwater collection structure;
- Wet-pit station construction;



- Minimum three electric submersible pumps, each with a capacity to pump 50% of the total pump station capacity;
- All pumps to be equally sized;
- Controls to alternate lead and lag pump operations;
- Guide rails and lifting chains for maintenance;
- Grit chamber and/or other pretreatment of stormwater; and
- Standby power.

The inflow to the pumping station for the 5-acre drainage area is approximately 12 cfs (5,400 gpm) for a 50-year storm. The pump station proposed for the low point near Howard and Walbach Streets is a rectangular pre-cast concrete wet-pit station with approximately 3,360 cubic feet of storage. Pumps should be three-phase electric submersible types, sized to deliver 2,800 gpm each at a total dynamic head of approximately 13 feet. A natural gas-powered generator enclosed in a separate building will deliver electric standby power.

### *5.4.4 Gas, Electric, Telephone, and Cable*

The Yankee Gas Company has indicated an ability to service the proposed development but has stated that they will need to upgrade the distribution system in the area in order to provide adequate service. The gas company will install their new mains based upon the actual phasing of the development parcels and the type of heating system that will be used in the individual parcels. Typically, the Yankee Gas Company will construct and pay for any upgrades or extensions of gas lines to serve commercial users, provided an appropriate return on investment can be obtained

through future gas sales to prospective users or businesses. The size and nature of proposed development of the MDP will undoubtedly provide Yankee Gas with that assurance. Costs associated with gas line upgrades and extensions, therefore, are not included in the infrastructure budgeted costs. Appended Map 3.6 illustrates the existing and proposed gas systems within the MDP area.

Each of the private utility companies serving the project area has indicated an ability to serve the proposed development. The existing and proposed telephone and electric systems are shown on appended Map 3.7.

The costs to locate the electric, telephone and cable lines underground will be significant. Preliminary estimates indicate that the costs will be over $1,400,000. These costs include pole and pole line removal, new manhole structures, and a concrete encased duct bank system with 12, four inch PVC conduits. These cost estimates factor in the potential reimbursement of part of the cost of the electric cables and their installation as currently provided for under Connecticut General Statute Chapter 130, Section 8-133a; however, pending deregulation of the electric industry may result in a situation where the electric service provider will not be responsible for transmission and therefore will have no obligation to reimburse the NLDC or the City for any costs. Negotiations are currently underway with the respective utilities relative to the cost reimbursement for relocating the existing overhead systems underground.

### *5.4.5 Streets and Sidewalks*

Adequate and safe vehicular access to the sites comprising the MDP area is a principal consideration for



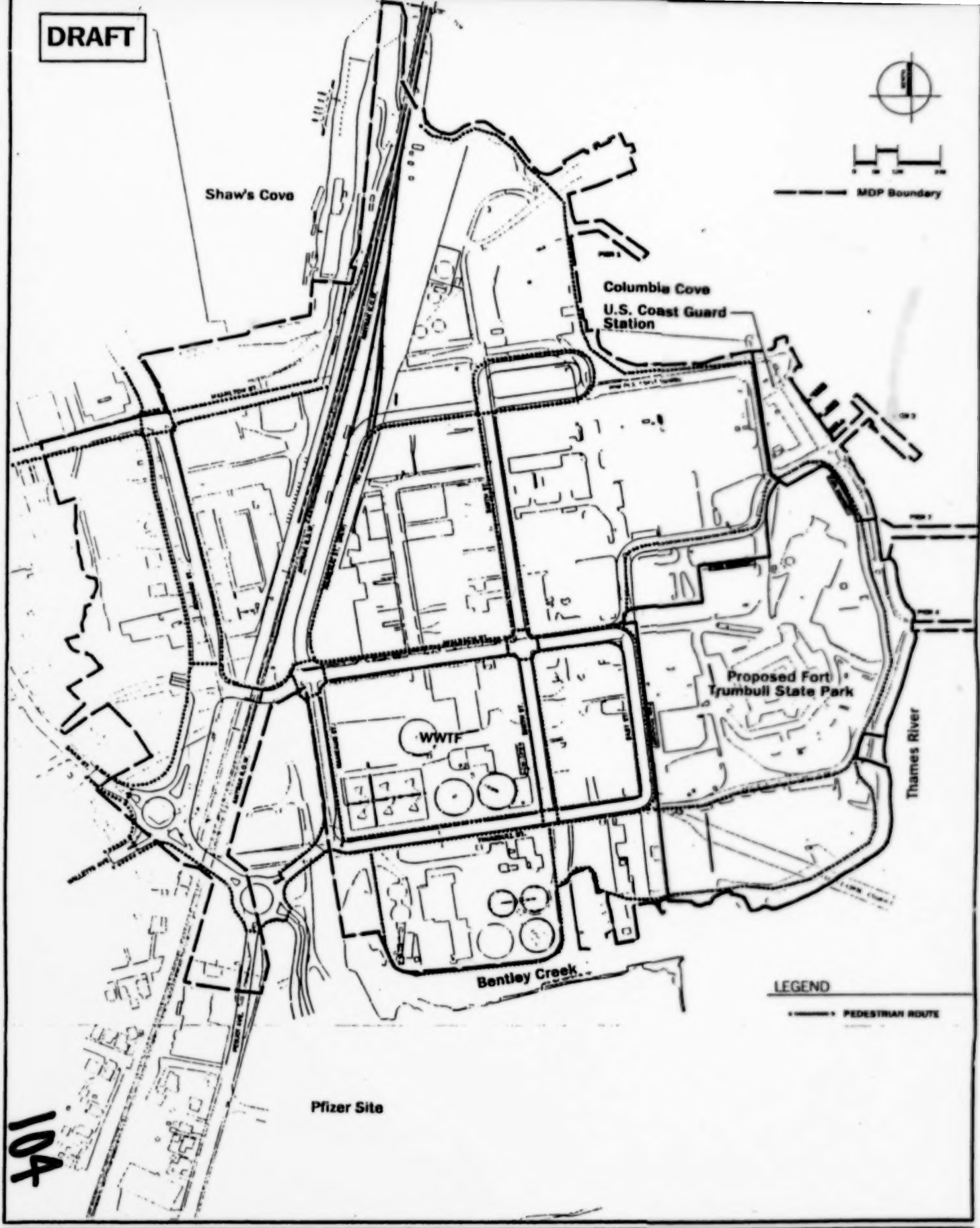
a successful redevelopment program. Street and traffic improvements will also be necessary to increase the capacity of local streets to accommodate projected traffic volumes generated by the redevelopment sites, improve roadway geometry to make the streets safer, comply with current highway standards, and create a more attractive street image. The existing and proposed streets are shown on appended Map 3.8. Proposed sidewalks are diagrammatically shown on Figure 7.

A particular challenge is to improve vehicular access to the Fort Trumbull peninsula which includes coastal areas east of the Amtrak rail corridor. Existing access points to the peninsula area are limited and deficient. Conditions of the two existing underpasses which carry traffic beneath the Amtrak rail lines at Walbach Street and Pequot Avenue are summarized as follows:

- Aged and in need of maintenance, if not replacement;
- Road beds that lie below flood elevations;
- Inadequate vertical clearances prohibiting passage of certain trucks and buses; and
- Limited horizontal clearances restricting the width and number of travel lanes, reducing the line of sight, and limiting the ability to provide bike lanes or sidewalks on both sides of the street.

One of the primary objectives of the project is to improve access to Fort Trumbull MDP area and its immediate environs while providing the following:

- An attractive "gateway" that will provide a commanding entrance to Pfizer's new campus, the proposed Fort Trumbull State Park, and the redevelopment sites of the Fort Trumbull area;




PEDESTRIAN ROUTE MAP

7

# FORT TRUMBULL MUNICIPAL DEVELOPMENT PLAN

## CITY OF NEW LONDON, CONNECTICUT

**Prepared for: New London Development Corporation**

- Improved existing and projected traffic flows from the proposed Pfizer Global Development Facility, the proposed State Park at Fort Trumbull, the proposed reuse of the NUWC site, potential commercial, industrial and/or residential development in the Fort Trumbull area, and current and future through-traffic serving other City neighborhoods;

- Improved public safety by correcting or mitigating existing flooding problems at the Walbach Street railroad underpass in order to maintain access to the peninsula during minor storms events; and

- A means for efficient and safe evacuation of the peninsula in the event of a major storm event.

The proposed road network will achieve the above goals while increasing traffic capacity on the southerly reaches of Howard Avenue and at the railroad underpasses. This will be accomplished by widening and realigning roads and constructing two modern traffic roundabouts in the vicinity of the railroad in order to increase traffic capacity, improve sight lines and provide for better and safer roadway geometry.

The proposed modern roundabouts are to be located on either side of the Amtrak rail line near the Pequot Avenue railroad underpass. One will be located at the intersection of the realigned Howard Avenue, Shaw Street, and Willetts Street and the other at the intersection of Pequot Avenue and a realigned Trumbull Street.

The modern roundabout is a type of circular intersection that has been successfully implemented in Europe and Australia over the past few decades. Despite the approximately 35,000 roundabouts in operation around the world, there are fewer than 50 that exist in the United States. Until recently, roundabouts have been

slow to gain support in this country. The lack of acceptance can generally be attributed to the negative experience with traffic circles or rotaries built in the earlier half of the twentieth century. Severe safety and operational problems caused these traffic circles to fall out of favor by the 1950's. However, substantial progress has been achieved in the subsequent design of circular intersections, and a modern roundabout should not be confused with the traffic circles of the past.

The modern roundabout is defined by two basic principles that distinguish it from a nonconforming traffic circle. Roundabouts follow the "yield-at-entry" rule in which approaching vehicles must wait for a gap in the circulating flow before entering the circle.

Roundabouts involve low speeds for entering and circulating traffic, as governed by small diameters and deflected entrances. In contrast, traffic circles emphasize high-speed merging and weaving, made possible by larger diameters and tangential entrances.

The number of roundabouts constructed in the U.S. is relatively small, but those that are currently in operation have been reported to be performing favorably in terms of shorter delays, increased capacity, improved safety, and improved aesthetics. The roundabouts have resulted in an overall reduction in the number and severity of accidents, despite the initial concern that lack of familiarity with this type of intersection would lead to driver confusion.

Roundabouts can produce operational improvements in locations where the space available for queuing is limited. Roads are often widened to create storage for vehicles waiting at red lights, but the reduced delays and continuous flows at roundabouts allow the use of



fewer lanes between intersections. Possible applications may be found at existing diamond interchanges, where high left turn volumes can cause signals to fail. By constructing a pair of roundabouts at the ramp intersections, capacity improvements to the interchange can be accomplished without the costly requirement of widening the structure to carry additional lanes over or under the freeway.

The twin roundabouts proposed for the Fort Trumbull MDP will result in operation improvements similar to those noted in the preceding paragraph for diamond interchanges. Due to the limited horizontal clearance that exists in the roadbed beneath the Amtrak rail underpass at Pequot Avenue, there is limited opportunity to add lanes for traffic capacity and queuing of vehicles. New traditional signalized intersections were investigated for the Howard-Shaw-Willets intersection and at the Pequot-Trumbull intersection in order to accommodate the increase traffic volumes anticipated for the MDP area, the Fort Trumbull State Park and the Pfizer Global Development Facility.

Due to the need for new turning lanes and travel lanes for capacity and storage behind traffic signals, certain left turns will be prohibited and many additional lanes of traffic will need to be constructed. Five lanes were required at Howard Ave. Four lanes were required under the Pequot Avenue underpass, which required a reduction in lane width and shoulders and three lanes on Pequot Avenue.

The twin roundabout design typically requires only one entering lane at each leg of each roundabout. This allows for fewer approach lanes on Howard Avenue and Pequot Avenue. An exception to this is the two lanes approaching the Howard-Shaw-Willetts roundabout from Pequot Avenue. This leg will have two entering lanes and therefore result in three lanes under

the Pequot Avenue railroad underpass (two northbound lanes and one southbound lane). The existing horizontal clearances at the Pequot Avenue underpass will allow for three, 12-foot wide lanes and a three-foot wide paved and striped shoulder. Pequot Avenue currently has one sidewalk along the south side of the underpass. This walk will be maintained or reconstructed.

By designing modern roundabouts at these two locations, fewer lanes will be needed, traffic flow will be facilitated, left-turn prohibitions can be eliminated, and more land will be available for landscape improvements. The roundabouts will be designed to accommodate the turning of large vehicles (semi-trailer trucks) and large emergency vehicles (fire apparatus). Careful design and placement of traffic and directional signs and proper lighting will help to make the roundabouts safe and efficient traffic intersections.

The intersections about the Walbach Street railroad underpass are proposed to be traditional, four-way, signalized intersections with signalized pedestrian crossings. Traffic volumes and turning lane needs at the Howard Avenue-Walbach Street intersection require five lanes on Howard Avenue and three lanes on Walbach Street. Currently there are two traffic lanes on Walbach Street. The horizontal clearance of the Walbach Street underpass is fixed by the granite abutments that carry the bridge structure above. To accomplish the increase to three lanes, the lanes will have to be 11 feet in width, which is less than the standard 12-foot width.

Walbach Street currently has sidewalks at each side of the railroad underpass. The southerly walk will be eliminated to provide space for the additional vehicular travel lane. Currently, however, there are no provisions for bike lanes or shoulders at either the



Walbach Street or Pequot Avenue underpasses. The construction or striping of shoulders on Howard Avenue, at the Pequot Avenue underpass, and on other streets within the MDP will provide greater safety for cyclists, however, due to space and other limitations and the introduction of the traffic roundabouts, it is not possible to meet federal requirements for a continuous bicycle lane within the MDP area. Therefore, this is not intended to be an official bicycle route. Bicycles will share the road alongside motorized vehicles as is the practice on most other streets in New London.

The planned roadway improvements also will provide increased vertical clearance for emergency vehicles at the Walbach Street railroad underpass. Current clearance is only ten feet zero inches. This will require lowering the road bed beneath the overpass and modifying the superstructure to replace the bridge beams with shallower, more efficient members. It is anticipated that this remedial construction will only provide an additional 18 inches of clearance for a total of 11 feet 6 inches. The optimal vertical clearances of 14 feet 6 inches will not be achieved. Trucks and buses therefore, will still not be able to clear the bridge. However, as the City's tallest fire apparatus is 11 feet 3 inches, it is deemed to be an important and worthwhile improvement. This grade change may impact the sanitary sewer trunk lines at the Walbach Street underpass. These utilities may have to be relocated or lowered. A contingency in the construction cost estimate has provided for this potentiality.

The vertical clearance at the Pequot Avenue railroad underpass is also deficient. Its current height is approximately 12 feet 8 inches. Several options for improving the vertical clearance at this bridge were evaluated, with the intent of accommodating large vehicles and possibly semi-trailer trucks. There are

numerous cost and feasibility issues that thwart improving the vertical clearance at the Pequot Avenue underpass as follows:

- The cost of replacing the bridge with a more efficient structure with lower profile girders would be very expensive and, even then, the optimal height of 14 feet 6 inches could not be achieved without reconstructing and elevating several thousand feet of the twin Amtrak rail lines above the bridge;
- The existing abutments of the bridge have shallow footings that would be undermined by any lowering of the roadbed beneath the underpass. The costs to underpin the abutments would be excessive and could cause temporary disruption to rail traffic;
- Numerous underground utilities, including sizable sanitary sewer trunk lines that lead to the regional Water Pollution Control Facility, exist under the roadbed beneath the underpass. These utilities have very little cover (i.e. they are buried at a shallow depth). Any attempt to lower the roadbed to increase the vertical clearance would require the removal and reconstruction of these utilities at a lower depth. The costs of this utility work would be excessively high; and
- The roadbed beneath the underpass lies at an elevation that is lower than the 100 year flood elevation. Any lowering of the roadbed would increase the likelihood of flooding during major storm events.

Considering these cost and feasibility constraints and considering that the existing height of the Pequot Avenue underpass allows for the use of the underpass by emergency vehicles, most buses, and



most commercial vehicles, it was determined that the benefits of improving the vertical clearance at this underpass did not justify the cost. Any large commercial vehicles that need to access Pfizer's Global Development Facility or the MDP parcels in the peninsula area will need to take the southern Pequot Avenue route that has been used for many years by large vehicles that needed to access NUWC, the WPCF or the former mills on Pequot Avenue.

The proposed reconstruction of the roads in the vicinity of the Amtrak line will alleviate current flooding problems. The flooding problem will also be mitigated by construction of storm chambers and high-volume pumps to discharge water resulting from storms. While these efforts will improve the current situation, portions of the roads will still be subject to flooding during extreme coastal storms (i.e. hurricanes). The impact of this flooding on emergency ingress and egress during hurricanes will be minimized by maintaining an elevation of 7.1 feet NGVD or higher on the designated evacuation route.

The evacuation route from the Fort Trumbull peninsula will lead from Walbach Street, via Nameaug Street, to the Pequot/Howard Street railroad underpass. From the underpass, Willets Avenue and Shaw Street both lead to higher ground. On the peninsula, a small southerly portion of Nameaug Street that is currently below elevation 7.1 feet will be raised to 7.1 feet or higher, including the intersection with the Pequot Avenue roundabout just east of the railroad. This places the entire evacuation route above the level of the FEMA 10-year flood (7.1 feet), and 0.7 feet above the level of the Army Corps of Engineers 10 year flood (6.4 feet).

During a hurricane storm event approaching the 100 year storm, it is possible that portions of the streets

between 7.1 feet and 10.0 feet in elevation will be subject to flooding. This flooding would only occur if the storm arrival is coincident with the timing of a spring high tide. In the event of flooding of this type, emergency vehicles are capable of operation in streets that are inundated by up to 2 feet of water. The 100 year storm flooding could result in the lowest portions of the evacuation streets that are impassable to some vehicles for as long as one hour and 35 minutes, and will be impassable to emergency vehicles due to flooding in excess of two feet for as long as 50 minutes out of the 12 hour cycle.

The proposed improvements will result in subsequent changes to the existing through-traffic or local traffic patterns. Harris Street will be eliminated and the existing alignment of the westerly portion of Trumbull Street and the southerly portion of Nameaug Street will be changed.

Effectively, all streets within the limits of the MDP area will be realigned or reconstructed within their current alignment. Some of the existing rights-of-way (ROW) of streets proposed to be discontinued, such as Chelsea Street, Harris Street, Goshen Street and portions of Trumbull Street, will be abandoned and annexed to NLDC parcels to be utilized as development sites. Where existing public utilities exist within these discontinued streets, provisions will be made for the maintenance of utility easements so that the underground pipes and other improvements can remain in use.

Other City ROW's in streets that will be realigned will be abandoned but maintained as utility corridors and/or landscaped open space areas. This will occur in



the ROW of Howard Street between Walbach and Shaw streets and limited portions of the Shaw Street ROW in the vicinity of Willetts Street. The city streets in these areas will be realigned leaving portions of the ROW that will not be necessary for traffic use. However, because the ROW's will still have underground public utilities and because these small areas are not contiguous with larger NLDC development sites, the ROW's will be retained as utility corridors and landscaped open space (the surplus existing pavement demolished and lawns and other plantings will be installed where appropriate).

One short section of existing public street, the section of Hamilton Street between Howard Avenue and the Amtrak rail line, may be converted from a public ROW to a private street. This is because the street currently may not conform to public street width and dead-end street standards as it is a narrow dead-ended street without a cul-de-sac at its terminus. The street will be improved with new pavement curbs and sidewalks in its current location to the MDP standards for a "Local Street" (see discussion on proposed MDP street hierarchy that follows). In the event that the public status of this easterly length of Hamilton Street is changed, every provision will be made to maintain access rights to existing private properties that are located on the east side of Shaw's Cove and currently utilize Hamilton Street as their principal access.

Appended Map 6.2 identifies where these existing City ROW's to be abandoned are located and what the status of the ROW's will be upon completion of the MDP.

Major components of the proposed street network include the following:

- Modem traffic roundabouts at the intersections of a realigned Howard Avenue-Shaw Street-Willetts Street and at Pequot Avenue and a realigned Trumbull Street.
- Installation of storm water pump station as described in Section 5.4.3 (Storm Sewer).
- Realignment of Howard Street between its intersection with Shaw-Willetts and its intersection with Hamilton Street;
- Realignment of the westernmost section of Trumbull Street between its intersection with Pequot Avenue and its intersection with Nameaug Street. This realignment is necessitated by the introduction of the Pequot-Trumbull roundabout;
- Widening of Howard Street between Hamilton and Walbach Street to five lanes, including a center turning lane;
- Discontinuation of Harris Street in order to improve sight lines and provide safer roadway geometry;
- Elimination of Goshen and Chelsea Streets;
- Provision of full traffic signals at the following three intersections: (1) Howard and Walbach; (2) Howard and Hamilton; and (3) Walbach and Nameaug;
- Widening of Nameaug Street between Trumbull and Walbach Street to provide better access between the Pfizer Global Development Facility and the proposed development at Columbia Cove. This change will also serve to distribute traffic more efficiently between the two underpasses and reduce the potential for traffic delays;



- The construction of a new street, Nameaug Street Extension. This street will start at Walbach Street directly across from its intersection with the existing Nameaug Street and run adjacent and parallel to the east side of the Amtrak rail line. It will provide access to the proposed development sites at Columbia Cove;
- Realignment of Pequot Avenue between the southern end of the MDP area and the proposed Pequot-Trumbull roundabout;
- Widening and improvement, including larger curb radii at intersections, as necessary of all streets within the MDP area that are to remain. These streets include Hamilton Street, Walbach Street, Smith Street, East Street and most sections of Trumbull Street. The improvements include providing new bituminous concrete pavement, curbs, handicapped ramps, driveway aprons, concrete or brick (decorative pre-cast concrete unit pavers) sidewalks and streetscape amenities (ornamental street lights, street trees); and
- Construction or reconstruction of sidewalks, handicapped ramps and painted cross-walks along both sides of most streets within the MDP boundary, with the exception of the inner loop created around the Amtrak rail embankment and bounded by Pequot Avenue, Nameaug Street, Walbach Street, and Howard Street (refer to Figure 7).

Appended Map 3.8 illustrates the proposed location and type of streets and sidewalks. For design purposes, streets within the MDP area have been classified into three categories: arterial, collector and local. The categories define a hierarchy that correlates with the degree of traffic than the street is intended to carry.

Arterials will not only provide access to the development sites, but will also carry through-traffic. They must be designed to carry the high level of traffic and will therefore be of higher design. Accordingly, the character of the streetscape on arterials will be less intimate that the collector and local streets. For example, light standards on arterial streets need to be much taller to provide illumination across a wider expanse of pavement.

Collector streets will carry less traffic than the arterials and will act as conduits between development sites and the arterials. Local streets will have the least amount of traffic and will not serve through-traffic. They will be narrower and more intimate in scale and therefore relate better to the more quiet character of the residential neighborhoods.

Table 5-3 summarizes the character of proposed improvements for each of the three categories of proposed or reconstructed streets. More specific traffic and street plans will be developed based upon the following:

- Further refinement of development plans of the MDP area;
- Additional investigation and study of the various engineering, traffic, environmental, cost, planning and safety issues; and
- In consideration of comments received from the public and regulatory agencies.
- To determine the most suitable network of streets and sidewalks to provide safe efficient, and attractive access to the Fort Trumbull area.
- Provides for streets and utilities to be constructed under a detailed phasing and "maintenance and protection of traffic" plans to minimize disruption of traffic patterns, maintain access to



private sites, minimize length of utility service shut-offs and to ensure continuous access to surrounding properties by emergency vehicles.

**Table 5-3**
**Summary of Proposed Street Characteristics**

| *Street Component* | *Arterial Street* | *Collector Street* | *Local Street* |
|---|---|---|---|
| Sidewalk type | concrete | concrete | pre-cast concrete pavers |
| Sidewalk width | 6 feet | 5 feet | 5 feet |
| Snow shelf width | 5 feet | 5 feet | 5 feet |
| Bike lane/ shoulder width | 5 feet | 5 feet | 2 feet |
| No. of traffic lanes | 5 | 2-3 | 2 |
| Traffic lane width | 12 feet | 12 feet | 12 feet |
| Total right-of-way width | 94 feet | 56-68 feet | 50 feet |
| Light standard type | "cobra head" | Ornamental | ornamental |
| Light standard height | 30-35 feet | 18-20 feet | 12 feet |
| Light standard spacing | 150 feet O.C. | 60 feet O.C. | 42 feet O.C. |
| Light standard location | both sides of street, alternating | Both sides of street, alternating | both sides of street, alternating |
| Street tree location | 3 trees between each light standard | 2 trees between each light standard | 2 trees between each light standard |
| Street tree spacing | 75 feet O.C. both sides | 40 feet O.C. both sides | 28 feet O.C. both sides |

### *5.4.6 Riverwalk*

The Riverwalk will provide a practical pedestrian and bicycle alternative to vehicle transportation on streets within the Fort Trumbull peninsula area. The Riverwalk will be accessible at several locations. Within the peninsula area, users needing parking can access the Riverwalk via the state park (including park support parking), or from City streets in the vicinity of the Village Green. It is expected that peninsula residents, hotel/conference center guests, and health club patrons would also use the Riverwalk. A through link to the City of New London Downtown Waterfront Park may be provided at the north end of the peninsula, across Shaw's Cove at a future date (but not as part of this MDP). At the south end of the peninsula, the Riverwalk will link with the Pfizer complex entrance (including their public access waterfront walkways), and with Pequot Avenue, which provides sidewalk access to the Marina District, and other waterfront sites in south New London. Bicycle access along City streets will connect with the City's Ocean Beach Park.

### *5.4.7 Solid Waste Disposal*

The individual development parcels will contain enclosed solid waste devices for the use of that complex. Compacted solid waste will then be removed, in covered vehicles, to a solid waste disposal facility.



### *5.4.8 Estimated Cost of Site/Infrastructure Improvements*

Table 5-4 summarizes the estimated construction costs for the redevelopment project. These estimated costs are subject to review and approval by DECD prior to project implementation as part of the MDP Funding Plan and Budget (see Section 8.0).

## Table 5-4
## Probable Costs for Infrastructure and Special Construction[1] [2]

| | *Infrastructure Item / Task* | *Estimated Cost of Item / Task* |
|---|---|---|
| A | **Site Preparation** | $1,681,713 |
| B | **Storm** | $1,419,789 |
| C | **Water** | $383,876 |
| D | **Sanitary** | $220,500 |
| E | **Street Demolition** | $22,768 |
| F | **Traffic Improvements** | $345,000 |
| G | **Improvements to Existing Railroad Underpasses** | $720,000 |
| H | **Street Construction**[2] | $749,799 |
| I | **Curbs** | $441,760 |
| J | **Sidewalks** | $627,191 |
| K | **Street Lights, Street Trees, Amenities and Furnishings** | $2,926,775 |
| | **Infrastruture Items/Tasks A through K Subtotal** | $9,539,171 |
| | Contractor Mobilization, General Conditions OH&P(15%) | $1,430,876 |
| | Contingency (10%) | $953,917 |
| | **Subtotal** | $11,923,964 |
| | Design (10%)[3] | $1,192,396 |
| | 1998 Costs Escalated to Year 2000 (4% per year) | $972,995 |
| | **Infrastructure Items/Tasks Total** | $14,089,356 |
| | *Special Construction Item / Task* | *Estimated Cost of Item / Task* |
| L | **Enhancement & Buffer Plantings at WWTF**[4] | $897,500 |
| M | **Building Demolition**[5] | |
| | Residential/Commercial Properties | $3,608,675 |
| | NUWC Site | $3,033,000 |
| | Assumed Utility Demolition | $750,000 |
| N | **Site (soils) and Building (lead paint/asbestos) Remediation**[6] | --- |
| O | **Site (development parcels) Cost Premiums** | $612,600 |
| | **Special Construction Items/Tasks L through O) Subtotal** | $8,901,775 |
| | Contractor Mobilization, General Conditions OH&P(15%) | $1,335,266 |
| | Contingency (10%) | $890,178 |
| | **Subtotal** | $11,127,219 |
| | Design (10%)[3] | $1,112,722 |
| | 1998 Costs Escalated to Year 2000 (4% per year) | $907,981 |
| | **Infrastructure Items/Tasks Total** | $13,147,922 |
| | **INFRASTRUCTURE AND SPECIAL CONSTRUCTION ITEMS/TASKS TOTAL** | $27,237,277 |

1 Estimate excludes all land and the following soft costs: land acquisition, relocation, legal, administrative, owner's insurance, permits & fees, construction interest, finance/bonding costs marketing, etc.

2 Street construction and streetscape costs based on the following design assumptions. Arterial St.: 12' traffic lanes; 5' shoulder/bike lane, each side; 6' concrete sidewalks; 35' high light standards @ 150' O.C., both sides; street trees @ 75' O.C., both sides. Collector St: 12' traffic lanes; 5' shoulder/bike lane, each side; 5' concrete sidewalks; 20' high light standards @ 60' O.C., both sides; street trees @ 40' O.C., both sides. Local St:12' traffic lanes; 5' shoulder/bike lane, each side; 5' ornamental precast concrete pavers sidewalks; 12' high light standards 42' O.C., both sides; street trees @ 28' O.C., both sides.

3 This 10% design number is factored onto General Conditions and contingency numbers as well as hard construction costs and therefore is deemed adequate in size to cover design fees that may exceed 10% for some components of work. The design fee also assumes NLDC pays for all design, including design work that may be reimbursable by utility companies.

4 Enhancements and buffer plantings along perimeter of the WWTF per CDM Facilities Planning Study of November 1998 and CUH2A Cost estimate of August 1998; excluding the treatment of the waterfront and aesthetic improvements internal to the WWTF. These costs will be paid by the City under a separate budget or authorization.

5 Excludes the following: asbestos; lead abatement; removal of underground tanks; hazardous materials and soils removal, remediation and disposal. All clean fill to remain on site as clean backfill (i.e. concrete and brick). Site to be assembled as a whole allowing for demolition to be performed as one contiguous site.

6 Refer to estimate provided by HRP.

## 5.5 Evacuation Process

A detailed evacuation plan will be developed and approved by the City of New London prior to occupancy of structures within Parcels 1, 2, and 3. The preferred evacuation route is via Walbach and Nameaug Streets, exiting the peninsula via Pequot Avenue or Howard Street (see Figure 4, Section 1.3). Access/egress during flooding events is being provided on evacuation streets that have an elevation of 7.1 feet NGVD or higher. This places the entire evacuation route above the 10-year flood. The 10-year FEMA flood level standard is 7.1 feet NGVD, which is 0.7 feet higher than the Army Corps of Engineers 10-year flood level of 6.4 feet. The 50-year flood elevation is 9.0 feet NGVD, and the 100-year flood elevation standard is 10.0 feet NGVD. A berm of 8.0 feet NGVD will be maintained east of the Pequot/Howard Street underpass, ensuring that storm flooding to that level from Bentley Creek and/or Trumbull Street will be kept clear of the underpass.

During a hurricane storm event approaching the 100 year storm, it is possible that portions of the streets between 7.1 feet and 10.0 feet in elevation will be subject to flooding. This flooding would only occur if the storm arrival is coincident with the timing of a spring high tide. In the event of flooding of this type, emergency vehicles are capable of operation in streets that are inundated by up to 2 feet of water. The 100 year storm flooding could result in the lowest portions of the evacuation streets that are impassable to some vehicles for as long as one hour and 35 minutes, and will be impassable to emergency vehicles due to flooding in excess of two feet for as long as 50 minutes out of the 12 hour cycle.

The evacuation plan will address the following required elements:

- Monitoring. Coastal weather systems and hurricane tracking, as well as storm notices of the Office of Emergency Management
- Implementation. Criteria for requesting evacuation of peninsula, such as prediction of coastal tidal flooding exceeding elevation of 8' within 12 hours
- Evacuation Areas. Maps of areas to be evacuated based upon potential coastal flood hazards.
- Evacuation Routes. Clearly designated and marked evacuation routes with appropriate signage.
- Storm Shelter Designation.
- Warnings and Notification. The mechanism for issuing the evacuation notice to and by the media (TV, radio, newspaper), by speaker equipped public safety vehicles and by siren.
- Special Assistance/Needs. A list of residents in the evacuation areas who may need special assistance due to age, handicap, etc.
- Criteria for securing evacuated area, and for ensuring safe return (checking for gas leaks, downed power lines, clear streets, etc.)
- Memorandum of Understanding with USCG Station located on the peninsula regarding shared emergency resources during storm situations.

* * *

## 9.0 ADMINISTRATIVE PLAN

The NLDC or other eligible entity designated by the City of New London shall be responsible for administering the Fort Trumbull Municipal Development



Plan, subject to the terms and conditions of that Plan, including the EIE completed in accordance with the CEPA, and all applicable prescribed laws and regulations governing this project. The duties of the NLDC will include:

1. Coordination of project management and approvals with the State of Connecticut, Departments of Economic and Community Development and all other State, Federal, and local agencies as required.
2. Acquisition of property.
3. Issuance of contract(s) for asbestos removal, demolition, site preparation, abatement, and remediation.
4. Relocation of affected residents and businesses.
5. Coordination of demolition and site preparation with the appropriate State and City agencies.
6. Marketing and advertising for development/site proposals.
7. Entering into contracts for design and execution of project improvements.
8. Transfer of the site to the designated redeveloper(s).
9. Administration of appropriate financial transactions and reports.
10. All day to day project administration.
11. Maintenance of all necessary records, including relocation records.
12. General project management and reporting to DECD as required on program.

The above will be carried out by the New London Development Corporation staff; enhanced as needed by consulting engineers, legal counsel, etc. and temporary relocation staff. A project management plan, including roles of NLDC staff and consultants, will be prepared for DECD approval.

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## APPENDIX A

## SELECTION OF AND RATIONALE FOR THE PREFERRED ALTERNATIVE – FORT TRUMBULL MDP AREA

**New London, Connecticut**
**February 1999**

Submitted to the State of Connecticut
Department of Economic and Community Development
February 1999

Submitted by the
New London Development Corporation

Contributors:

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### 1.0. Overview

This document is intended to support the *Record of Decision* (ROD) for the Draft Environmental Impact Evaluation (*DEIE*) of the Fort Trumbull MDP Area in New London, Connecticut. Six-land use alternatives were extensively evaluated in the *DEIE*, however a preferred alternative was not selected. The following discussion presents the preferred alternative and describes the rationale for its development.



### *New London and the Fort Trumbull Project*

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), is undertaking a municipal development project adjacent to the Thames River in New London, Connecticut.

The project area is located in the southeast part of New London, encompassing approximately 90 acres of primarily public utility, residential, and commercial areas. Figure 1 is a location plan of the Fort Trumbull area. This area includes the U.S. Navy's closed Naval Undersea Warfare Center (NUWC) along the Thames River, the regional Water Pollution Control Facility (WPCF), and the adjacent Fort Trumbull area, including all or portions of Howard, Hamilton, Shaw, Harris, Trumbull, Walbach, Nameaug, Smith, Chelsea, Goshen, and East Streets, and Pequot Avenue. The project area includes approximately 115 parcels. The NUWC site alone is 32 acres.

The Fort Trumbull area has been targeted for evaluation under the municipal development planning process for numerous reasons. The majority of structures in the area are in relatively poor condition, exhibit a high amount of functional obsolescence, and have limited market potential. Vacancy rates are notably high (82% vacancy of non-residential buildings and 20% vacancy of residential units at the time of preparation of the *DEIE*). Tax revenues in the MDP area (±$325,000) are quite low considering it comprises an area of 90 acres.

A 790,000 square foot global development facility proposed by Pfizer, Inc. (to be located immediately to the south and outside of the MDP area) and reuse of a portion of the NUWC site for development of a state

park, creates an opportunity for improvement of the Fort Trumbull area consistent with these planned projects. This also presents opportunities to stimulate the local economy, improve waterfront access along the Thames River, make aesthetic and visual improvements, and complement ongoing downtown revitalization efforts.

Plans for the project area will be prepared in accordance with a Municipal Development Planning process under Section 130, 132, and/or 588(1) of the Connecticut General Statutes.

### *Fort Trumbull Project Goals*

In April of 1998, the New London City Council created a committee of six people (two from the Local Reuse Authority (LRA), two from the NLDC and two from the State of Connecticut) to evaluate the Local Reuse Authority (LRA) plan for the disposition of the NUWC property and to consider asking for a delay in the public sale of a portion of this property. The committee identified the following goals for the Fort Trumbull area:

1. To create a world-class development that will complement the undertakings of Pfizer, Inc. and set a standard for development in New London.
2. To create an economic asset for the City of New London that will create jobs, generate tax revenue, and result in spin-off economic activity.
3. To maximize public access to the waterfront and, in doing so, encourage uses which are water dependent or which will be enhanced by water access and views.
4. To develop a project which will help build momentum for the revitalization of downtown New London and the balance of the city to the benefit of the city's residents and visitors.



Three of the four project goals relate either directly or indirectly to economic development. As such, this is a founding principle of this project. These goals were carried through the planning and evaluation of alternatives and selection of the preferred alternative. The preferred alternative strives to promote economic development, while maximizing public access to the waterfront, encouraging water dependent and related uses, and minimizing negative environmental impacts.

## 2.0 Overview of Draft Environmental Impact Evaluation Land Use Alternatives

The Draft Environmental Impact Evaluation (DEIE) evaluated six land use alternatives with an array of land uses. While there is some overlap and common elements in the six land use alternatives, each has a distinct theme as noted below:

Alternative No. 1 – No Action

Alternative No. 2 – Recreation/Tourism

Alternative No. 3 – Residential/Commercial

Alternative No. 4 – Business Campus

Alternative No. 5 – Mixed Use 1

Alternative No. 6 – Mixed Use 2

The analysis contained in the DEIE evaluated the impact of the various components associated with the six land use plans. It was recognized that the ultimate preferred alternative could borrow land use components from any or all of the plans. As stated on page 3-5 of the *DEIE*:

"The alternative plans represent general land use areas and density of development. They are not intended to be exact geographic limits or configurations. A preferred alternative has not been selected and it is anticipated that the ultimate selected preferred plan may be a hybrid of several alternatives."

A brief description of the six alternatives follows.

***Alternative 1 – No Action*** – One of the requirements of CEPA is to evaluate a no action alternative. In this particular instance, no action is somewhat unusual in that some activities and plans would likely proceed by others even if there were no MDP action.

Under the no action scenario, it is assumed that the Navy would proceed with disposition of the NUWC property as planned prior to the introduction of the MDP process, in accordance with the approved Local Reuse Authority's (LRA) preferred plan. The LRA's preferred plan indicated disposition of the NUWC property through conveyance of the southern portion to the Department of Environmental Protection for future development of a state park, public benefit conveyance of a portion of the property near Columbia Cove for maritime uses, and public sale of the remaining area.

***Alternative 2 – Recreation/Tourism*** – The intent of this alternative was to complement the proposed Fort Trumbull State Park, concentrating recreational, educational, and cultural uses east of the railroad in the Fort Area and at NUWC. Office and retail uses are proposed west of the railroad in the Gateway Area.

***Alternative 3 – Residential/Commercial*** – This alternative highlights a residential component throughout the MDP area, intermixed with the state park and open space recreational areas, and minor



amounts of office and retail uses proposed in the Gateway Area.

***Alternative 4 – Business Campus*** – This alternative focuses the majority of land use in the form of office campus and a supporting hotel/conference center, with small amounts of retail and residential uses in the Gateway Area.

***Alternatives 5 & 6 – Mixed Use 1 & 2*** – These two mixed use alternatives incorporate recreational, residential, commercial office, retail, and hotel/conference uses in different proportions and arrangements.

## 3.0 Rationale for Selection of the Preferred Alternative

Following the 45 day review and comment period of the Draft Environmental Impact Evaluation for the Fort Trumbull MDP area, review of public and state agency comments, and consideration of the administrative record, technical data and other relevant information, a preferred alternative was selected. This alternative is a composite of positive elements of Alternatives 2, 4, 5, and 6. The four goals identified for this project which highlight economic development through the creation of jobs, tax revenues and spin-off economic activity, played a major role in the ultimate selection of the preferred alternative.

*DEIE* Alternative 4 (*Business Campus*) represents the greatest economic development potential of the five action alternatives. It also results in the greatest impacts to traffic, generates the greatest percentage of impervious cover, has the highest construction costs, and was considered to be the least complementary with respect to the planned State Park facility and other nearby waterfront uses. The residential and recreational alternatives (*DEIE* Alternatives 2 and 3)

were considered with respect to environmental impacts as well as their ability to meet the project goals. Although these alternatives have lower associated construction costs and have lesser traffic and relocation impacts, they do not generate the economic development desired for this project, and in their pure form are not consistent with the State Conservation and Development Plan or local land use policies.

Residential and recreational land uses as components of an urban center, however, have numerous benefits. Residential uses can provide an essential element to an urban community center. The City of New London has an abundance of lower income housing and rental units, with a shortage of moderate to high range housing. At the same time, the jobs created by the Fort Trumbull MDP project, coupled with those to be created by the nearby Pfizer development, will generate a greater demand for moderate and higher-end urban dwellings located in close proximity to the workplace.

It is estimated that in this relatively small City, 5.79 square miles in size, only about seven percent of the City's vacant land is available for residential development. A good portion of this vacant land, however, has serious development limitations. The City has experienced a decline in both population, since 1960, and employment, since 1970. Additionally, it is estimated that only 37 percent of all of the housing units in the City are owner occupied.

Balancing the competing needs and impacts of this project led to the ultimate selection of a modified mixed use alternative. A compromise of economic development with environmental impacts resulted in an alternative which takes advantage of the economic potential of business development, coupled with the



positive aspects of a mixed use community development. The result is a positive outcome with fewer negative impacts.

The preferred alternative is depicted in Figure 2. Major elements of this composite plan are presented in Table 1 and are described in the ensuing text.

***Waterfront Uses*** – Waterfront uses along Shaw's Cove, Columbia Cove, Bentley Creek, and the Thames River were maintained as presented in Alternatives 3 through 6, including the 16-acre State Park at the inactive NUWC site, the public riverwalk, and other water related commercial uses. These elements were retained in the preferred alternative for their contributions to waterfront access and water dependency. This emphasis on public access and water dependent uses is consistent with the identified project goals as well as state land use planning goals and the Connecticut Coastal Management Act policies.

**TABLE 1**
**Preferred Alternative**

| Land Use Component | Description | DEIE Alternative Origin | Comments |
|---|---|---|---|
| State Park | 16 acres | Alternatives 3, 4, 5, and 6 | |
| Public Walkway | Project Perimeter | Alternatives 2, 3, 4, 5, and 6 | |
| Columbia Cove Area | 40-60 Slips | Alternatives 3, 4, 5, and 6 | Reduced from 80-100 slips. |
| Water-Related Commercial | 25,000-30,000 SF | Alternatives 2, 3, 4, 5 and 6 | |
| Waterfront Commercial | 20,000-25,000 SF | Alternatives 2, 3, 4, 5, and 6 | |
| Gateway Office (Existing) | 50,500 SF | Alternatives 5 and 6 | |
| Gateway Office/Incubator | 90,000 SF | Alternatives 5 and 6 | |
| Gateway Retail | 10,000 SF | Alternatives 5 and 6 | |
| Fort Area Office/Incubator | 90,000 SF | Alternative 4 | Reduced from 375,000 s.f. |
| R&D/Office | 5,000 SF | Alternatives 2, 3, 4, 5, and 6 | |
| Hotel/ Conference Center | 200-250 Rooms | Alternatives 5/6 | |
| Athletic Club/Center | 20,000 SF | Alternatives 5 and 6 | |
| Park/Waterfront Support | 2.4 acres | Alternative 2 | |
| Residential Mid-Range Density | 80-100 Units | Alternatives 3 and 5 | Reduced from 115 units. |



***Office/Incubator Uses*** – The Gateway Area office/incubator use as proposed in *DEIE* Mixed Use Alternatives 5 and 6 was selected for its economic development potential, creation of direct and indirect employment, and generation of tax revenues which directly address the project goals. Additional Office/Incubator uses are proposed in the eastern portion of the Fort Area between the railroad and Smith Street as in Alternative 4. A small area of R&D/Office use is also proposed in the Lower Pequot Avenue Area, as in *DEIE* Alternatives 2 through 6. There is a potential for a small amount of residential use (approximately 20 units) along the western side of Smith Street as a transition between the residential and business uses. This use would replace approximately 30,000 square feet of the office/incubator use on this block.

***Hotel/Conference Center*** – The Hotel/Conference center land use as presented in Alternatives 5 and 6 has been selected as a 200 to 250 room facility in the northern portion of the MDP area. The larger hotel facility was incorporated to support surrounding uses, including the Fort Trumbull State Park, planned office uses in the Fort and Gateway areas, as well as the nearby planned Pfizer offices to the south of the MDP area. The hotel would be near, but not directly on, the waterfront. The area surrounding the hotel would be developed as an urban village, linking the nearby business and residential uses.

***Residential Uses*** – A smaller area of residential land use than that which was proposed in *DEIE* Alternatives 3, 5, or 6 is included in the preferred alternative to support the other uses in the area. This component is important to the concept of urban center revitalization, where residents can live and work in the same urban community. This concept is consistent with the goals presented in the *Conservation and Development*

*Policies Plan for Connecticut* with regard to prevention of urban sprawl. The residential component will also offset the impacts of traffic, impervious area, and cost associated with the business office development.

***Support Uses*** – Additional support uses are proposed in the block defined by Smith, Walbach, East, and Trumbull Streets. These uses, an important component of which will be parking, will support the planned Fort Trumbull State Park and surrounding waterfront commercial uses. This block was identified in *DEIE* Alternative 2 as being a portion of the State Park, with similar intended uses.

## 4.0 Rationale for Selection of the Land Use Component Locations of the Preferred Alternative

Once appropriate and practical land uses were identified for the preferred alternative, the process of determining the most appropriate location for the various uses were initiated. This process involved an examination of numerous site characteristics, access, existing infrastructure, and regulatory requirements. For example, it is obvious that marina related activities should be located adjacent to the waterfront. However, this use must be balanced with the potential for environmental impact to aquatic resources. An attempt has been made to provide water low impact water dependent uses.

Office/incubator uses were concentrated in the Gateway and eastern Fort Areas for several reasons. First, these uses represent the most traffic-intensive aspects of the plan. Accordingly, they were sited in close proximity to existing roadway corridors such that convenient and efficient vehicular access is accomplished. Keeping the majority of these uses west of the railroad underpasses was also a priority, due to



the physical constraints caused by these structures. The remaining office uses were maintained closer to the main entrance to the Fort Area for the purpose of concentrating traffic away from the internal peninsula, therefore minimizing traffic impacts. These office uses are more compatible with the railroad and sewage treatment plant uses in the eastern Fort Area and will provide a screen for these less desirable site features.

Hotel and residential uses were placed in the western portion of the Fort and NUWC areas, away from the major concentration of traffic and utilities. These uses are not compatible in the western Fort Area adjacent to the sewage treatment plant and the active Amtrak railroad. The adjacency of these land uses to the planned Fort Trumbull State Park and hotel area was considered to be a more compatible match, creating more of an urban village effect. Additionally, residential uses will help to ensure around-the-clock activity, helping to keep the area watched and therefore safer. Other incidental uses as presented in Alternatives 5 and 6, including parking, an athletic club, and related hotel services would be located in the hotel/conference center area.

## 5.0 Potential Impacts of the Preferred Alternative

As described above, the preferred alternative is a composite of numerous alternatives which were evaluated in the *DEIE*. Therefore, the impacts are very similar to those previously assessed. Specific impacts are described below:

***Land Use and Zoning Impacts*** – The preferred alternative is a mixed use alternative which incorporates elements most common to *DEIE* alternatives 4, 5, and 6. These uses are consistent with statewide

land use planning policies with respect to urban area regional centers, encompassing land areas containing traditional core commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance. The office/incubator uses comprise a major component of the preferred alternative, representing a significant economic development feature. This is complemented by the hotel conference center and associated support uses, including an athletic club, waterfront amenities, and necessary parking. The residential component provides a buffer between the business uses and the proposed state park and public riverwalk. It also promotes a holistic urban community, where people can live and work in close proximity.

The proposed uses in the preferred alternative are generally consistent with local zoning regulations (Waterfront Commercial/Industrial, Waterfront Development District, and General Commercial District). Minor inconsistencies between proposed land use and zoning will be identified during the Municipal Development Planning process and will be adjusted as necessary during MDP implementation.

Consistency of the preferred alternative program elements with the Connecticut Coastal Management Act Policies has been addressed in the *DEIE* with respect to the existing regional water pollution control facility, Navy and Coast Guard facilities, and the proposed riverwalk, state park, and waterfront related commercial uses along Columbia Cove, Shaw's Cove, and Bentley Creek. These are described in detail in *DEIE* Section 4.2.1.

***Socioeconomic Impacts*** – Socioeconomic impacts have been evaluated for all of the land use components of the preferred alternative. These components were evaluated in various combinations in the *DEIE*.



Table 2 presents this information for the preferred alternative.

**TABLE 2**
**Summary of Socioeconomic Impacts for the Preferred Alternative**

| Category | Low Estimate | High Estimate |
|---|---|---|
| Construction Costs | $44,183,355 | $73,947,010 |
| Construction Wages | $19,882,510 | $33,288,305 |
| Construction Employment | 518 | 867 |
| Direct Employment | 718 | 1,362 |
| Indirect Employment | 500 | 940 |
| Tax Revenues Generated | $680,544 | $1,249,843 |

The socioeconomic impacts of the preferred alternative are positive with respect to job creation (construction, direct, and indirect) and generation of tax revenues. When compared against the five action alternatives evaluated in the *DEIE*, direct employment of the preferred alternative is higher than that which was projected for Mixed Use Alternatives 5 and 6, but does not reach the high values forecast for the Business Campus (Alternative 4). The same is true for indirect employment. Construction employment of the preferred alternative is between that which was forecast for *DEIE* Mixed Use Alternatives 5 and 6. The same is true for tax revenues generated.

***Neighborhood/Housing Impacts*** – Similar to DEIE Alternatives 2, 4, and 6, implementation of the preferred alternative would require the relocation of all 115 dwelling units in the MDP area. (DEIE Alternatives 3 and 5 retained a portion of the current housing stock.) The current dwelling units in the Walbach/Smith/Chelsea Street block would be replaced by

office/incubator uses. The existing dwelling units in the Walbach/East/Trumbull Street block would be replaced by parking and other support uses associated with the adjacent State Park and nearby waterfront commercial uses. These areas are not conducive for future residential uses due to their proximity to the railroad, areas of concentrated traffic, and the sewage treatment facility.

Residential and business relocation is necessary to meet the project goals as described. New residential development will occur in areas which do not currently support residential uses. None of the proposed residential uses will replace an existing residential use in the same location, with the possible exception of the western side of Smith Street, where a small amount of residential development may occur.

Less than 12% of residential buildings in the MDP area, interspersed throughout the different districts, are considered in average or better condition. Approximately 122,300 square feet of residential properties are considered in fair condition, representing 58% of the residential inventory. The remaining 63,800 square feet (30%) are in poor condition. These properties are similarly scattered throughout the MPD area contributing to a saw-tooth visual impression in the various blocks.

Since 1990, the existing buildings have undergone minimal private investment. In fact, portions of the MDP area appear to have suffered more from disinvestment and owners' neglect than improvements or upgrades. Slightly more than $925,000 in improvement costs, based on assessor's information, has been invested since 1990, and more than 60% of this amount has been for improvements to 14 non-residential buildings. Total improvement costs over these eight years, when compared to current assessments, equate to only



6% of total value. This indicates an average improvement cost of less than 1% of assessment per year, suggesting that many properties suffer from deferred maintenance.

The composition of the Fort Trumbull MDP area is reflective of the City of New London as a whole in that the majority of its residential dwellings are renter-occupied. As of February 19, 1999, 67 of the 115 dwelling units in the MDP area were occupied. Of these, only 15 were owner-occupied, with the remaining 52 renter-occupied.

Based on an analysis conducted for this project, available rentals in New London are plentiful. In an average weekly listing, between 15 and 20 one-bedroom units were listed for rent; 10 to 15 two-bedroom units were listed; 5 three-bedroom units were listed; and 5 studio/efficiency units were listed for rent in New London. In addition, the larger apartment complexes in the area advertised unit availability without providing unit characteristics.

Recent surveys indicate that there is also adequate availability of residential dwellings available for ownership in the greater New London area in a comparable price range to those in the MDP area. As of September 1998, just prior to *DEIE* publication, New London had 106 active residential listings. Waterford had 154 and Groton had 220. Average list prices for the three communities are $104,000, $168,100, and $194,000 respectively. A review of published real estate listings in New London showed 19 homes for sale under $70,000 and 23 homes for sale between $70,000 and $90,000.

Extensive mitigative measures have been proposed to offset projected impacts. In July of 1998, the *Relocation Plan for the Fort Trumbull Area Municipal*

*Development Project* was developed in conjunction with this project. The Plan conforms with the Uniform Relocation Assistance Act (URAA). Since that time, NLDC has been acquiring properties and relocating individuals and businesses in the MDP area on a voluntary basis.

The purpose of relocation services and assistance is to provide displaced households with an orderly, timely, and efficient move, and to keep them informed of services and payments that are available. Relocation services and assistance will be administered by the New London Development Corporation (NLDC) through a relocation consultant. A relocation counselor representing the NLDC is assigned to assist all displaced households in finding a suitable replacement dwelling. To date, this process has been successfully carried out with those individuals who have voluntarily expressed an interest in relocating.

Future acquisition and relocation will be undertaken to ensure the availability of resources to accommodate displacees. This careful management of the redevelopment process will ensure availability of resources. The relocation process will be accomplished by the New London Development Corporation with assistance from others as appropriate. The relocation of site occupants will comply with the Uniform Relocation Assistance Act (Chapter 135 Connecticut General Statutes), the *Relocation Location Plan for the Fort Trumbull Area Municipal Development Project* (July 1988), and local procedures. The purpose of the Uniform Relocation Act is to establish a uniform policy for the fair and equitable treatment of all persons displaced by state and local real property acquisition projects. Any individual, family, or business displaced by this project will be offered relocation assistance services for the purpose of locating a suitable replacement property.



In addition to relocation assistance under the URAA, $10 million of Connecticut Housing Finance Authority (CHFA) low rate financing loans will be available to help residents that may be dislocated during or following any proposed redevelopment. The funds will be offered at a rate which is 0.25 percent lower than CHFA's usual rate in first mortgage financing and can be used by renters and owners to purchase and rehabilitate homes. An additional $250,000 will be available in downpayment assistance for relocated homeowners. The Small Business Assistance Program will also be available, with $250,000 to help small businesses which will be displaced.

Most recently, a Social Equity Committee has been formed to bring together a variety of local human service organizations to meet the needs of individuals in the City. This group consists of members from the City Department of Health and Social Services, Creative Connections, and other social service agencies to work together on various aspects of difficult relocations.

Public comments regarding relocation impacts were received from several individuals living within the MDP area. These are addressed in the *Response to Public Comments* section of the *Record of Decision*.

***Community Facilities and Services Impacts*** – These impacts, many of which are positive, would be essentially identical to those described under *DEIE* Alternative 5. No negative impacts are anticipated with respect to educational facility needs, since there is a projected decrease in school aged children in the project area (based on density of proposed residential development). Fire and police protection, health care, and recreation would be as described under *DEIE* Section 4.5.1.

***Aesthetic/Visual Resource Impacts*** – Aesthetic and visual impacts for the preferred alternative would be positive. The aesthetic features described for the pertinent components of DEIE Alternatives 4, 5, and 6 would apply to the preferred alternative.

***Public Utilities and Services Impacts*** – The common elements discussion in *DEIE* Section 4.7.1 applies to the preferred alternative. Water supply demands and sewage generation would be in the range as defined for Alternatives 4, 5, and 6. Water demands would be less than historic usage in the Fort Trumbull area and approximately equal to existing estimated usage in the area. The same is true for sewage generation. Neither utilities would be negatively impacted by the project.

***Cultural Resource Impacts*** – These impacts will be as described in *DEIE* Section 4.8.5.

***Traffic and Parking Impacts*** – Traffic generation of the preferred alternative will be approximately equivalent to levels which were projected for Mixed Use Alternative 6, with similar levels of service (mostly LOS A and B).

***Water Resource Impacts*** – These impacts will be as described in *DEIE* Section 4.10.

***Flood Hazard Impacts*** – Flood hazard impacts to the common elements of the preferred alternative will be as described in *DEIE* Section 4.11.1. Flood impacts as described for the pertinent components of *DEIE* Alternatives 4, 5, and 6 would apply to the preferred alternative. Additionally, the following points are noted:

- Under the preferred alternative, fewer numbers of people would reside in the flood prone Fort Trumbull MDP area than currently do;



- Stormwater drainage and associated flooding impacts will be improved under the preferred alternative, most notably at the railroad underpasses;
- A flood evacuation plan will be developed to reduce the safety risk of flooding to residents;
- The Fort Hill area on the future State Park property will serve as a point of refuge during a flood event;
- New housing will be elevated such that the habitable levels will be located above the 500-year flood elevation. It is not known at this time whether elevation will be accomplished by the placement of fill or by structural methods. This will be determined by the ultimate developer of the site. Specifically, the lowest floor (including basement and utilities) of all new construction of non-residential structures will:

  (i) have the lowest floor (including basement) elevated to or above the base flood level; or

  (ii) together with attendant utility and sanitary facilities, be designed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capacity of resisting hydrostatic and hydrodynamic loads and affects of buoyancy.

River estuaries, such as the Thames River can be subject to two types of flooding: riverine runoff and coastal storm surges that raise tide levels along the shore to create wave run-up. The Thames River does not have significant freshwater runoff related flood

problems due to its large width and depth. The principal concern is thus coastal flood hazards.

It is noted that many of the factors listed for consideration in Statute Section 25-68d and the Flood Management Regulations for State Agencies Section 25-68h-1 apply mainly to riverine inland floodplains rather than coastal areas. Additionally, the Fort Trumbull area does not support significant inland or tidal wetlands, nor are there any riparian forests or rare or endangered species. The following points are noted, based upon Section 25-68d(b) of the Statutes and Floodplain Management Regulations:

1. The project does not obstruct flood flows as it is in a coastal area without a floodway.
2. The project does not affect floodwater storage or flood control functions of the floodplain.
3. It does not cause an adverse change in flood flow velocities.
4. There is no impact to upstream or downstream properties because it is a coastal area.
5. There are no stream channel encroachment lines.
6. The buildings will be raised above FEMA and DEP flood elevation requirements.
7. The area is sheltered from wave activity.
8. The utilities will be raised and/or flood-proofed.
9. The City of New London currently has a Department of Civil Preparedness that, in conjunction with the New London Fire and Police Departments, has the ability to organize timely and appropriate response to emergency situations, including floods. The City also has the ability to provide shelter through the aid of the New London Chapter of the American Red Cross. Flood monitoring and warning capabilities will be expanded for the Fort Trumbull MDP area following development and implementation of a project-specific emergency evacuation plan.
10. Coastal access is being provided via the public walkway.
11. The fill will be protected from erosion.
12. The site is not on or near a barrier beach.
13. Stormwater management practices will be used to protect and improve water quality.



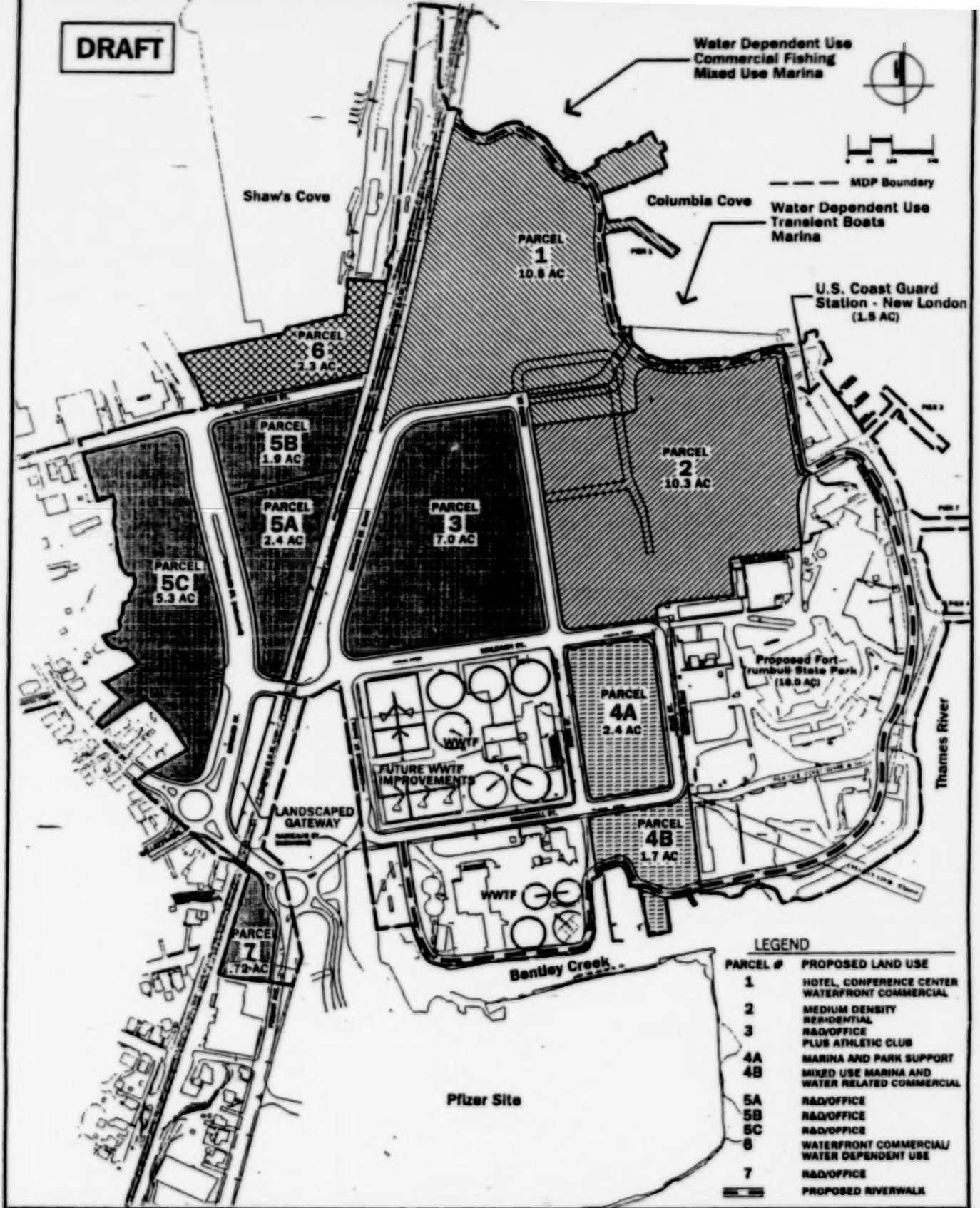
***Biological Environment Impacts*** – These impacts will be as described in *DEIE* Section 4.12.6.

***Physical Environment Impacts*** – These impacts will be as described in *DEIE* Section 4.13.

***Air Quality Impacts*** – These impacts will be as described *in DEIE* Section 4.14.

***Noise Impacts*** – These impacts will be as described in *DEIE* Section 4.15.

***Solid Waste and Hazardous Materials Impacts*** – These impacts will be as described in DEIE Section 4.16 (general discussion) and in DEIE Subsections 4.16.4 through 4.16.6. Placement of residential land uses will require that the residential criteria remediation standards be met.




PROPOSED LAND USES

5.1

# FORT TRUMBULL MUNICIPAL DEVELOPMENT PLAN

## CITY OF NEW LONDON, CONNECTICUT

Prepared for: New London Development Corporation



3/5

Supreme Court, U.S.
FILED
DEC 3 - 2004
CLERK

No. 04-108

# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

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# DRAFT ENVIRONMENTAL IMPACT EVALUATION

## FORT TRUMBULL
## MDP AREA
## New London, Connecticut

**November 10, 1998**

(Map Omitted In Printing)

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RKG Associates, Inc. – Economic Analysis/ Building Inventory
Bartram and Cochran MBIA – Economic Analysis
Harrall-Michalowski Associates, Inc. – Neighborhood Relocation Planning
HRP Associates, Inc. – Hazardous Waste and Contamination Assessment
Diversified Technology Consultants, Inc. – Civil Engineering
Wilbur Smith Associates – Traffic Engineering

(LOGO) MILONE & MACBROOM

## NOTE TO REVIEWERS
## November 10, 1998

Notice is hereby given by the State of Connecticut Department of Economic and Community Development that, pursuant to Section 22a-1(d) of the Connecticut Environmental Policy Act, a Copy of the Draft Environmental Impact Evaluation (DEIE) document for the Fort Trumbull Municipal Development Plan (MDP) Area, New London, Connecticut is available for review at the office of the New London Development Corporation, 165 State Street, Suite 313, New London, Connecticut. Copies of the DEIE are also available at the following locations:

New London City Clerk's Office
New London Public Library
New London Office of Development & Planning
New London Senior Center
Connecticut Department of Economic
and Community Development

This project will involve preparation and implementation of a Municipal Development Plan under Section 130, 132, and/or 588(1) of the Connecticut General Statutes. The project area is located along the west bank of the Thames River to the north of Greens Harbor and includes the U.S. Navy's closed Naval Undersea Warfare Center (NUWC), the regional Water Pollution Control Facility, and the adjacent Fort Trumbull area to the east of the Amtrak rail line, and portions of Howard Street, Hamilton Street, Shaw Street, and Harris Street to the west of the rail line.

The comment period for the DEIE will conclude on December 28, 1998. Written comments should be submitted to:



Attention: Peter Simmons, P.E.
Community Development Specialist
Connecticut Department of Economic
and Community Development
505 Hudson Street
Hartford, Connecticut 06106

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| ACOE | Army Corps of Engineers |
| B&C | Bartram and Cochran MBIA |
| BRAC | Base Realignment and Closure |
| CCMA | Connecticut Coastal Management Act |
| CDM | Camp Dresser & McKee, Inc. |
| CEPA | Connecticut Environmental Policy Act |
| CERCLA | Comprehensive Environmental Response Compensation and Liability Act |
| CGS | Connecticut General Statutes |
| CHC | Connecticut Historical Commission |
| CHFA | Connecticut Housing Finance Authority |
| CL&P | Connecticut Light & Power |
| CO | Carbon Monoxide |
| COG | Council of Governments |
| CTDEP | Connecticut Department of Environmental Protection |
| dBA | A-Weighted Decibel |
| DECD | Department of Economic and Community Development |
| DEP | Department of Environmental Protection |
| DOT | Department of Transportation |
| DPH | Department of Public Health |
| DPUC | Department of Public Utility Control |
| DSS | Decent, Safe, and Sanitary |
| DTC | Diversified Technology Consultants |
| EA | Environmental Assessment |
| EIE | Environmental Impact Evaluation |
| EPA | Environmental Protection Agency |
| ERA | Economics Research Associates |
| FEMA | Federal Emergency Management Agency |



| | |
|---|---|
| FHWA | Federal Highway Administration |
| gpd | gallons per day |
| HMA | Harrall-Michalewski Associates, Inc. |
| HUD | Department of Housing and Urban Development |
| ISO | Insurance Services Organization |
| kV | kilovolt |
| KVA | kilovolt ampere |
| $L_{dn}$ | Day/Night Sound Level |
| $L_{eq}$ | Equivalent Sound Level |
| LOS | Level of Service |
| LRA | Local Reuse Authority |
| MDP | Municipal Development Plan |
| $\mu g/m^3$ | microgram per cubic meter |
| MG | million gallons |
| MGD | million gallons per day |
| MMI | Milone & MacBroom, Inc. |
| NAAQS | National Ambient Air Quality Standards |
| NDDB | Natural Diversity Data Base |
| NESHAP | National Emission Standards for Hazardous Air Pollutants |
| NGVD | National Geodetic Vertical Datum |
| NLDC | New London Development Corporation |
| $NO_2$ | Nitrogen Dioxide |
| NPDES | National Pollutant Discharge Elimination System |
| NRCS | Natural Resources Conservation Service |
| NUWC | Naval Undersea Warfare Center |
| OLISP | Office of Long Island Sound Programs |
| OPM | Office of Policy and Management |
| Pb | Lead |
| PM | Particulate Matter |

| | |
|---|---|
| PO | Project Oceanology |
| ppb | parts per billion |
| ppm | parts per million |
| R&D | Research and Development |
| RCRA | Resource Conservation and Recovery Act |
| RKG | RKG Associates, Inc. |
| RSR | Remediation Standard Regulations |
| ROD | Record of Decision |
| SARA | Superfund Amendments and Reauthorization |
| SCS | Soil Conservation Service |
| SEAT | South East Area Transit |
| SF | Square Feet |
| SHPO | State Historic Preservation Officer |
| SNET | Southern New England Telephone |
| $SO_2$ | Sulfur Dioxide |
| STC | State Traffic Commission |
| TAMS | TAMS Consultants, Inc. |
| TCLP | Toxicity Characteristic Leaching Procedure |
| ULI | Urban Land Institute |
| URAA | Uniform Relocation Assistance Act |
| U.S. | United States |
| USDA | United States Department of Agriculture |
| USHUD | United States Department of Housing and Urban Development |
| UST | Underground Storage Tank |
| WPCF | Water Pollution Control Facility |
| WRT | Wallace Roberts and Todd |
| WSA | Wilbur Smith and Associates |
| WWPCA | Water and Water Pollution Control Authority |
| XRF | x-ray fluorescent |



# EXECUTIVE SUMMARY

## Introduction

### *Project Background*

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), is undertaking a planning project adjacent to the Thames River in New London, Connecticut. Plans for the project area are being prepared in accordance with a Municipal Development Planning process under Section 130, 132, and/or 588(1) of the Connecticut General Statutes. The planning process may result in a recommendation to undertake redevelopment of all or part of the planning area. Because state funds are involved, this Environmental Impact Evaluation (EIE) is being prepared under the Connecticut Environmental Policy Act (CEPA) in conjunction with the Municipal Development Plan (MDP).

The population in New London has been declining since 1960 and has not been lower since the 1930's. The unemployment rate in New London as of June 1998 was 7.6%, as compared to the nearby urban municipalities of Norwich at 6.3% and Groton at 4.7%, and statewide unemployment of 4.0%. The end of the "cold war" and reduction in defense contracts has had a significant local economic impact.

The project area is located in the southeast part of New London, encompassing approximately 90 acres of primarily residential and commercial areas. The project area includes the U.S. Navy's closed Naval Undersea Warfare Center (NUWC) along the Thames River, the regional Water Pollution Control Facility (WPCF), and the adjacent Fort Trumbull area, including all or portions of Howard,

Hamilton, Shaw, Harris, Trumbull, Walbach, Nameaug, Smith, Chelsea, Goshen, and East Streets, and Pequot Avenue. For discussion purposes, the project area, which is generally referred to as the Fort Trumbull area, has been segmented into several smaller areas as shown on Figure 1.1-4 and on the front cover of this document. These are referenced as the Gateway Area, Fort Area, NUWC, and Lower Pequot Avenue Area.

The Fort Trumbull area has been targeted for evaluation under the municipal development planning process for numerous reasons. The majority of structures in the area are in relatively poor condition, exhibit a high amount of functional obsolescence, and have limited market potential. Vacancy rates are notably high (82% vacancy of non-residential buildings and 20% vacancy of residential units). Tax revenues in the MDP area (±$325,000) are quite low considering it comprises an area of approximately 90 acres.

An 800,000 square foot clinical research development facility proposed by Pfizer, Inc. (to be located immediately to the south and outside of the MDP area) and reuse of a portion of the NUWC site for development of a state park creates an opportunity for improvement of the Fort Trumbull area consistent with these planned projects. This also presents opportunities to stimulate the local economy, improve waterfront access along the Thames River, make aesthetic and visual improvements, and complement the downtown revitalization efforts.

### *Planning Process*

In June of 1998, the Connecticut Department of Economic and Community Development issued an Environmental



Assessment (EA) for the Fort Trumbull MDP area which concluded that the project could potentially have a significant effect on the environment. Several major areas of concern were identified in the EA, including the possible acquisition of residential properties and relocation of residents; adequacy of the existing water supply; congestion and traffic safety issues; historic importance and archaeological significance of the project area; flooding; and stormwater management. As a result of DECD's finding, the subject Environmental Impact Evaluation has been undertaken.

The EIE process began in late June 1998. Numerous consultations were engaged to assist in specific phases of the work. Preliminary findings were discussed at numerous neighborhood meetings. Input and review comments are now being solicited from the community and interested public on the Draft EIE. Input has also been solicited from local, state and federal agencies.

Upon completion of a 45 day public comment period of the DEIE (to be concluded on December 28, 1998), the Connecticut Department of Economic and Community Development must forward the following information to the Office of Policy and Management, for determination of the adequacy of the evaluation:

(1) all public notice documentation;

(2) a brief summary of the public hearing, if one is held;

(3) comments received from all interested parties;

(4) the agency decision relative to proceeding with the proposed action; and

(5) a discussion of the intentions for initiation of actions for minimizing impacts.

This constitutes the Record of Decision.

The CEPA process concludes with the review of the EIE and Record of Decision by OPM and their determination of whether or not regulatory requirements have been satisfied. The final EIE is the basis for the implementation of the project. A municipal Development Plan is then created consistent with the findings of the CEPA process. A mandatory public hearing is held upon completion of the MDP. Procedures for the adoption of the MDP are set forth in Section 32-224(c) of the Connecticut General Statutes. This process must include a finding by the OPM that the plan is not inimical to the overall goals and objectives of the state. Upon obtaining such a finding, the plan would then be legally adopted by the city and approved by DECD.

### *Project Goals*

The project goals for the Fort Trumbull area have been defined as follows:

1. To create a world-class development that will complement the undertakings of Pfizer, Inc. and set a standard for development in New London.
2. To create an economic asset for the City of New London that will create jobs, generate tax revenue, and result in spin-off economic activity.
3. To maximize public access to the waterfront and, in doing so, encourage uses which are water dependent or which will be enhanced by water access and views.
4. To develop a project which will help build momentum for the revitalization of downtown New London and the balance of the city to the benefit of the city's residents and visitors.



### Alternatives Evaluated

A variety of potential uses have been evaluated for the Fort Trumbull area. However, a preferred alternative has not yet been selected. It is anticipated that the ultimate selected preferred plan may be a hybrid of several of the alternatives evaluated herein. Major project components are highlighted below:

- Approximately 16 acres of the land currently occupied by the U.S. Naval Undersea Warfare Center will be transferred to the Department of Environmental Protection to establish the Fort Trumbull State Park, providing open space for passive and active recreation as well as preservation of this historic site as a cultural resource. One small parcel of the NUWC site will remain in the possession of the U.S. Coast Guard and a second will remain in the possession of the U.S. Navy for their continued use. The remainder of the property is anticipated to be improved and developed, either through public sale or through another form of conveyance.
- Upgrades to the existing regional Water Pollution Control Facility are planned to reduce odors, improve aesthetics, and improve the quality of treated wastewater.

- Stormwater quality will be improved via the installation of an updated stormwater collection and treatment system.
- Roadway and traffic improvements are planned to accommodate increased projected traffic in the area and to overcome existing deficiencies.
- The following land use alternatives are under consideration:

  Alternative No. 1 – No Action

  Alternative No. 2 – Recreation/Tourism

  Alternative No. 3 – Residential/Commercial

  Alternative No. 4 – Business Campus

  Alternative No. 5 – Mixed Use 1

  Alternative No. 6 – Mixed Use 2

Various project elements are common to all of the alternatives except the no action alternative. They include the redevelopment of the NUWC site as a state historic park, a continuous riverfront walkway, water dependent uses at Columbia Cove, Shaw's Cove, and along Bentley Creek, and research and development land use west of Pequot Avenue.

A brief description of the six alternatives follows.

***Alternative 1 – No Action*** – One of the requirements of CEPA is to evaluate a no action alternative. In this particular instance, no action is somewhat unusual in that other activities and plans would likely proceed even if there were no MDP action.

Under the no action scenario, it is assumed that the Navy would proceed with disposition of the NUWC property as



planned prior to the introduction of the MDP process, in accordance with the approved Local Reuse Authority's (LRA) preferred plan. The LRA's preferred plan indicated disposition of the NUWC property through conveyance of the southern portion to the Department of Environmental Protection for future development of a state park, public benefit conveyance of a portion of the property near Columbia Cove for maritime uses, and public sale of the remaining area.

***Alternative 2 – Recreation/Tourism*** – This alternative complements the proposed Fort Trumbull State Park, concentrating recreational, educational, and cultural uses east of the railroad in the Fort Area and at NUWC. Office and retail uses are proposed west of the railroad in the Gateway Area.

***Alternative 3 – Residential/Commercial*** – This alternative highlights a residential component throughout the MDP area, intermixed with the state park and open space recreational areas, and minor amounts of office and retail uses proposed in the Gateway Area.

***Alternative 4 – Business Campus*** – This alternative focuses the majority of land use in the form of office campus and a supporting hotel/conference center, with small amounts of retail and residential uses in the Gateway Area.

***Alternatives 5 & 6 – Mixed Use 1 & 2*** – These two mixed use alternatives incorporate recreational, residential, commercial office, retail, and hotel/conference uses in different proportions and arrangements.

**Potential Impacts**

The following presents brief summaries of potential impacts that would be anticipated as a result of implementation of this project.

***Land Use and Zoning Impacts*** – The majority of the Fort Trumbull MDP area has been designated in the Conservation and Development Policies Plan for Connecticut as an Urban Area Regional Center. Regional Centers encompass land areas containing traditional core commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance. State policy seeks to concentrate economic development to the extent possible in major urban centers, promoting infill development and intensification where appropriate. It is also intended to promote stability of urban communities and to support staged, orderly growth of urban development. Regional and local policies and plans are reflective of the regional center designation. This is also reflected in local zoning ordinances of the Fort Trumbull area.

Land use and zoning impacts vary among the six land use alternatives. Alternatives 2 (Recreation/Tourism) and 3 (Residential/Commercial) do not generally meet the goals and objectives of local, regional, and statewide land use policies, whereas Alternatives 1 (No Action), 4 (Business Campus), 5 (Mixed Use 1), and 6 (Mixed Use 2) do.

***Socioeconomic Impacts*** – All six of the land use alternatives would have a positive impact on job creation and generation of tax revenues. These are summarized in Table ES-1



***Neighborhood/Housing Impacts*** – Varying degrees of neighborhood relocation would be required to implement Alternatives 2, 4, 5, and 6. Extensive mitigative measures have been proposed to offset these impacts. In the "no action" alternative there would be no relocation, since all of the land use changes would occur at the NUWC property. In Alternatives 2 (Recreation/Tourism), 4 (Business Campus), and 6 (Mixed Use 2), most or all of the existing residents and businesses would be relocated. Alternatives 3 (Residential/Commercial) and 5 (Mixed Use 1), have the potential to retain some, but not all, of the existing residents and businesses.

***Aesthetic/Visual Resource Impacts*** – All of the Alternatives would result in aesthetic and visual improvements. Alternative 1 would only involve the NUWC property, and therefore improvements would be less widespread. Implementation of Alternatives 2 through 6 would result in aesthetic improvements to the Water Pollution Control Facility, creation of a waterfront riverwalk, landscaping improvements, and demolition of decrepit buildings.

**TABLE ES-1**
**Summary of Socioeconomic Impacts**

| Land Use Category | Alt. 1 No Action | Alt. 2 Recreation/ Tourism | Alt. 3 Residential/ Commercial | Alt. 4 Business Campus | Alt. 5 Mixed Use 1 | Alt. 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| Direct Employment –Low | 1,080 | 506 | 335 | 1,332 | 574 | 591 |
| Direct Employment – High | 1,779 | 1,019 | 710 | 2,289 | 1,099 | 1,124 |
| Indirect Job Creation – Low | 802 | 337 | 220 | 949 | 385 | 394 |
| Indirect Job Creation – High | 1,321 | 659 | 452 | 1,610 | 720 | 734 |
| Construction Costs – Low | $3,200,000 | 28,231,500 | 40,131,680 | 56,752,040 | 43,713,320 | 48,943,320 |
| Construction Costs – High | $12,000,000 | 58,098,330 | 64,249,500 | 104,202,900 | 72,893,250 | 79,402,750 |
| Construction Wages – Low | $1,440,000 | 12,704,175 | 18,059,256 | 25,538,428 | 19,670,994 | 22,024,494 |
| Construction Wages – High | $5,400,000 | 26,144,249 | 28,912,275 | 46,891,305 | 32,801,963 | 35,731,238 |
| Construction Employment – Low | 38 | 331 | 470 | 665 | 512 | 574 |
| Construction Employment – High | 141 | 681 | 753 | 1,222 | 854 | 931 |
| Tax Revenues – Low | $61,152 | 375,704 | 603,116 | 931,651 | 671,562 | 771,507 |
| Tax Revenues – High | $229,320 | 946,459 | 1,064,008 | 1,838,437 | 1,229,190 | 1,353,587 |

Source: Marshall Valuation Service and RKG Associates, Inc.

***Public Utilities and Services Impacts*** – Utility improvements would be necessary under all of the alternatives. This work is anticipated to be conducted within existing or future roadway right-of-ways and not impact adjacent land uses. Under all land use alternatives, the existing storm drainage system will need to be modified to accommodate new roadway alignments and improvements and to correct deficiencies in the existing system. The storm drainage systems will incorporate stormwater quality renovation elements and/or infiltration systems to meet stormwater general permit requirements.

***Energy Use and Conservation*** – There is no known data readily available on historic energy use in the Fort Trumbull MDP area and guidelines have not been prepared for future energy use. In general, it is anticipated that new buildings will be more energy efficient than the older existing buildings, and will need to conform to or exceed current standards.

High electrical-demand uses are not proposed under any of the identified land use alternatives. However, it is anticipated that individual users will take advantage of energy-saving measures and available incentives. Additionally, future development projects will be designed in accordance with applicable state and local building codes with respect to electrical components, lighting, and HVAC.

***Cultural Resources Impacts*** – Potential impacts to cultural resources would result under all of the land use alternatives. However, extensive mitigation measures have been proposed to offset these impacts. The Connecticut Historic Commission has reviewed and agreed with the proposed course of action.

***Traffic and Parking Impacts*** – All of the land use Alternatives will result in additional traffic in the Fort Trumbull area. The "no action" alternative (Alternative 1) results in the highest peak hour traffic. Under Alternatives 2 through 6, mitigation measures have been proposed to offset these impacts.

***Water Resource Impacts*** – Minimal water resource impacts are anticipated under any of the alternatives. Improvement to stormwater management is expected in any case.

***Flood Hazard Impacts*** – Much of the Fort Trumbull MDP area is located in the flood hazard zone. Redevelopment of a portion or all of the area would present an opportunity to floodproof buildings or construct new buildings in accordance with FEMA and DEP standards. An evacuation plan would be developed under Alternatives 2 through 6, as well as roadway modifications to improve ingress and egress in the area.

***Physical Environment Impacts*** – Minimal physical impacts are anticipated under any of the alternatives.

***Air Quality Impacts*** – As there will be additional traffic generated as a result of implementation of any of the identified alternatives (including the no action alternative), localized air quality impacts will also result. However, these are expected to be minimal and will not be regionally significant. It should be noted that the "no action" alternative (i.e. no MDP action) would result in the highest peak hour traffic, with no associated roadway improvement mitigation.

***Noise Impacts*** – There will be increases in off-site traffic levels, particularly along Howard Street and Bank Street



as a result of the planned Pfizer facility as well as proposed uses within the Fort Trumbull MDP area. It is anticipated that increased traffic will create noise that will be consistent with an urban transportation hub. However, the geometric and lane improvements at intersections will minimize changes in noise from motor vehicles. Electrification of the Amtrak rail line is expected to lessen rail operation related noise.

***Solid Waste and Hazardous Materials Impacts*** – The need for and extent of site remediation will be governed by the relevant statutes and regulations affecting such activities. Implementation of any of the alternatives would result in the clean-up of contaminated soil, waste containers, and aging material storage tanks.

### Cumulative Impacts

Positive cumulative impacts are anticipated as a result of implementation of this project with respect to economic growth through job and tax revenue creation, parks and recreational facilities, public access, wetland restoration, aesthetics, site remediation, improved stormwater management, and additional flood protection. Negative impacts are expected with respect to traffic, air quality, noise, cultural resources, neighborhood relocation, and possibly marine water resources.

### Unavoidable Impacts

Unavoidable impacts caused by demolition and construction are anticipated with respect to air and noise quality, as well as short-term increased equipment traffic and use.

Unavoidable long term impacts are expected in the areas of traffic, air quality, noise, and cultural resources.

### Irreversible and Irretrievable Commitment of Resources

The implementation of any of the six alternatives would consume non-renewable resources during the construction and implementation (i.e., construction supplies, fuel, etc). Since these resources can not be reused, they are considered to be irreversibly and irretrievably committed. Similarly, disposal of demolition material at a landfill and/or solid waste disposal facility will take up capacity in such facilities which is irreversible and irretrievable.

### Mitigation Opportunities

Mitigation opportunities have been evaluated for each of the identified resources. The areas that have been evaluated in the greatest detail and for which the greatest number measures have been proposed are those which have the greatest potential to have impacts. These include traffic and transportation, neighborhood relocation, sensitive cultural resources, and flood hazard areas.

## 1.0 PURPOSE AND NEED

### 1.1 Introduction

#### *1.1.1 Project Background*

The New London Development Corporation (NLDC), in association with the Connecticut Department of Economic and Community Development (DECD), is undertaking a planning project adjacent to the Thames River in New London, Connecticut. Figure 1.1-1 is a location plan of the City of New London and



New London County. Figure 1.1-2 shows the project area in relation to downtown New London. The project area includes the U.S. Navy's closed Naval Undersea Warfare Center (NUWC), the regional Water Pollution Control Facility (WPCF), and the adjacent Fort Trumbull area as shown in Figure 1.1-3. The project area is also adjacent to the Shaw's Cove Redevelopment Area.

NLDC is a nonprofit, private economic development organization originally formed in 1978. The corporation was established with the authority to raise and borrow funds, manage projects, acquire and sell properties, and engage in any activity related to the progress and general welfare of the community.

Plans for the project area will be prepared in accordance with a Municipal Development Planning process under Section 130, 132, and/or 588(1) of the Connecticut General Statutes. The planning process may result in a recommendation to undertake redevelopment of all or part of the planning area. This Environmental Impact Evaluation (EIE) is being prepared under the Connecticut Environmental Policy Act (CEPA) in conjunction with the Municipal Development Plan (MDP). An Environmental Impact Statement is also being prepared for the disposition of the NUWC property, but has not yet been issued by the Department of the Navy.

The driving force behind this project is the City of New London's desire to revitalize its economy by focusing on the potential offered in the Thames River corridor. The need to stimulate the local economy is heightened by the closing of the NUWC facility in 1996. As many as 1,500 people (not including contractors) were once employed at this complex at its peak in the late 1980's (personal communication, John Templeton, September 30, 1998).

A key catalyst for development of this area is the proposed Pfizer, Inc. global research facility to be located immediately to the south of the MDP boundary. New London Mills previously occupied the site on which Pfizer has proposed its development. The project will involve a private investment of approximately $150 million and is designed to accommodate approximately 2,000 employees.

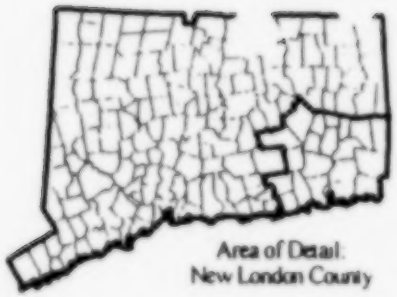
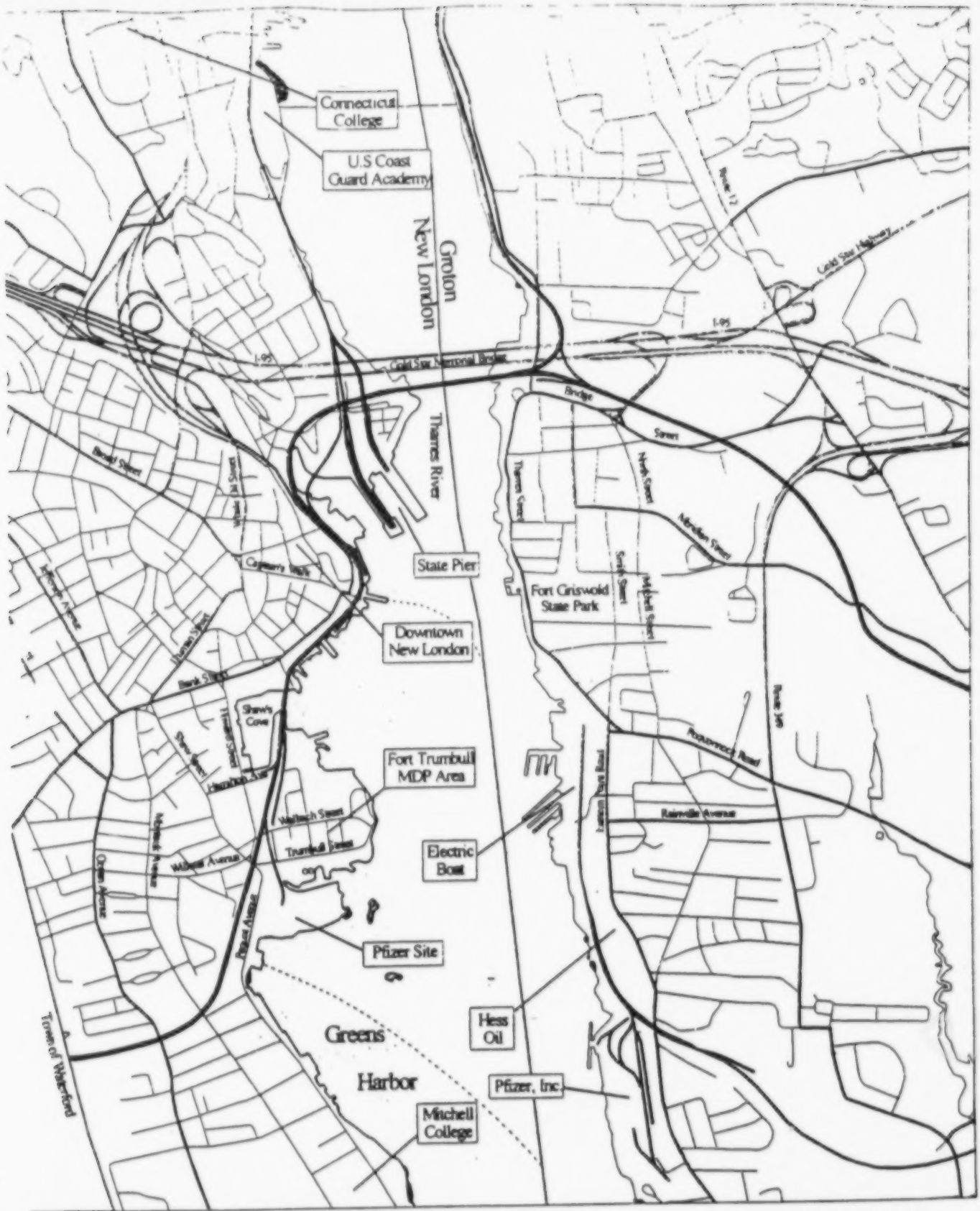


**Figure 1.1-1**
**Location Map - City of New London**

Fort Trumbull MDP Area - New London, Connecticut
Draft Environmental Impact Evaluation - November 1998




nbull MDP Area - New London, Connecticut
Environmental Impact Evaluation - November 1998

. GIS coverages developed by Milone & MacBroom, and HMA, Inc. Sources include Connecticut DEP, of New London, FEMA, and US Navy. Intended for planning - not for design use.

N
W E
S

Figure 1.1-2
Project Location Map

1000 0 1000 2000 Feet



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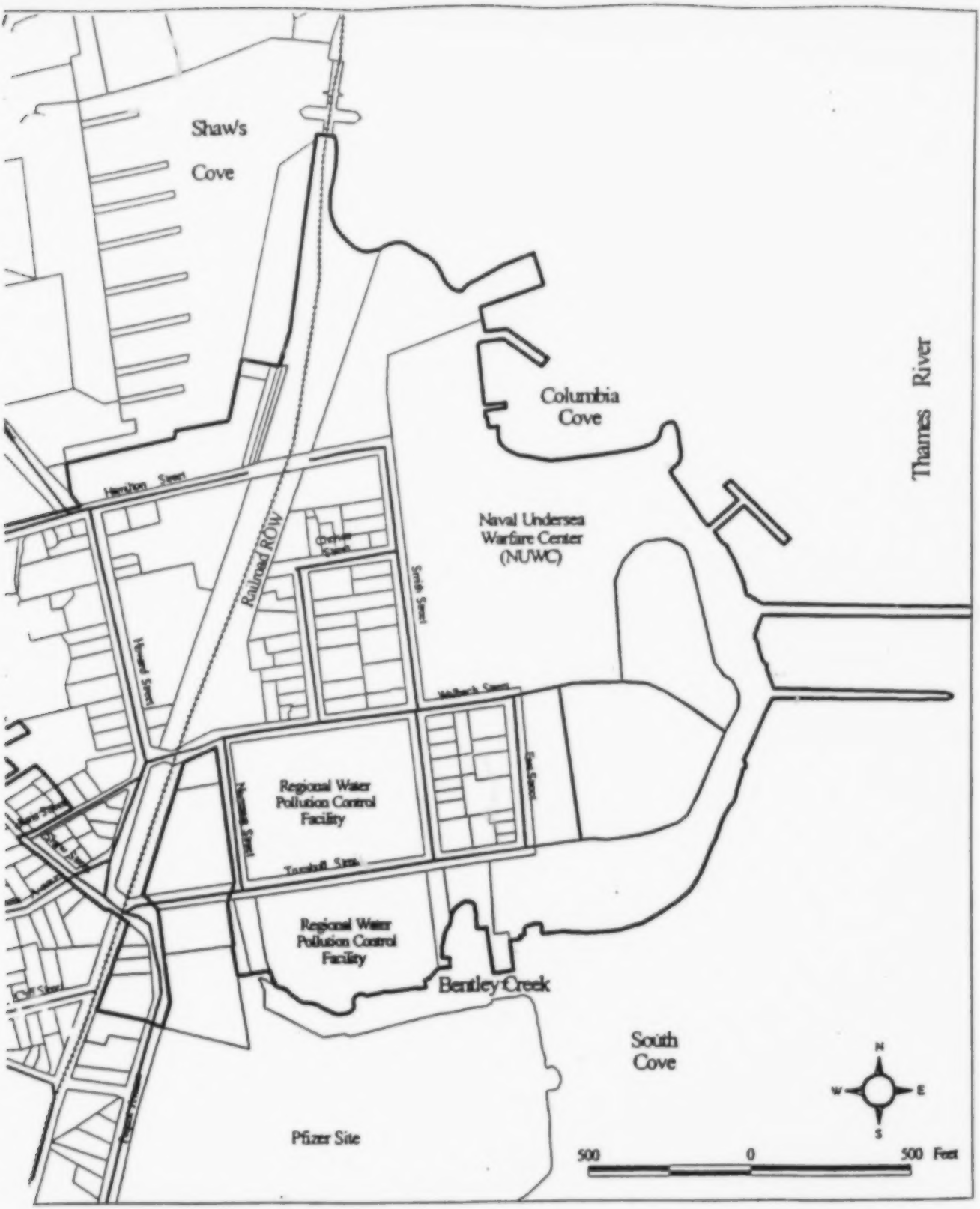



nbull MDP Area - New London, Connecticut
Environmental Impact Evaluation - November 1998

GIS coverages developed by Milone & MacBroom,
nd HMA, Inc. Sources include Connecticut DEP,
f New London, FEMA, and US Navy. Intended for planning
not for design use.

# Figure 1.1-3
# Project Area

MDP Project Border

In order to induce private investment into the Fort Trumbull area, the State of Connecticut and the City of New London have committed to invest over $64 million. Major categories of public investment include $20 million for the creation of Fort Trumbull State Park on a portion of the NUWC property; $7 million for the upgrade of the regional sewage treatment facility which is located in the Fort Trumbull area; $9 million for environmental remediation of sites; and $24 million for the preparation of a comprehensive plan for the area, for property acquisition, infrastructure development, and other activities to support implementation of the plan. An additional $10.5 million will be available for relocation assistance. Of this amount, $10 million will be in the form of Connecticut Housing Finance Authority (CHFA) low rate financing loan money. Two hundred and fifty thousand dollars will be available in the form of down payment assistance to residents, and an additional $250,000 will be available through Small Business Assistance Program relocation funding.

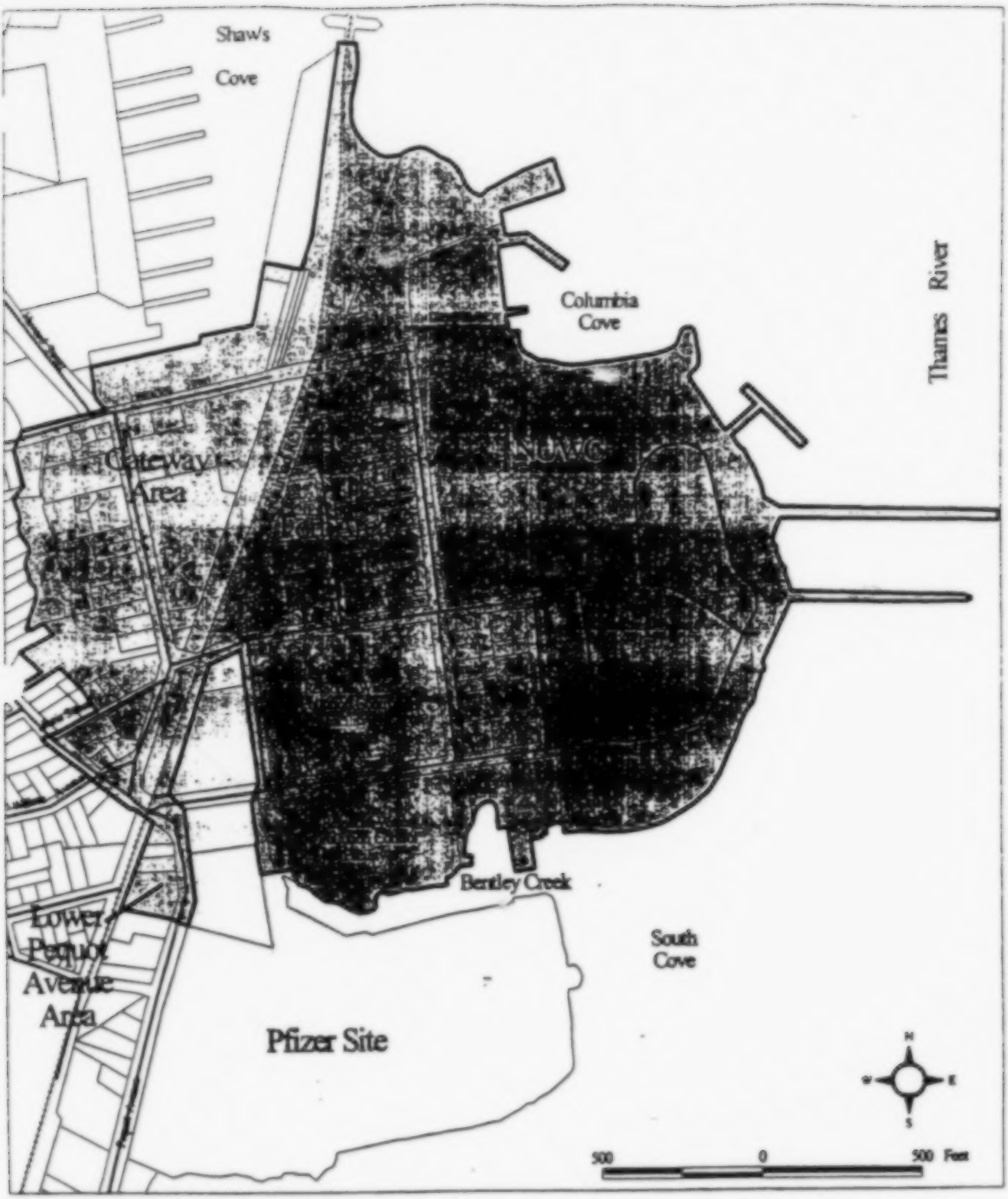
### *1.1.2 Project Location*

The City of New London is located in southeastern Connecticut. It is a waterfront community, along the tidal estuary of the Thames River and Long Island Sound. New London is only 5.79 square miles in size, making it geometrically the second smallest municipality in the State of Connecticut. The estimated 1998 population is 23,860 people based on data published by Claritas, Inc. (State of Connecticut DECD population estimates for 1995 are somewhat higher at 26,920 people.) The community supports several institutions, including Connecticut College, Mitchell College, and the U.S. Coast Guard Academy. Nearly 54% of the total land area of New London is occupied by

nonprofit institutions which are exempt from local property taxes.

The project area is approximately 90 acres in size and includes a residential and commercial area of approximately 115 parcels. The NUWC site alone is 32 acres. For discussion purposes, the MDP area has been segmented into several smaller areas as described below. Figure 1.1-4 delineates the various project planning areas. A brief description of each follows:

*Gateway Area* – The Gateway Area-is envisioned to be the primary entrance to the MDP area and encompasses the land area to the west of the Amtrak railway. It includes properties on both sides of Howard Street from its intersection with Hamilton Street to the junction with Shaw Street and Trumbull Street. The Gateway Area also includes properties on Hamilton Street between Howard Street and the railroad tracks, as well as properties along Harris Street to the south. This area is currently occupied primarily by commercial properties and parking, intermixed with single- and multi-family residential dwellings, and vacant properties. It occupies approximately 21 acres.




Fort Trumbull MDP Area - New London, Connecticut
aft Environmental Impact Evaluation - November 1998

Note: GIS coverages developed by Milone & MacBroom, Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, FEMA, and US Navy. Intended for planning only - not for design use.

# Figure 1.1- 4
# Project Planning Areas

MDP Project Border



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*Lower Pequot Avenue Area* – The Lower Pequot Avenue Area is a small portion of the MDP area, approximately 1.3 acres in size. It is limited to the four parcels located just south of the junction of Shaw and Trumbull Streets, between the railroad tracks to the west, and Pequot Avenue to the east. This area includes two vacant residential properties, one vacant lot, and one industrial use parcel.

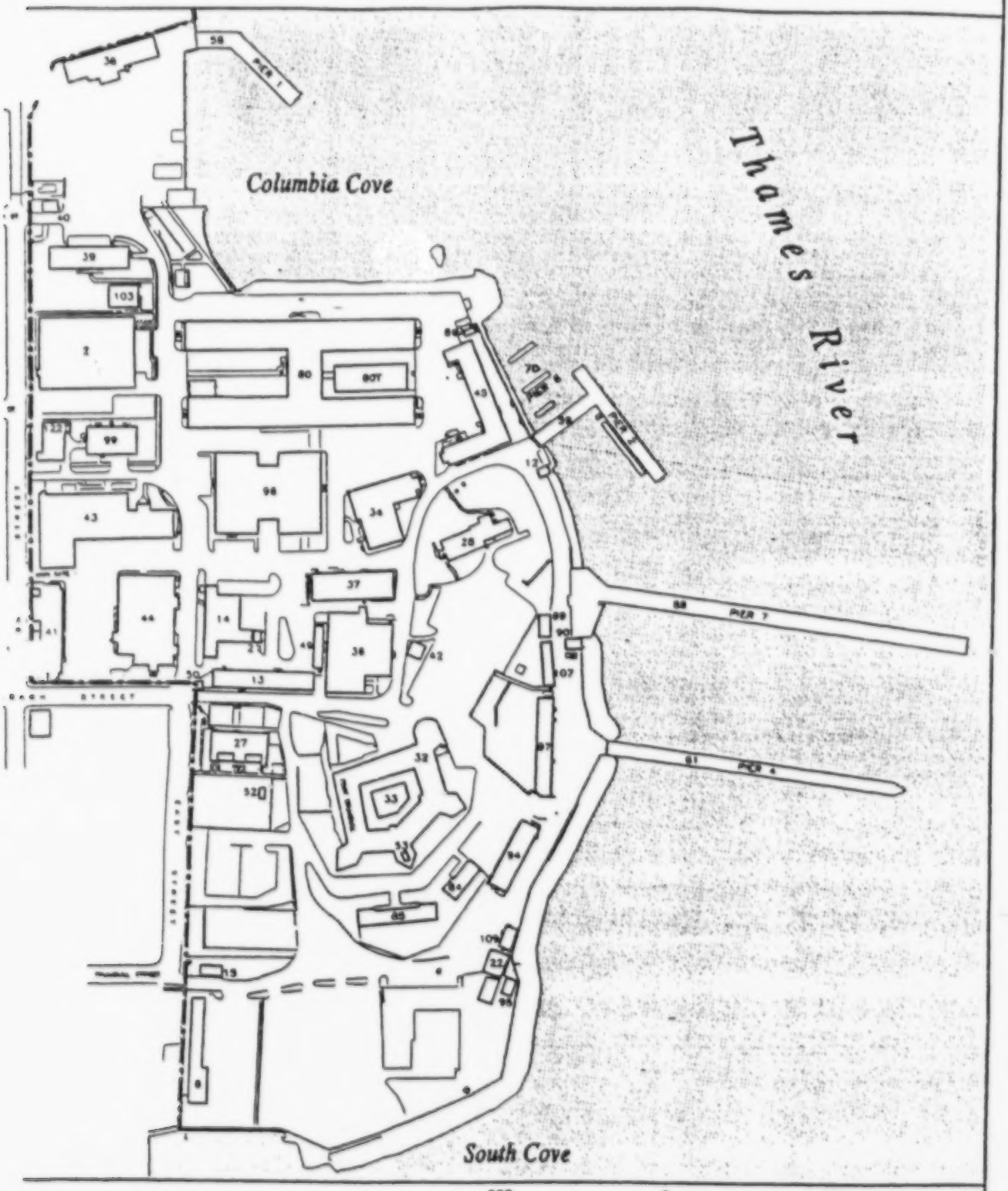
*Fort Area* – The Fort Area includes all of the property to the east of the Amtrak railroad within the MDP area, exclusive of NUWC. This includes the Amtrak property immediately adjacent to the railroad tracks, as well as properties along Trumbull Street, Nameaug Street, East Street, Walbach Street, Smith Street, Goshen Street, and Chelsea Street. A prominent physical feature of this area is the regional Water Pollution Control Facility (WPCF), which occupies both sides of Trumbull Street from Nameaug Street to Smith Street, comprising approximately 10 acres. Other uses include several residential areas, undeveloped parcels, and a minor amount of commercial and industrial uses. The total land of the Fort Area is approximately 35 acres.

*Naval Undersea Warfare Center (NUWC)* – Figure 1.1-5 shows the NUWC property and building designations. Building references by name and number are listed in Appendix C. The NUWC property encompasses approximately 32 acres along the Thames River opposite of Smith Street and East Street. The Navy base was closed in 1996 when its staff and operations were transferred to Newport, Rhode Island. The current plan for the property as adopted by the Local Reuse Authority (LRA) contemplates the disposition of 16 acres to the Connecticut Department of Environmental Protection (DEP) for the establishment of the Fort Trumbull State Park; 2.7 acres under consideration for maritime conveyance; 12 acres

for possible future development; and several smaller parcels, including a 1.5-acre parcel and a 0.1-acre parcel, to be retained by the U.S. Coast Guard and the Navy, respectively. The reuse plan for the property is being reevaluated as part of the MDP process. The recommendation of the MDP process will be presented to the LRA for its consideration.

*Pfizer Site* – The Pfizer site is located on the 24-acre property which was historically occupied by New London Mills, a manufacturer of linoleum. The New London Mills complex was dismantled in the late 1980's and early 1990's. Although the Pfizer site is not part of the Municipal Development Plan (MDP) and is not subject to the CEPA process, this facility is a neighboring property which, when developed, will substantially contribute to the city's economic development objectives. It is being considered in the EIE, primarily due to the cumulative nature of activities in the area.

# NUWC New London Site Plan




Mapping provided by TAMS Consultants, Inc.

FIGURE 1.1-5

### *1.1.3 Project Chronology*

The following is a chronology of major activities, events, and milestones to date relating to the Fort Trumbull MDP area:

- 1997 – New London Development Corporation (NLDC) reforms to assist the City of New London in its economic development process.
- January 1998 – The State Bond Commission authorizes $5.35 million in bonds to support planning activities and property acquisition to be undertaken by NLDC in support of the project and $10 million as the first installment toward the investment in the creation of Fort Trumbull State Park.
- February 1998 – Pfizer Inc. announces its intention to develop a facility for clinical trials on the former New London Mills site.
- April 1998 – NLDC hires an executive director, its first employee. The New London City Council gives initial designation to NLDC to prepare a Municipal Development Plan for the Fort Trumbull area.
- April 1998 – NLDC holds the first in a series of informal, neighborhood meetings to include and incorporate public comment on the MDP process. The City Council also creates a committee of six people (two from the Local Reuse Authority (LRA), two from the NLDC, and two from the State of Connecticut) to evaluate the current LRA plan for the disposition of the NUWC property and to consider asking for a delay in the public sale of a portion of this property.
- May 1998 – The New London City Council gives authority to NLDC to prepare plans for the Fort

Trumbull area under any of three state statutes (Section 130, 132, and/or 588(1)) and establishes the boundaries of the planning area. The State Bond Commission approves the second installment of $2.9 million to fund the preparation of a Municipal Development Plan for the area and to fund property acquisition activities. NLDC initiates requests for qualifications from consultants to prepare various aspects of the Municipal Development Plan and Environmental Impact Evaluation under CEPA.

- May 1998 – A consultant is hired by the Water Pollution Control Authority to conduct a study of the possible upgrades to the regional WPCF.
- June 1998 – The City of New London authorizes the conveyance of the former New London Mills site to Pfizer, with the contingency that the State of Connecticut commits to resolve or guarantee resolution of all liens on the property. A total of $6.1 million in additional state bonding authority is approved to support the project.
- June 1998 – The Local Reuse Authority formally requests of the Navy that public sale of properties on the NUWC site be delayed until February 28, 1999 to allow time for the preparation of a comprehensive plan for the Fort Trumbull area through the Municipal Development Plan process. This request is approved by the Navy.
- June 1998 – The final Environmental Assessment under the Connecticut Environmental Protection Act is issued by the Department of Economic and Community Development, with the recommendation to proceed with a full Environmental Impact Evaluation.



- July 1998 – Planning consulting team is hired for the CEPA process and Municipal Development Plan Preparation.

## 1.2 The CEPA Process

### *1.2.1 Overview of Regulation*

The Connecticut Environmental Policy Act (CEPA), established in Sections 22a-1 through 22a-1h of the Connecticut General Statutes, recognizes the complex relationship between the natural environment and human actions, including population growth, high-density urbanization, industrial expansion, natural and cultural resources, and technological advances. The Regulations of Connecticut State Agencies (Sections 22a-1 through 22a-1a-12) outline a process whereby, through coordination with other state, local, regional and federal governments, as well as public and private entities, a sponsoring state agency can evaluate and minimize the projected impacts of a project to the resources of the state.

State funds will be utilized in the Fort Trumbull MDP area, thus triggering the CEPA process. The sponsoring state agency is the Connecticut Department of Economic and Community Development (DECD). NLDC is the implementing agency.

### *1.2.2 Determination of Environmental Significance*

A major function of the CEPA process is the determination of whether a project will have a significant effect. Significant effect is defined as substantial adverse impact on the environment. Agencies preparing such CEPA documents must consider the following two factors: (1) direct and indirect effects and, (2) cumulative impacts.

### *Environmental Assessment*

The first phase of the CEPA process is development of an Environmental Assessment (EA). In this work task, existing data and information are evaluated in a relatively fast track process to assess whether a project may potentially cause a significant environmental impact. In some cases, a determination is made that additional site specific and more intensive study is necessary to make that determination. In other, less complex cases, a Finding of No Significant Impact (FONSI) is issued at the conclusion of the EA process.

In July 1998, the Connecticut Department of Economic and Community Development issued an Environmental Assessment for the Fort Trumbull MDP area and determined that the project could potentially have a significant effect on the environment. A copy of this is included as Appendix A. Several major areas of concern were identified in the EA, including the possible acquisition of residential properties and relocation of residents; adequacy of the existing water supply; congestion and traffic safety issues; historic importance and archaeological significance of the project area; flooding; and stormwater management. As a result of DECD's finding, the subject Environmental Impact Evaluation has been conducted.

### *Environmental Impact Evaluations*

The Environmental Impact Evaluation (EIE) process is intended to be an early planning process during which options are discussed and the impact of each alternative action is compared. Significant issues are identified and analyzed in detail, allowing participation of interested and/or affected agencies and persons.



Public input and participation is a major component of the CEPA process. Early scoping and information exchange is essential. Section 6.0 of this document contains a detailed accounting of the scoping, consultation, and coordination process that has taken place to date. The overall process for public participation is summarized as follows:

- A period of no less than forty-five (45) days must be provided for notice, distribution, and review of the Draft Environmental Impact Evaluation by any interested parties.
- Upon receiving comment, the sponsoring agency must review comments, perform any additional environmental study and analysis, or amend the evaluation as appropriate. It is the sponsoring agency's responsibility to respond to all substantive comments received.
- A public hearing may be held, if requested in accordance with state statutes, regulations, and Section 22a-1a-11 of the regulations. A period of no less than thirty (30) days following the date of availability of the EIE must be provided before such public hearings.
- The sponsoring agency (in this case the Department of Economic and Community Development) must forward the following information to the Office of Policy and Management, for determination of the adequacy of the evaluation: (1) all public notice documentation; (2) a brief summary of the public hearing, if one is held, (3) comments received from all interested parties; (4) the agency decision relative to proceeding with the proposed action; and (5) a discussion of the intentions for initiation of actions for minimizing impacts. This constitutes the Record of Decision

(final EIE document and the measures for mitigation identified therein).

- The CEPA process concludes with the review of the EIE and Record of Decision by OPM and their determination of whether or not regulatory requirements have been satisfied. The final EIE is the basis for the implementation of the project.
- A Municipal Development Plan is then created consistent with the findings of the CEPA process. A mandatory public hearing is held upon completion of the MDP. Procedures for the adoption of the MDP are set forth in Section 32-224(c) of the Connecticut General Statutes. This process must include a finding by the OPM that the plan is not inimical to the overall goals and objectives of the state. Upon obtaining such a finding, the plan would then be legally adopted by the city and approved by DECD.

## 1.3 Project Goals

To date, input has been solicited from local, state and federal agencies. At the local level, this has included various departments and agencies within the City of New London, educational institutions located within the city, the business community, and the New London residential community. At the state level, the Office of the Governor, the Department of Economic and Community Development (DECD), the Connecticut Department of Environmental Protection (DEP), the Connecticut Historical Commission (CHC), the Office of Policy and Management, (OPM), and the Department of Transportation (DOT) have been included. At the federal level, the U.S. Navy and their interests at the NUWC property, the U.S. Coast Guard, and the State Historic Preservation Officer (SHPO) have been



represented. This process creates a vehicle for community input and involvement.

The goals for the Fort Trumbull area have been identified by the committee of six as follows:

1. To create a world-class development that will complement the undertakings of Pfizer, Inc. and set a standard for development in New London.
2. To create an economic asset for the City of New London that will create jobs, generate tax revenue, and result in spin-off economic activity.
3. To maximize public access to the waterfront and, in doing so, encourage uses which are water dependent or which will be enhanced by water access and views.
4. To develop a project which will help build momentum for the revitalization of downtown New London and the balance of the city to the benefit of the city's residents and visitors.

These goals have been carried through the planning and evaluation of alternatives.

## 1.4 Proposed Action

A variety of potential uses have been evaluated for the Fort Trumbull area. However, a preferred alternative has not yet been selected. It is anticipated that the ultimate selected preferred plan may be a hybrid of several of the alternatives evaluated herein. Major project components are highlighted below:

- Approximately 16 acres of the land currently occupied by the Naval Undersea Warfare Center will be transferred to the Department of Environmental Protection to establish the Fort

Trumbull State Park, providing open space for passive and active recreation as well as preservation of this historic site as a cultural resource. One small parcel of the NUWC site will remain in the possession of the U.S. Coast Guard and a second will remain in the possession of the U.S. Navy for their continued use. The remainder of the property is anticipated to be improved and developed, either through public sale or through another form of conveyance.

- Additional land use improvements are proposed for the remainder of the Fort Trumbull area. The following-land use alternatives are under consideration. These are described in detail in Section 3.0 of this document.

  Alternative No. 1 – No Action
  Alternative No. 2 – Recreation/Tourism
  Alternative No. 3 – Residential/Commercial
  Alternative No. 4 – Business Campus
  Alternative No. 5 – Mixed Use 1
  Alternative No. 6 – Mixed Use 2

- Upgrades to the existing regional Water Pollution Control Facility are planned to reduce odors, improve aesthetics, and improve the quality of treated wastewater.

- Stormwater quality will be improved via the installation of an updated stormwater collection and treatment system.

- Roadway and traffic improvements are planned to accommodate increased projected traffic in the area and to overcome existing deficiencies.



## 1.5 Relationship to Other Projects and Planning Documents

For the purposes of this EIE, numerous planning documents have been evaluated in the context of the Fort Trumbull area to ensure that this planning effort is consistent with relevant state, regional, and local planning policies. These are summarized below.

*State Planning Documents*

- Conservation and Development, Policies Plan for Connecticut, 1998-2003, Office of Policy and Management, Hartford, CT.

- Connecticut Environmental Goals and Indicators, Connecticut Institute of Water Resources, University of Connecticut, September 30, 1996.

- Environment/2000: Connecticut's Environmental Plan, Connecticut Department of Environmental Protection and The Commissioner's Environment/2000 Advisory Board, Draft October 1997.

- Reference Guide to Coastal Policies and Definitions, Connecticut Department of Environmental Protection, Rev. January 1996.

*Regional Planning Documents*

- Southeastern Council of Governments, Land Use, 1990, February 1991.

- Southeastern Council of Governments, Population and Housing, 1990, March 1992.

- Southeastern Council of Governments, Social Indicators, 1990, February 1995.

- Southeastern Council of Governments, Proposed Regional Conservation and Development Policy

Guide for Southeastern Connecticut (DRAFT), July 1997.

*Local Planning Documents*

- Plan of Conservation and Development, City of New London, CT. Prepared by: The Office of Development and Planning and the New London Plan of Development Steering Committee, March 1, 1997 (Adopted April 3, 1997).
- Zoning Regulations, City of New London, CT, Planning and Zoning Commission, as amended through September 1, 1998.

*Other Related Documents*

A great deal of work has been conducted to date by the Navy on the NUWC property. The NUWC property lies within the MDP boundary and, therefore, the EIE has considered following planning and site investigation documents:

- Feasibility Report, Naval Undersea Warfare Center, Fort Trumbull State Park, June 18, 1997, Amended: December 1997.
- Implementation Strategy, Naval Undersea Warfare Center, New London, CT, Economics Research Associates and Sasaki Associates, Inc., April 17, 1997.
- Redevelopment Strategy, Naval Undersea Warfare Center, New London, CT, Economics Research Associates and Sasaki Associates, Inc., April 17, 1997.
- Draft Cultural Resources Survey; Naval Undersea Warfare Center; New London, Connecticut; TAMS Consultants, Inc.; April 1998.



Additionally, the EIE has considered the neighboring Pfizer, Inc. development through ongoing coordination with Pfizer representatives. Pfizer is planning an 800,000 square foot global research and development facility. The site of the Pfizer complex is located immediately to the south of the Fort Trumbull MDP area, between Pequot Avenue and Trumbull Street, on property which was previously occupied by New London Mills.

## 2.0 AFFECTED ENVIRONMENT

### 2.1 Land Use

An understanding of land use plans and policies at the local, regional and state levels is essential to the analysis of potential alterations of land uses. The following discussion sets the framework of land use policies which apply to the Fort Trumbull MDP area. Consistency of identified project alternatives (presented in Section 3.0) with these plans, policies, statutes, and regulations is evaluated in Section 4.0 of this document.

#### *2.1.1 Statewide Land Use Conservation and Development*

The following discussion presents portions of the *Conservation and Development Policies Plan for Connecticut* (1998-2003) as they relate to the Fort Trumbull MDP project. Italicized sections are direct excerpts from the Plan. Not all Plan policies are included in this discussion, as they may not directly apply. For an expanded review of the Plan, the reader is directed to the full 141-page document.

The Conservation and Development Policies Plan for Connecticut (1998-2003) is a statement of the state's growth, resource management, and public investment

policies. The Plan provides a policy and planning framework for the administrative and programmatic actions and capital and operational investment decisions of state government, which influence the future growth and development of the state. The objective of the Plan is to guide a balanced response to human, environmental, and economic needs in a manner which best suits the future of Connecticut. The Connecticut General Assembly, in accordance with Sections 16a-24 through 16a-33 of the Connecticut General Statutes, established the Plan.

Public Act 91-395 requires state agencies to be consistent with the Plan when undertaking certain actions, including authorization of state grant money in excess of $100,000 for the acquisition, development, or improvement of real property. The MDP project will receive state funding as described in Section 1.0 of this document. Therefore consistency with the state Plan is evaluated herein.

The accompanying Conservation and Development Plan Locational Guide Map apportions the state into land categories according to each area's characteristics and suitability for different forms of development or conservation activities. The categories of land use are designated on the Locational Guide Map as follows:

***Urban Areas***

- Regional Centers
- Neighborhood Conservation Areas
- Growth Areas

***Areas of Environmental Concern***

- Existing Preserved Open Space
- Preservation Areas
- Conservation Areas



***Rural Areas***

- Rural Community Centers
- Rural Land

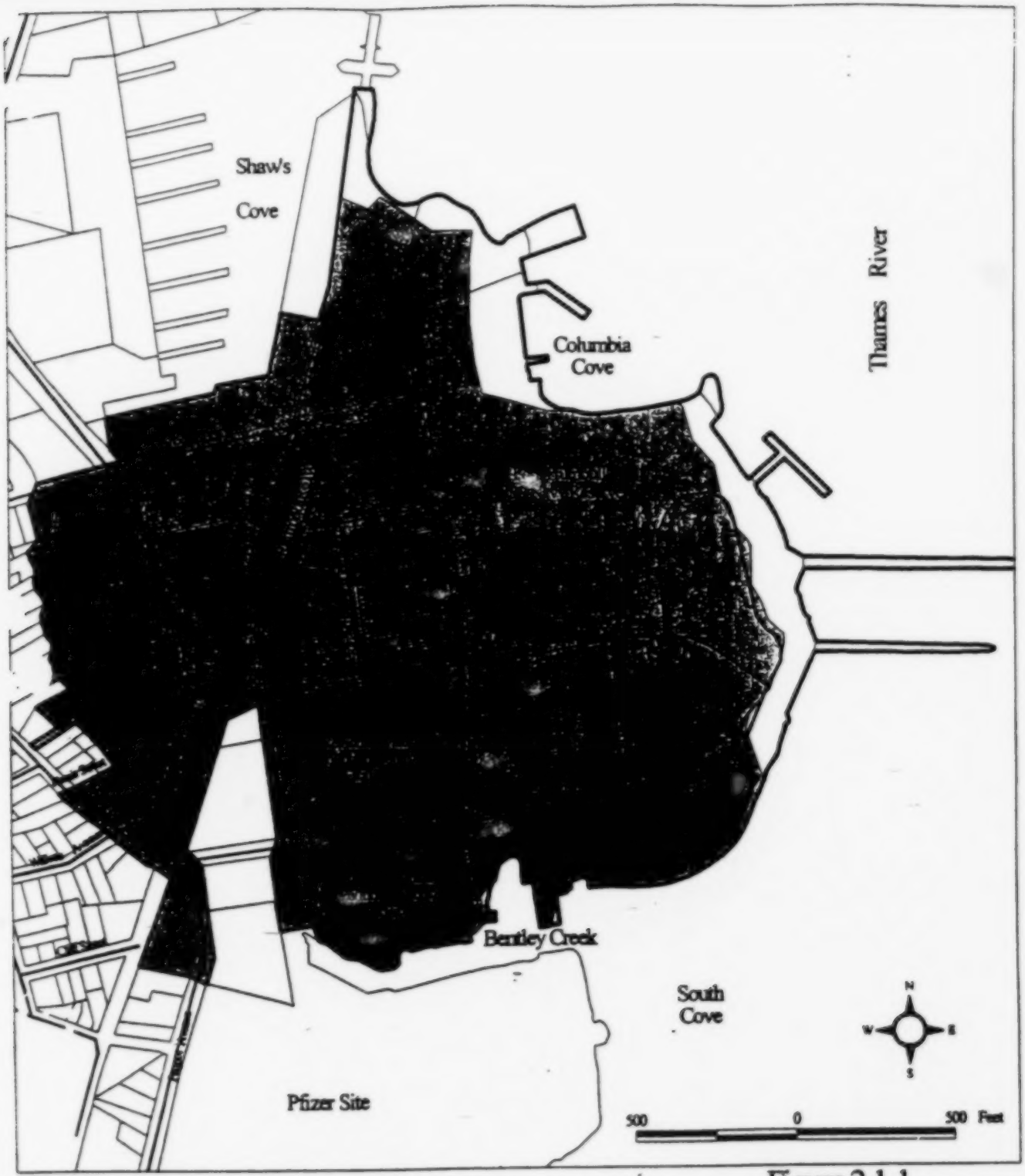
Figure 2.1-1 shows the statewide conservation and development plan land designations for the project area. The majority of the Fort Trumbull area is classified as a Regional Center, with most of the balance of the project area classified as Conservation Area. Small areas of Preservation and Existing Preserved Open Space are also designated on the Locational Guide Map. Descriptions of land use designations in the project area are presented below.

***Regional Centers***

Regional Centers encompass land areas containing traditional core area commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance.

Section 4-66b of the General Statutes sets forth the following urban goals to be used to assess consistency of a proposed action with state policy:

- *to revitalize the economic base of our urban areas by rebuilding older commercial and industrial areas and encouraging new enterprises to locate in the central cities in order to protect existing jobs and create new job opportunities needed to provide meaningful economic opportunity for inner city residents;*
- *to revitalize urban neighborhoods to reduce the isolation of various income, age, and minority groups through the promotion of fair and balanced housing opportunities for low and moderate-income residents;*




ort Trumbull MDP Area - New London, Connecticut
Draft Environmental Impact Evaluation - November 1998

Note: GIS coverages developed by Milone & MacBroom, Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, OPM, and US Navy. Intended for planning only - not for design purposes.

Figure 2.1-1
Conservation and Development Policies Plan Location Map

MDP Project Border
Conservation Areas
Existing and Preserved Open Space
Preservation Areas
Regional Centers

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- *to revitalize the quality of life for the residents of our urban areas by ensuring quality education, comprehensive health care, access to balanced transportation, adequate recreational facilities, responsive public safety, coordinated effective human services programs, decent housing, and employment opportunities; by preserving the scarce resources of pure air and clean water; and by ensuring full and equal rights and opportunities for all people to reap the economic and social benefits of our society; and*

- *to coordinate the conservation and growth of all areas of our state to ensure that each area preserves its unique character and sense of community and further ensure a balanced and prudent use of our state's scarce resources.*

State policy seeks to concentrate economic development to the extent possible in major urban centers, promoting infill development and intensification where appropriate. It is also intended to promote stability of urban communities and to support staged, orderly growth of urban development.

The highest priority has been assigned to affirmatively supporting rehabilitation and revitalization of the economic, social, and physical environment of Regional Centers. State policy supports a range of public facilities, services, and amenities that serve to encourage private investment in development forms consistent with urban strategies. As a result, the following approach and guidelines are among those identified in the *Conservation and Development Policies Plan* for Growth Areas (i.e. lands near Regional Centers that provide the opportunity for staged urban expansion generally in conformance with municipal or regional development plans).

- *target economic development assistance emphasizing site cleanup, land assembly, structural rehabilitation; and the location of labor-intensive businesses to revitalize the economic base of Regional Centers, to encourage new enterprises and create new opportunities for urban residents;*
- *give priority to infrastructure proposals that provide needed growth capacity in Regional Centers;*
- *support new product development and facilities for start-up firms, especially those that provide some entry level employment opportunities and which are strategically suited to their communities (can compete in local markets or complement a regional economic cluster);*
- *scrutinize regulatory processes and seek to simplify, streamline, or eliminate those rules that unduly hinder economic development in urban areas, while ensuring continuing efficient protection of public safety, health and the environment;*
- *locate all appropriate state facilities within urban areas with preference to sites in Regional Centers;*
- *promote recreational uses of urban rivers and their banks as part of a greenway system and the protection, interpretation, and public use of other urban natural resources;*
- *develop heritage parks where appropriate to foster tourism and recreational opportunities and to display and interpret local history;*
- *promote, to the extent possible, the concentration of major facilities on public transportation routes at employment densities of at least 50 employees per acre.*



***Conservation Areas***

Conservation Areas represent a significant portion of the state and a myriad of land resources. Conservation areas include flood fringe areas that are, or may be, defined under the National Flood Insurance Programs, Connecticut's Channel Encroachment Line Program, or the Coastal Area Management Program, as areas subjected to 100-year flood and not included in the floodway. Historic preservation areas are also included in Conservation Areas.

To attain the widest range of beneficial public uses and appropriate development, state actions in Conservation Areas should be designed to:

- *promote research, education, resource management, regulations, financial, and technical assistance or public acquisition as necessary to achieve proper use and protection of Conservation Areas;*
- *undertake or support only those uses that are compatible with the resource or hazard of concern, consistent with evaluations of both direct and secondary impacts;*
- *demonstrate the lack of alternative sites, overriding social or economic concerns, and the lack of any reasonable alternative public or private uses for any proposal which is clearly and significantly incompatible with conservation; and*
- *include mitigation measures necessary to both protect against degradation and enhance environmental quality.*

***Preservation and Existing Preserved Open Space Areas***

A narrow fringe of land along the waterfront edge within the MDP area has been classified as

Preservation Area, due to its proximity to the waterfront and associated flood hazard characteristics. State policies regarding preservation areas promote preservation and management of these areas as open space. Plans and proposals that are incompatible with open space uses should demonstrate overriding public benefits and the lack of viable alternative sites.

A small triangular parcel formed by Howard Street, Harris Street, and Shaw Street has been classified as Existing Preserved Open Space. It is unclear why this designation has been assigned, since this land area is currently developed. This area should be redesignated by OPM during its next revision to the Plan.

### *2.1.2 Regional Land Use*

The Southeastern Connecticut Region consists mostly of the suburban municipalities of Colchester, East Lyme, Griswold, Ledyard, Lisbon, Montville, Preston, Sprague, Stonington, and Waterford surrounded by the rural towns of Salem, Bozrah, Franklin, Voluntown, and North Stonington. Norwich, Groton, and New London are the urban centers, making up approximately 11.3% of the 559.2 square miles of the Southeastern Connecticut Region.

Approximately 21% of the region is occupied by intensive land uses, leaving a rather large portion (61%) of undeveloped lands. Several factors limit the ability to intensively develop areas in the southeastern Connecticut region, including poorly drained soils, shallow depth to bedrock, steep slopes, flood hazard areas, availability of utilities, ownership, zoning, financing, and regulatory jurisdictions of state and federal governments.

The major development contributing to regional growth has occurred at low densities, more in the



rural and suburban towns than the three urban municipalities, although urban growth continues along the Thames River corridor and the Long Island Sound coast, and more recently along Interstate 95.

The region has had a historic dependence on defense related industries. The end of the Cold War significantly altered regional land use patterns, with the reduction of defense-related industries and manufacturing. It is further expected that dramatic changes will continue to occur with the increase in gaming facilities and associated development. (*Regional Conservation and Development Policy Guide for Southeastern Connecticut*, October 1997)

It is the goal of the Southeastern Connecticut Council of Governments (SCCOG) that diversified and balanced development be sought in the region and opportunities be created in an effort to minimize dependence on a single industry for employment, thereby reducing the strain of high unemployment rates on the region's economic health.

### *2.1.3 Land Uses in the Project Vicinity*

Development in southeastern Connecticut is concentrated primarily along the coastline of Long Island Sound and along the Thames River. Single-family and multi-family residential areas, commercial establishments, and open space areas generally occur inland of the densely developed coastline.

On the western bank of the Thames River, north of the project area, are the Shaw's Cove area and downtown New London which supports commercial uses and major transportation uses, including ferry services, passenger rail, and a major parking facility. Further north are the State Pier, the Goldstar Memorial bridge, Connecticut College and the U.S. Coast

Guard Academy. To the south along the western bank of the Thames River are Greens Harbor, Mitchell College, and Ocean Beach.

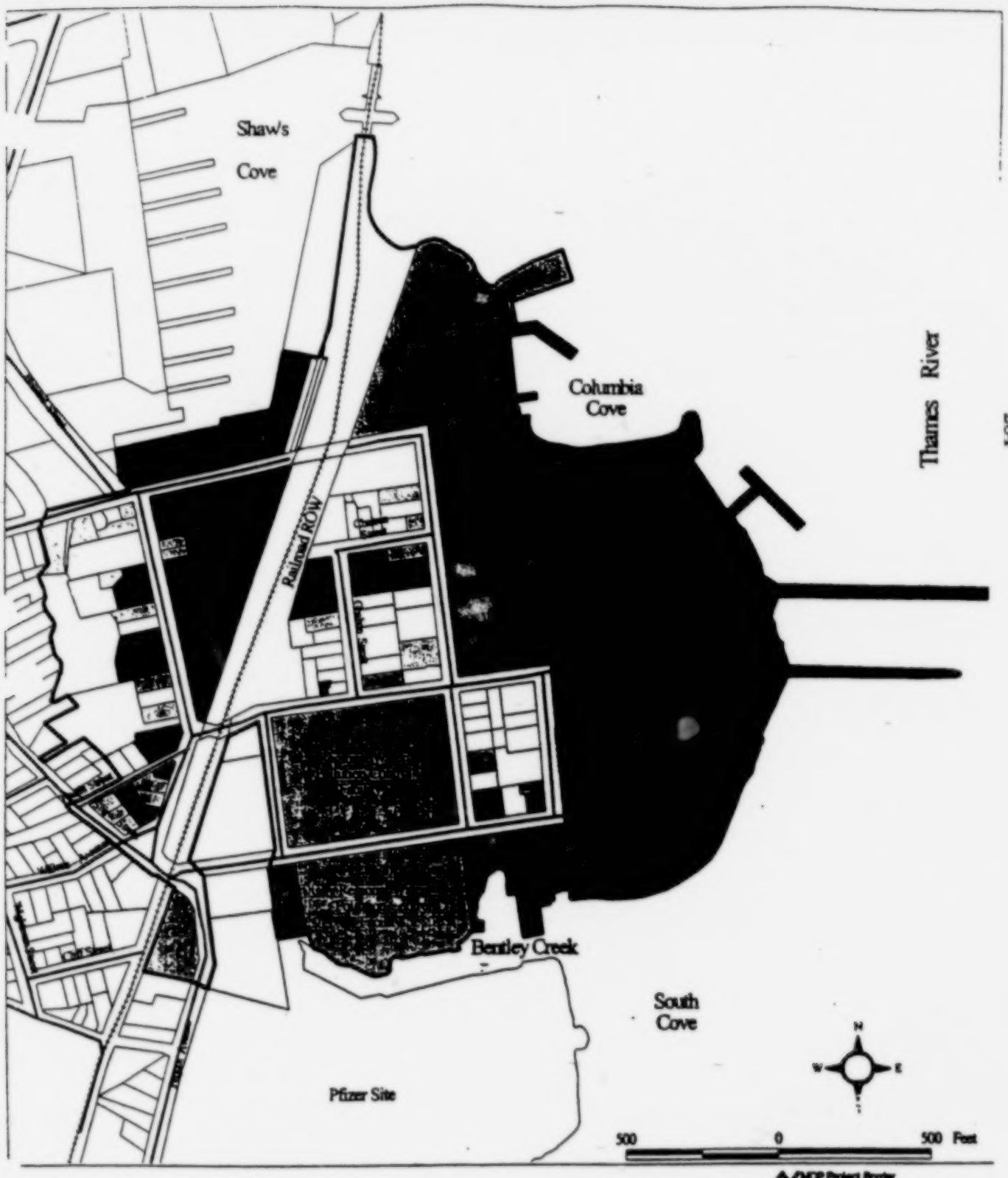
Major land uses on the eastern bank of the Thames River, across from the project area, include General Dynamic's Electric Boat facility, Pfizer Pharmaceutical Company, and Fort Griswold.

Other noteworthy land uses in the surrounding regional area include Crystal Mall in Waterford, Foxwoods Casino in Ledyard, Mohegan Sun Casino in Montville, and Mystic Seaport and Aquarium in Stonington. Nearby open space areas include Harkness Memorial State Park in Waterford, and Bluff Point State Park and Fort Griswold in Groton.

Land uses immediately surrounding the Fort Trumbull area consist of waterfront uses dominated by harbors and marinas, commercial uses, and mixed residential and office/commercial areas.

### *2.1.4 Land Uses Within the MDP Boundary*

Figure 2.1-2 depicts existing land uses in the project area. Land use within the MDP area includes the NUWC facility, the regional Water Pollution Control Facility, a mixed residential/commercial area, and single- and multi-family neighborhoods. A description of land uses in the four project planning areas follows.

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rort Trumbull MDP Area - New London, Connecticut
I t Environmental Impact Evaluation - November 1998

ote: GIS coverages developed by Milone & MacBroom Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, and US Navy. Intended for planning only - not for design purposes.

Figure 2.1-2
Land Uses in
the Project Area

*Gateway Area*

The portion of the project area located to the west of the railroad tracks consists of commercial and industrial establishments intermixed with single- and multi-family residences. The Miner & Alexander Lumber Company is the major commercial establishment located between Hamilton Street and Shaw's Cove. The largest building in this area is a 50,000 square foot office building located at 194 Howard Street. This structure has been vacant but is being renovated for office use. Businesses, office buildings, and residences occur along Howard Street. Several undeveloped parcels occur to the west of Howard Street along the western edge of the project area.

*Fort Area*

A major physical feature in the Fort Area is the regional Water Pollution Control Facility which is bordered by Nameaug Street to the west, Walbach Street to the north, Smith Street to the east, and Bentley Creek to the south. The facility is marked by the massive treatment tanks and buildings associated with the wastewater treatment process.

The remainder of the Fort Area consists primarily of single-family and multi-family residences, with several small businesses, restaurants, and commercial establishments. New London Seafood Distributors is located in the northern portion of the Fort Area near Columbia Cove, and Fort Trumbull Marina is located in the southern portion of the Fort Area along Bentley Creek.

***Lower Pequot Avenue Area***

Land uses in the Lower Pequot Avenue Area are limited to two vacant residential dwellings, one vacant lot, and one industrial property.

***NUWC Area***

The eastern portion of the project area, located to the east of Smith and East Streets and bordering the Thames River, is occupied by the Fort Trumbull U.S. Navy Reserve Base, Naval Undersea Warfare Center (NUWC). The base consists of a 19th century fort and blockhouse as well as various laboratories, administrative offices, residences, and other buildings. Several piers on the Thames River are also associated with this facility. This facility has been closed since 1996 and most of the buildings are unoccupied. A staff of approximately 15 people continue to secure and maintain the facility.

### *2.1.5 History of Development*

Aerial photographs of the project area dating back to 1965 were examined to qualitatively document changes which have occurred over the last three decades. A discussion of this review follows.

*1965 aerial photograph*

In 1965, the project area was densely developed, with a general appearance similar to present day conditions. The following differences are noted:

- The NUWC property had more lawn and parking areas and fewer buildings than it does today. A small bay was present at the southeastern corner of the property.
- The regional Water Pollution Control Facility on Trumbull Street appears much the same as today;



however, the portion of the facility to the north of Trumbull Street had not yet been constructed. This area supported residential houses, a warehouse, and undeveloped land.

- In the western portion of the project area, the undeveloped land between Howard Street and Shaw Street appeared less overgrown than it does today. An open stormwater drainage channel extended north to Hamilton Street. The large parcel between Howard Street and the railroad tracks, now the site of a large office building, supported several factory or warehouse buildings.

*1970 aerial photograph*

Very little visible change took place within the project area between 1965 and 1970. The open stormwater drainage channel in the undeveloped land between Howard Street and Shaw Street had been piped underground at its northern end, and the remaining open channel appeared much the same as it does today.

*1975 aerial photograph*

Significant changes occurred at the NUWC property between 1970 and 1975. Several buildings were constructed, including Buildings 2, 80T, 96, 99, and 122T (see Figure 1.1-5). The small bay at the southeastern corner of NUWC had been filled in and a parking lot was constructed on top of it.

The factory or warehouse buildings located on the large parcel between Howard Street and the railroad tracks were demolished, and the site was vacant.

*1980 aerial photograph*

The portion of the regional Water Pollution Control Facility south of Trumbull Street was constructed between 1975 and 1980. The buildings that had

occupied the site were demolished, with the exception of a large building near the corner of Walbach Street and Smith Street, which remains standing today.

The large parcel between Howard Street and the railroad tracks remained vacant.

*1986 aerial photograph*

A large office building had been constructed on the vacant parcel between Howard Street and the railroad tracks. North of the study area, the realignment of Howard Street and the construction of the Shaw's Cove office complex was completed.

*1990 aerial photograph*

Between 1986 and 1990, a parking lot was constructed at the regional Water Pollution Control Facility on the corner of Nameaug Street and Walbach Street. Otherwise, very little visible change occurred in the area during this period.

*1996 aerial photograph*

An additional sewage treatment tank was constructed at the regional Water Pollution Control Facility on the north side of Trumbull Street.

### *2.1.6 Zoning*

Three municipal zones occur within the project area as shown graphically in Figure 2.1-3. These are Waterfront Commercial/Industrial (WC-I), General Commercial District (C-1), and the Waterfront Development District (WD). In many locations within the MDP area, land uses are inconsistent with the zoning designation.

A description of zoning in the project planning areas follows.

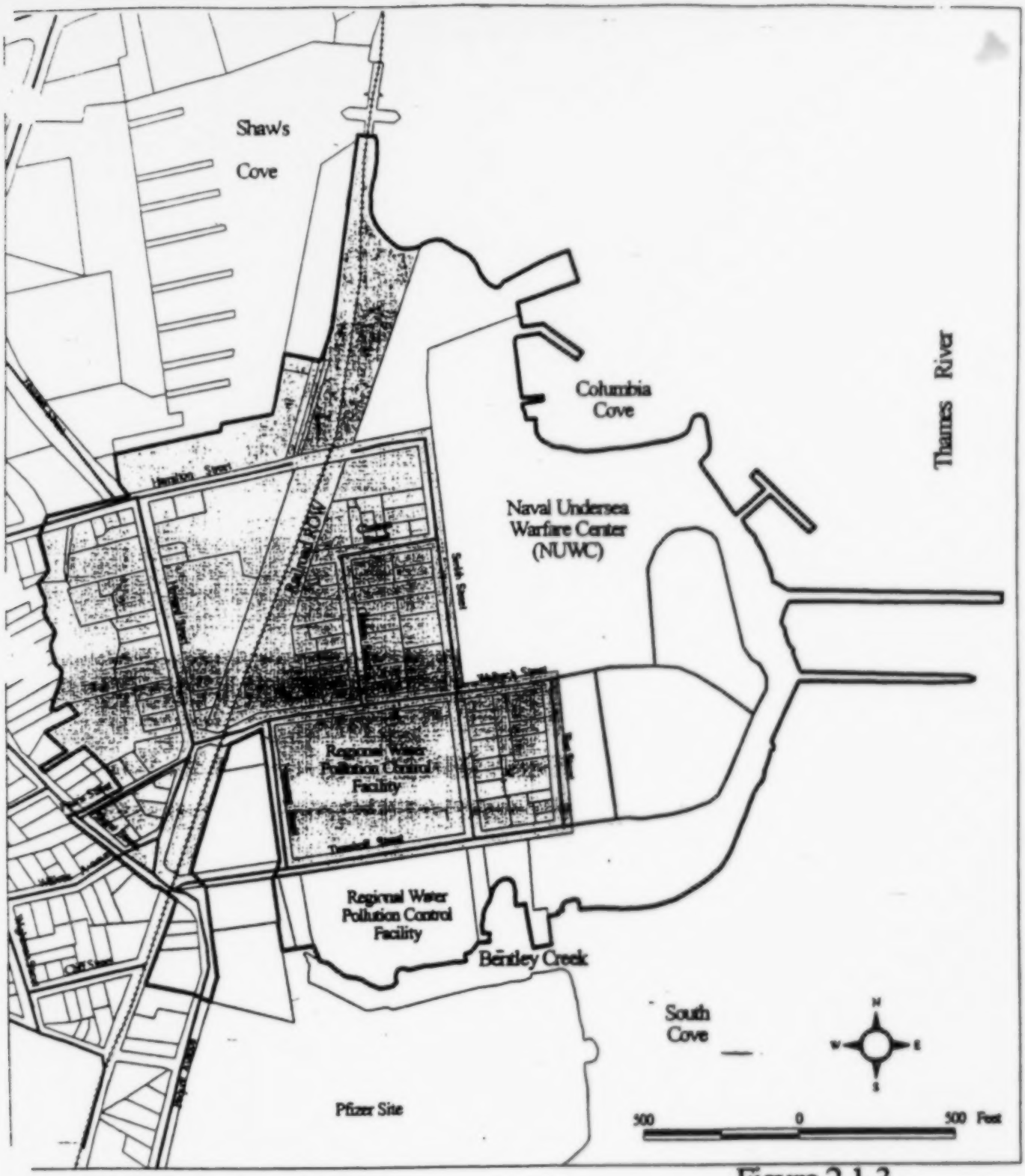


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Figure 2.1-3
Zoning in the Project Area

MDP Project Border
C-1 General Commercial District
WCI Waterfront Commercial/Industrial
WD Waterfront Development

F : Trumbull MDP Area - New London, Connecticut
t Environmental Impact Evaluation - November 1998

Note: GIS coverages developed by Milone & MacBroom, Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, FEMA, and US Navy. Intended for planning only - not for design use.

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### *Gateway Area*

The Gateway Area to the south of Hamilton Street is zoned C-1, General Commercial District. According to the New London Zoning Regulations, the purpose of the General Commercial District is "to provide for a wide range of commercial and limited industrial uses along major arterials; to accommodate uses that benefit from large numbers of motorists, and businesses that are not intensive central business area type activities. New residential development is discouraged except in certain instances." The minimum lot area in the General Commercial District is 5,000 square feet.

The Gateway Area to the north of Hamilton Street is zoned WD, Waterfront Development District. According to the New London Zoning Regulations, the purpose of the Waterfront Development District is to "encourage a mixture of land uses, with emphasis on waterfront access and water dependent and related uses." The minimum lot area in the Waterfront Development District is 20,000 square feet.

### *Fort Area*

Most of the Fort Area is zoned C-1, General Commercial District, from Hamilton Street to Trumbull Street.

The waterfront areas along the southern side of Trumbull Street, including a portion of the Water Pollution Control Facility and a small commercial marina, are zoned WCI, Waterfront Commercial District, as is an area to the north of Hamilton Street, immediately adjacent to the NUWC property.

The purpose of the Waterfront Commercial/Industrial zone is "to encourage water dependent and water related industrial and major commercial use along

appropriate portions of the Thames River waterfront consistent with the objectives of the State Coastal Area Management Program and the New London CAM Plan of Development." Minimum lot area in the Waterfront Commercial/Industrial zone is 10,000 square feet.

A small area to the north of Hamilton Street located immediately to the east of the Amtrak line is zoned Waterfront Development District (WD), including the Miner & Alexander Lumber Company.

***Lower Pequot Avenue Area***

The area south of Trumbull Street between Pequot Avenue and the railroad tracks is also zoned Waterfront Commercial/Industrial (WCI).

***NUWC Area***

The area east of Smith Street and East Street extending to the Thames River, including the NUWC facility, is zoned Waterfront Commercial/Industrial (WCI).

### *2.1.7 Coastal Zone Management*

The Fort Trumbull MDP area is located within Connecticut's coastal boundary as defined by Section 22a-94 of the Connecticut General Statues (CGS) and is subject to the provisions of the Connecticut Coastal Management Act (CCMA) (CGS Sections 22a-90 through 22a-112). In accordance with CGS Section 22a-100, state actions and state funded actions within the coastal boundary which may significantly affect the environment must be consistent with the goals and policies of the CCMA.



The coastal boundary is determined as follows: (1) a continuous line on the landward side by the interior contour elevation of the 100-year frequency coastal flood zone, as defined and determined by the National Flood Insurance Act; or (2) a 1,000 foot setback measured from the mean high water mark in coastal waters; or a 1,000 foot linear setback measured from the inland boundary of tidal wetlands mapped under CGS Section 22a-20, whichever is farthest inland. The entire MDP project area is within the coastal boundary.

Coastal waters are defined as those waters of Long Island Sound and its harbors, embayments, tidal rivers, streams and creeks which contain a salinity concentration of at least 500 parts per million (0.5 parts per thousand, ppt) under the low flow stream conditions as established by the Commissioner of the Department of Environmental Protection (CGS Section 22a-93(5)).

The following general goals and policies have been established in CGS Section 22a-92:

(1) to ensure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth;

(2) to preserve and enhance coastal resources in accordance with the policies established by chapters 439 (Environmental Protection Department and State Policy), 440 (Wetlands and Watercourses), 446i (Water Resources), 446k (Water Pollution Control), 447 (State Parks and Forests), 474 (Pollution), and 477 (Flood Control and Beach Erosion);

(3) to give high priority and preference to uses and facilities which are dependent upon proximity to the water or the shorelands immediately adjacent to marine and tidal waters;

(4) to resolve conflicts between competing uses on the shorelands adjacent to marine and tidal waters by giving preference to uses that minimize adverse impacts on natural coastal resources, while providing long-term and stable economic benefits;

(5) to consider in the planning process, the potential impact of coastal flooding and erosion patterns on coastal development so as to minimize damage to and destruction of life and property and reduee the necessity of public expenditure to protect future development from such hazards;

(6) to encourage public access to the waters of Long Island Sound by expansion, development, and effective utilization of state-owned recreational facilities within the coastal area that are consistent with sound resource conservation procedures and constitutionally protected rights of private property owners;

(7) to conduct, sponsor. and assist research in coastal matters to improve the data base upon which coastal land and water use decisions are made;

(8) to coordinate the activities of public agencies to ensure that state expenditures enhance development, while affording maximum protection to natural coastal resources and processes in a manner consistent with the state plan for conservation and development adopted pursuant to part I of Chapter 297;



(9) to coordinate planning and regulatory activities of public agencies at all levels of government to ensure maximum protection of coastal resources, while minimizing conflicts and disruption of economic development; and

(10) to ensure that the state and the coastal municipalities provide adequate planning for facilities and resources which are in the national interest and to ensure that any restrictions or exclusions of such facilities or uses are reasonable. Facilities and resources which are in the national interest include:

(a) adequate protection of tidal wetlands and related estuarine resources;

(b) restoration and enhancement of Connecticut's shellfish industry;

(c) restoration, preservation, and enhancement of the state's recreational and commercial fisheries, including anadromous species;

(d) water pollution control measures and facilities consistent with the requirements of the federal Clean Water Act, as amended;

(e) air pollution control measures and facilities consistent with the requirements of the federal Clean Air Act, as amended;

(f) continued operations of existing federally-funded dredged and maintained navigation channels and basins;

(g) energy facilities serving statewide and interstate markets, including electric generating facilities and facilities for storage, receiving or processing petroleum products and other fuels;

(h) improvements to the existing interstate rail, highway and water-borne transportation system;

(i) provision of adequate state or federally-owned marine related recreational facilities, including natural areas and wildlife sanctuaries; and

(j) essential maintenance and improvement of existing water-dependent military, navigational, resource management, and research facilities.

Reasonable grounds for the restriction or exclusion of a facility or use in the national interest shall include a finding that such a facility or use: (a) may reasonably be sited outside the coastal boundary; (b) fails to meet any applicable federal and state environmental, health or safety standard, or (c) unreasonably restricts physical or visual access to coastal waters.

Adverse impacts on coastal waters, as defined by the CCMA (CGS Section 22a-93(15) and 22a-93(17)), include the following:

- degrading tidal wetlands, beaches and dunes, rocky shorefronts, and bluffs and escarpments through significant alteration of their natural characteristics or functions;
- increasing the hazard of coastal flooding through significant alteration of shoreline configurations or bathymetry, particularly within high velocity flood zones;
- degrading existing circulation patterns of coastal waters through the significant alteration of patterns of tidal exchange or flushing rates, freshwater input, or existing basin characteristics and channel contours;



- degrading natural or existing drainage patterns through the significant alteration of ground water flow and recharge and volume of runoff;
- degrading natural erosion patterns through the significant alteration of littoral transport of sediments in terms of deposition or source reduction;
- degrading visual quality through significant alteration of the natural features of vistas and view points;
- development and activities such as (A) locating a non-water-dependent use at a site that (i) is physically suited for a water-dependent use for which there is a reasonable demand or (ii) has been identified for a water-dependent use in the plan of development of the municipality or the zoning regulations; (B) replacement of a water-dependent use with a non-water-dependent use; and (C) siting of a non-water-dependent use which would substantially reduce or inhibit existing public access to marine or tidal waters;
- degrading water quality through the significant introduction into either coastal waters or ground water supplies of suspended solids, nutrients, toxics, heavy metals or pathogens, or through the significant alteration of temperature, pH, dissolved oxygen or salinity; and
- degrading or destroying essential wildlife, finfish or shellfish habitat through significant alteration of the composition, migration patterns, distribution, breeding or other populations characteristic of the natural species or significant alterations of the natural components of the habitat.

As per Section 22a-92(a)(3), highest priority and preference must be given to uses and facilities dependent upon proximity to water or shorelands immediately adjacent to marine and tidal waters. As previously described, the

CCMA also requires the minimization of adverse impacts on future water-dependent development opportunities and activities (CGS Section 22a-93(17)).

As per the CCMA, the management of estuarine embayments with respect to coastal uses must sustain biological productivity and maintain healthy marine populations. Section 22a-93(7)(G) defines estuarine embayment as a protected coastal body of water with an open connection to the sea in which saline seawater is measurably diluted by freshwater, including tidal rivers, bays, lagoons and coves. The Fort Trumbull area is surrounded by waters that are characterized as an estuarine embayment pursuant to the CCMA definition.

Other pertinent sections of the CCMA are discussed in Section 2.9 (Water Resources, Section 2.10 (Flood Hazard Potential), and Section 2.11 (Biological Environment) as it pertains to these resources.

## 2.2 Socioeconomics

The following information regarding demographics, employment, and tax base has been obtained in part from the City of New London Plan of Development, regional documents. Census information and statistics, as well as data obtained from the New London Assessor's Office and field investigations. This discussion is intended to provide an overall background of the demographic make-up of the City of New London and the project area. Some of this information is referenced in the discussion of potential impacts in Section 4.0 of this document.

The population in New London has been declining since 1960 and has not been lower since the 1930's. Unemployment in the city, at 7.6%, is considerably



higher than the statewide rate of 4.0% and is higher than the closest urban municipalities of Groton (4.7%) and Norwich (6.3%). Tax revenues in the MDP area are quite low at $324,926, considering it comprises an area of approximately 90 acres. A more detailed discussion of demographics, employment, and tax revenues follows.

### *2.2.1 Demographics*

New London has been affected by the dramatic growth in population in the surrounding suburban and rural towns. Growth in New London stabilized in 1960 and since then, the city has been experiencing a decline. Since 1980, specific demographic changes have also occurred to the City of New London's residential population.

Between the years 1900 and 1960, the city's population nearly doubled from 17,548 persons to 34,182 persons, an increase of 95%. However, following the peak in 1960, population decreased by 16.5% to its 1990 level of 28,540 persons. Table 2.2-1 summarizes the growth and decline of the population of New London based on U.S. Census data.

The estimated 1998 population in New London, Connecticut is 23,860 based on data published by Claritas, Inc. This represents a decline of almost 5,000 persons in eight years. The population has not been this low since prior to 1920. Connecticut DECD population estimates are somewhat higher, with an estimated 1995 population of 26,920.

**TABLE 2.2-1**
**New London Historic Population**
**(1900-1990)***

| Year | Population | % Change | Year | Population | % Change |
|---|---|---|---|---|---|
| 1900 | 17,548 | --- | 1950 | 30,551 | + 0.3% |
| 1910 | 19,659 | + 12.0% | 1960 | 34,182 | + 11.9% |
| 1920 | 25,688 | + 30.7% | 1970 | 31,630 | - 8.1% |
| 1930 | 26,640 | + 3.7% | 1980 | 28,842 | - 8.8% |
| 1940 | 30,456 | + 14.3% | 1990 | 28,540 | - 1.0% |

*Source: U.S. Census

The city's declining population figures can be partially attributed to a series of changes to the demographic makeup that have occurred in the past few decades. Some of the changes include a declining number of families residing in the city, a decline in the size of the typical household, an increase in the number of householders living alone or in non-family households, as well as a decline in the birth rate. The population pattern is also affected by the World War II and Cold War expansion, and in later years, contraction of activities of the U.S. Naval submarine base in Groton and at Electric Boat.

Table 2.2-2 presents 1998 estimated population as compared to 1990 Census data based upon information published by Claritas, Inc. The Connecticut Office of Policy and Management projects that the decline in the city's population will slow over the next five years and is expected to stabilize by the year 2000 and then begin to increase. The sharp decline in population and families residing in New London demonstrates the need for revitalization in this community.

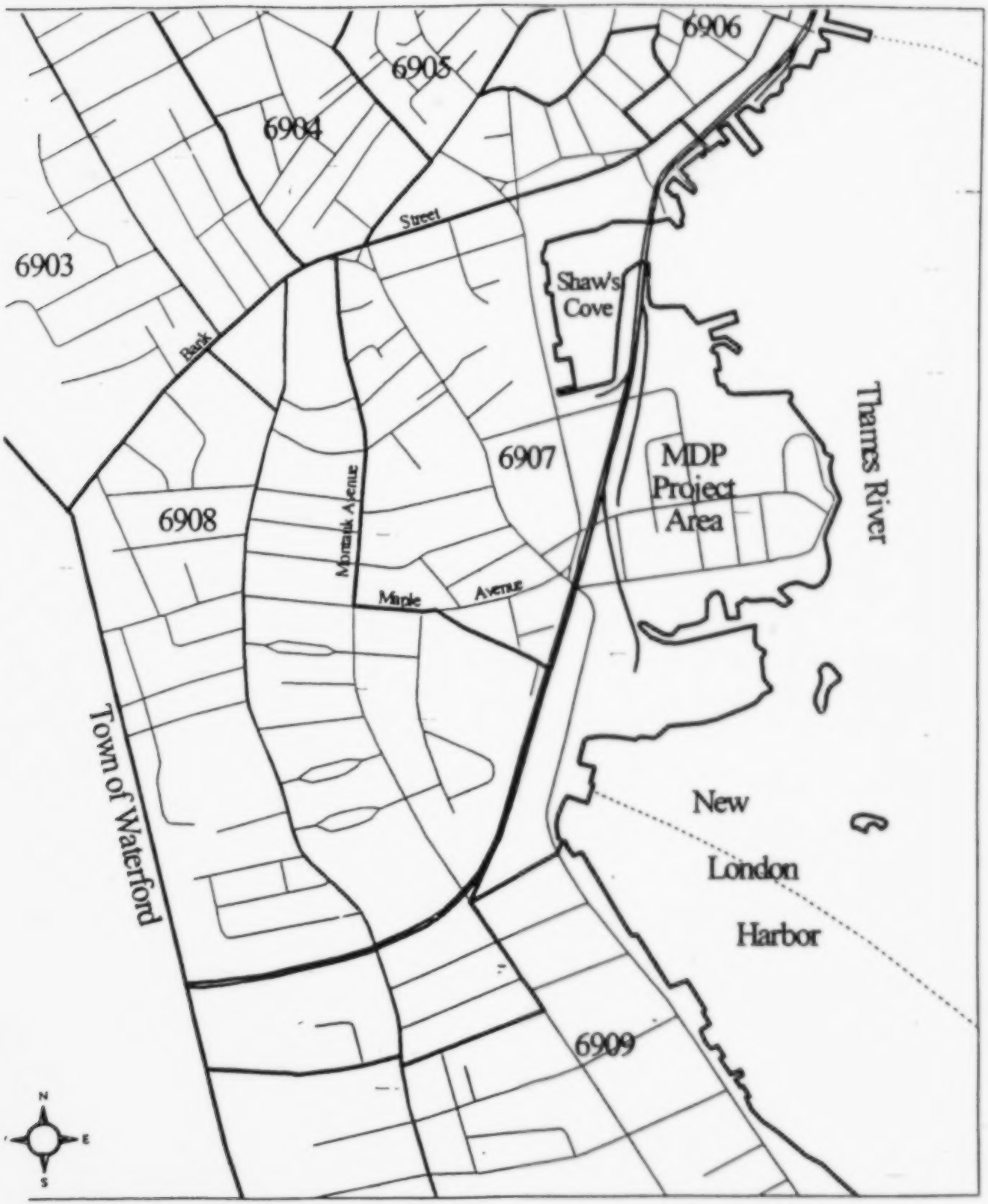


**TABLE 2.2-2**
**1998 Estimated New London**
**Population – Claritas, Inc.**

| Universe | 1990 Census | 1998 (est.) | % Change (1990-98) |
|---|---|---|---|
| Population | 28,540 | 23,860 | -16.4 |
| Households | 10,712 | 9,271 | -13.5 |
| Families | 6,007 | 5,047 | -16.0 |
| Housing Units | 11,970 | 10,698 | -10.6 |
| Household Size | 2.29 | 2.26 | -1.3 |

Source: Claritas, Inc., June 18, 1998.

The Fort Trumbull area is generally comprised of Census Tract 6907. Figure 2.2-1 shows the extent of Census Tract 6907. Table 2.2-3 presents demographic and socio-economic characteristics of this Census Tract in comparison to the city at large. As these figures demonstrate, demographics of the Fort Trumbull area is similar to that of the City of New London as a whole.




...mbull MDP Area - New London, Connecticut
...t Environmental Impact Evaluation - November 1998

...e: GIS coverages developed by Milone & MacBroom, and HMA, Inc. Sources include Connecticut DEP, ... y of New London, FEMA, and US Navy. Intended for planning y - not for design use.

Figure 2.2-1
1990 Census Tracts
— New London, Connecticut

1000 0 1000 2000

**TABLE 2.2-3**
**Demographic and Socio-Economic Characteristics**
**City of New London and Fort Trumbull Study Area**

| | City of New London | Tract 6907 |
|---|---|---|
| Population | 28,540 | 1,449 |
| Households | 10,715 | 565 |
| % Racial Minority | 27.2 | 31.5 |
| % Hispanic origin | 12.1 | 11.6 |
| Housing Units | 11,970 | 656 |
| Renter-Occupied Housing Units (%) | 63.1% | 61.4% |
| Owner-Occupied Housing Units (%) | 36.9% | 38.6% |
| Median Year Structure Built | 1939 | 1939 |
| Length of Residency Over 30 Years (%) | 10.4% | 12.2% |
| Median Household Income | $26,336 | $28,750 |
| Median Family Income | $31,274 | $29,911 |
| Per Capita income | $12,971 | $12,598 |
| % Low/Moderate Income Persons | 55.02% | 56.88% |

Source: 1990 Census STF 1A and STF-3A; U.S. Department of Housing and Urban Development

### *2.2.2 Employment*

The following discussion provides a baseline of existing employment in the City of New London and in the MDP project area. This baseline is evaluated further in Section 4.0 of this document, with respect to projected impacts on employment of the six project alternatives.

#### *Citywide Employment*

The economy of the City of New London has been adapted and readjusted to the changing forces of technology and the effects of national and international events that have shaped the nature of businesses and industries that comprised the city's

economic base. The city's economy has evolved through several distinct periods. Initially established as an agricultural plantation (1645), it grew into a significant merchant shipping and fishing/whaling port (1718-1871) before becoming a manufacturing community (1827-1920) and, most recently, a retail and service center. Throughout all of these periods, the city has been able to rebound and to retain a measure of its economic vitality.

Over the past 20 years (1970 to 1990), the city's economy has not grown as substantially as the regional and state economy. The regional labor market experienced a higher growth rate (45%) in employment than either the city (17%) or the state (40%) in the same time period, although the city did expand its employment base by 2,770 jobs. Its slower rate of growth resulted in its share of the total employment in the regional labor market to decline from about 21% in 1970 to less than 17% in 1989.

The unemployment rate as estimated for New London residents in 1998 by the Connecticut Department of Labor was 7.6%. This figure has remained relatively stable since 1990. This is somewhat higher than the unemployment rate for the State of Connecticut, which was 5.2% in 1990 and rests at 4.0% in 1998.

Table 2.2-4 illustrates employment trends by place of work in the city.



**TABLE 2.2-4**
**Employment Trends by Place of Work**
**for the City of New London**
**(Residents and Non-Residents) 1990-1997**

| Industry | 1990 | 1997 | Change | % Change |
|---|---|---|---|---|
| Construction | 430 | 180 | -250 | -58 |
| Manufacturing | 950 | 730 | -220 | -23 |
| Transportation, Comm., Utilities | N/A | 1,220 | --- | --- |
| Wholesale Trade | 500 | 410 | -90 | -18 |
| Retail Trade | 2,730 | 2,780 | +50 | +2 |
| Finance, Insurance, Real Estate | 850 | 450 | -400 | -47 |
| Other Services | 7,300 | 7,870 | +570 | +7 |
| Government | 4,300, | 2,950 | -1,350 | -31 |
| **TOTALS:** | **17,060** | **16,590** | **-1,690** | **-3%** |

Construction experienced the largest decrease in numbers from 430 in 1990 to 180 in 1997, illustrating a 58% decrease. A considerable decrease (47%) in employment was also experienced by the finance, insurance, and real estate brackets from 850 in 1990 to 450 in 1997. Overall total employment dropped by 3%.

***Existing Employment Base Within the MDP Area***

At the present time, there are approximately 28 businesses located within the MDP area. It is estimated that these businesses employ between 148 and 222 people in total, as outlined in Table 2.2-5.

Of the 28 businesses in the study area, only seven employ more than 10 people. Amtrak is the largest employer, with estimated employment of 40 to 60 people. No other employer in the study area employs more than 20 people.

**TABLE 2.2-5**
**Businesses in the MDP Area (October 1998)**

| Business | Location | Estimated Range | |
|---|---|---|---|
| **Gateway Area** | | **Low** | **High** |
| Miner and Alexander | 150 Howard St. | 10 | 16 |
| Hawthhorne Woodworking | 162 Hamilton St | 2 | 3 |
| Leger Electric | 162 Hamilton St. | 6 | 10 |
| County Contractor | 169 Howard St. | 4 | 8 |
| Acct/Lawyer Firms (3) | 194 Howard St. | 12 | 20 |
| Integrated System | 210 Howard St. | 3 | 5 |
| Islamic Center | 216 Howard St. | 1 | 1 |
| Leo's Service Station | 175 Howard St. | 2 | 3 |
| Halfway House | 189 Howard St. | 3 | 5 |
| Hughie's Restaurant | 221 Howard St. | 10 | 12 |
| Conn. Comm. RE | 229 Howard St. | 3 | 5 |
| Kevin's Corner (Thames Refinisher) | Harris St. | 0 | 0 |
| | **Subtotal** | 56 | 88 |
| **Fort Area** | | **Low** | **High** |
| Fort Trumbull Marina | 93 Trumbull St. | 2 | 3 |
| Private Lobstermen | | 2 | 3 |
| Optican | 95 Trumbull St. | 2 | 3 |
| NL Trap & Bait | 82 Trumbull St. | 3 | 5 |
| Byron's Auto | 72 Smith St. | 2 | 3 |
| Iglesia Primaria Church | 68 Smith St. | 1 | 1 |
| Comm. Fishing Fleet | 37 Smith St. | 12 | 18 |
| Processing Facility | 37 Smith St. | 3 | 5 |
| Sonalysts, Inc. (Currently Vacant) | 72 Goshen St. | 2 | 5 |
| Fort Trumbull Cafe | 36 Walbach St. | 3 | 5 |
| Amtrak Staging Area | Walbach St. | 40 | 60 |
| Caretaker/Security [1] | NUWC | 11 | 14 |
| | **Subtotal** | 83 | 125 |



| **Lower Pequot Avenue** | | **Low** | **High** |
|---|---|---|---|
| Acton Sheet Metal | 21 Pequot Ave. | 3 | 3 |
| Letter Company | 21 Pequot Ave. | 2 | 2 |
| Thames Refinisher | 21 Pequot Ave. | 4 | 4 |
| | **Subtotal** | 9 | 9 |
| | **Study Area Total** | **148** | **222** |

[1] Currently, a 14-person staff that will be reduced to 11 persons in September, 1998.

### *2.2.3 Existing Tax Revenues*

According to information provided by the New London Assessor's Office, properties in the MDP area have a total assessed valuation of $13.1 million, which includes several tax-exempt properties. This figure includes $4.2 million in land and an additional $8.9 million in buildings. Table 2.2-6 provides a summary of the taxable valuation of properties in the study area, by geographic area.

As shown in Table 2.2-6, the properties in the study area generate $357,929 in property tax revenue at full taxation. Excluding exempt and city-owned properties, a total of $324,926 is generated each year in real property taxes.

For purposes of this analysis, it is assumed that the underlying land values will reflect existing conditions, and that any new construction in the study area will be assessed at 70% of construction cost, based on assessment practices in Connecticut. No timing or phasing of revenues has been included, and all financial figures are stated in 1998 dollars.

**TABLE 2.2-6**
**Taxable Valuation of Study Area Properties**

| | Acres | Gross Bldg. SF | Land Asmt. (000) | Bldg. Asmt. (000) | Total Asmt. (000) | Real Estate Taxes [1] |
|---|---|---|---|---|---|---|
| NUWC-PS [2] | 14.7 | 555,185 | N/A | N/A | N/A | $0 |
| Gateway | 12.4 | 236,874 | $1,634.03 | $5,316.42 | $6,950.45 | $189,747 |
| Fort Trumbull [3] | 14.4 | 215,169 | $2,461.83 | $3,323.11 | $5,784.94 | $157,929 |
| Lower Pequot [4] | 0.9 | 28,218 | $121.10 | $254.45 | $375.55 | $10,253 |
| Subtotal | 42.5 | 1,035,446 | $4,216.96 | $8,893.98 | $13,110.94 | $357,929 |
| | | | | | | |
| GW Exempt [5] | 2.9 | 20,779 | $179.83 | $299.74 | $479.57 | ($13,092) |
| FT Exempt [6] | 2.8 | 13,440 | $561.54 | $167.79 | $729.33 | ($19,911) |
| Subtotal | 5.7 | 34,219 | $741.37 | $467.53 | $1,208.90 | ($33,003) |
| | | | | | | |
| **Net Total** | **36.8** | **1,001,227** | **$3,475.59** | **$8,426.45** | **$11,902.04** | **$324,926** |

Source: City of New London Assessment Division and RKG Associates, Inc.

[1] Based on a mil rate of $27.30.

[2] That portion slated for public sale and/or, maritime conveyance.

[3] Does not include wastewater treatment facility and adjacent city-owned land.

[4] Reflects properties #5 through 21 Pequot Avenue.

[5] Exempt properties in the Gateway include eight city-owned parcels.

[6] Exempt properties in the Fort Area include one church and five railroad parcels (or portions thereof).

## 2.3 Neighborhood/Housing

The potential for neighborhood relocation was identified in the Environmental Assessment for this project, as a significant issue requiring analysis in the CEPA process. The following discussion is presented as a basis for impact analysis of potential displaced residents and businesses associated with the identified land use alternatives.

### *2.3.1 Citywide Housing*

Over the past several decades, the City of New London's housing stock has been affected by a series of demographic and development trends. These trends have affected the ability of the community to respond to the maintenance, enhancement, supply and demand for the city's housing stock.

The 1990 Census statistics reveal that the composition of the housing supply has changed. The number of single-family housing units was 4,109, or 36% of all city housing units in 1980. The 1990 figures show a decrease of approximately 5% to 3,751, or 31.3% of the total housing units in the city. Table 2.3-1 illustrates the differences in housing stock between 1980 and 1990.

**TABLE 2.3-1**
**Composition of the New London Housing Stock**
**1980 – 1990**

| Type | 1980 | Percent | 1990 | Percent |
|---|---|---|---|---|
| Single-Family Unit | 4,109 | 36.0% | 3,751 | 31.3% |
| 2 – 4 Family Unit | 3,440 | 30.1% | 3,897 | 32.6% |
| 5 – 9 Family Unit | 1,165 | 10.2% | 1,326 | 11.1% |
| 10+ Family Unit | 2,691 | 23.6% | 2,797 | 23.4% |
| Other | | | 199 | 1.7% |
| **TOTALS:** | **11,405** | | **11,970** | |

Source: U.S. Census, 1980 and 1990

Today, the single-family dwelling is not the dominant form, and the percentage of single-family units in the housing stock is dramatically lower than all other municipalities in the region, including Norwich, and is lower than several of the larger urban communities in the state, including Stamford, Meriden, Middletown, Waterbury, and New Britain. Consequently, the percentage of multi-family dwelling units (2+ family units) is correspondingly high and has increased by over 12% from 7,296 in 1980 to 8,219 units in 1990. At the present time, 67% of all housing units in the city are classified as multi-family dwellings.

The majority of the city's residents tend to rent the housing that they live in. The total number of housing units that were renter-occupied in 1990 was 6,758 units or 63.1%, whereas only 3,954 or 36.9% of the units were owner-occupied. By comparison, a total of 5,719 housing units, 58.6% of all occupied housing units, were renter-occupied in 1970. Statistically, the trend towards the increasing numbers of renter-occupied units highlights the disproportionate imbalance between owner versus renter-occupied units.



These figures identify the need to develop strategies and programs to allow opportunities for more residents to attain home ownership, thereby improving the balance in the housing stock.

According to the 1990 U.S. Census, 7,300 (61%) of the total housing units in the City of New London were built prior to 1950. Only 15% of the city's existing housing stock has been constructed since 1970. It is expected that the majority of these buildings are structurally sound, although their age warrants the need for increasing levels of maintenance, rehabilitation, and modernization.

The overall condition of housing stock with respect to code compliance is not known at this time as this would, in many cases, require inspection of residential dwelling interiors which are not currently accessible. At least two buildings in the project area have been condemned by the city. Additional information concerning the condition of buildings within the project area is provided in Section 2.3.3 of this document. Table 2.3-2 presents the age of the New London housing stock as of 1990.

**TABLE 2.3-2**
**Age of New London Housing Stock**

| Year Built | Percent | Number |
|---|---|---|
| 1939 or earlier | 52.9% | 6,336 |
| 1940 to 1949 | 8.1% | 964 |
| 1950 to 1959 | 10.7% | 1,279 |
| 1960 to 1969 | 13.0% | 1,553 |
| 1970 to 1979 | 11.7% | 1,406 |
| 1980 to 1990 | 3.6% | 432 |
| **TOTALS:** | **100.0%** | **11,970** |

Source: U.S. Census, 1990

New London has little vacant land available for new residential development. A recent land use survey conducted by city staff revealed that only 258.61 acres (7.1%) of the total land area of the city (3,652.78 acres) are vacant and residentially zoned. A good portion of this vacant land has serious limitations for development. Consequently, very few new housing units were built during the 1980's in the city as compared to other communities in the region. During the period of 1980 to 1989, the City of New London experienced only a 2.5% increase in construction of new housing units as reported by the Southeastern Connecticut Regional Planning Agency in June of 1990. The regional average was 14.7%, and Colchester experienced the largest increase at 50%. Table 2.3-3 illustrates the increase in housing units for New London and selected surrounding towns.

**TABLE 2.3-3**
**Estimated Increase in Housing Units for New London and Selected Surrounding Towns – 1980 to 1989**

| Town | Percent | Total Units |
|---|---|---|
| New London | 2.5% | 289 |
| Sprague | 9.0% | 95 |
| Norwich | 9.7% | 1,482 |
| Waterford | 15.8% | 1,017 |
| Groton | 19.7% | 2,749 |
| Salem | 39.8% | 356 |
| Colchester | 50.8% | 1,404 |

Source: Southeastern Connecticut Regional Planning Agency

Since 1980, the number of vacant housing units has increased significantly in the City of New London, from a total of 950 vacant units to 1,258 units (+32%) in 1990. This increase equates to a vacancy rate of 10.5%, which can be further broken down at a rate of



2.3% for homeowners and 10.4% for renters. Excluding the 121 seasonal housing units, the vacancy factor of year-round housing units was 9.5%, as indicated in the 1990 Census.

More recent vacancy data is not available; however, anecdotal evidence from real estate professionals indicates vacancy at the newer, modernized apartments has declined from levels reported in the 1990 Census. However, there still remains an unknown number of dwelling units considered "unmarketable/uninhabitable" throughout New London, including the project area.

### *2.3.2 Residential Analysis*

*Overview*

The New London Plan of Conservation and Development reports that, despite its relatively compact size, New London offers a wide diversity of housing opportunities for its residents. The city contains a significant inventory of housing stock which varies in size and price and includes: spacious, well maintained historic mansions; single family homes; duplexes; townhouses; condominiums; apartment complexes; rooming and boarding houses; apartment hotels; group homes; and high density, high rise public housing. The City contains some of the most affordable housing in the State.

Table 2.3-4 presents statistics available from the 1990 Census of Population and Housing. It provides summary information on the number, availability, and cost of owner-occupied and rental housing units in New London and the neighboring municipalities of Groton and Waterford. As appropriate, data from the City of New London's Consolidated Plan for Housing and Community Development and Plan of Conservation and Development has also been included in this analysis.

**TABLE 2.3-4**
**Comparative Census Statistics –**
**New London and Adjacent Communities**

| | New London | Waterford | Groton |
|---|---|---|---|
| Total Number of Housing Units | 11,970 | 7,357 | 16,598 |
| Occupied Units | 10,712 | 6,956 | 14,853 |
| Vacant Units | 1,258 | 401 | 1,745 |
| % Vacant | 10.5 | 5.4 | 10.5 |
| Owner Occupied Units | 3,954 | 5,878 | 7,048 |
| % Owner Occupied | 36.9 | 84.5 | 47.5 |
| Renter Occupied Units | 6,758 | 1,078 | 7,805 |
| % Renter Occupied | 63.1 | 15.5 | 52.5 |
| Overall Vacancy Rate | 10.5 | 5.4 | 10.5 |
| Vacancy Rate for Owner Occupied | 2.3 | 1.5 | 4.6 |
| Vacancy Rate for Renter Occupied | 10.4 | 5.4 | 7.9 |
| Median Value | $131,600 | $159,700 | $148,200 |
| Median Contract Rent | $455 | $570 | $547 |

Source: 1990 U.S. Census

*Ownership*

As evidenced by the data presented in Table 2.3-4, the majority of the city's residents rent housing (63.1% of the housing units are renter-occupied). Over the past several census periods the percent of renter-occupied housing be [illegible] eased. In 1970, 58.6% of all occupied housing units were renter-occupied, increasing to 62.5% in 1980. As outlined in the city's Plan of Conservation and Development, this trend of increasing number of renter-occupied units highlights the current imbalance between owner and renter housing.



According to the Plan, these figures identify the "need to develop strategies and programs to allow opportunities for more residents to attain home ownership, thereby improving the balance in the housing stock."

*Home Ownership*

At the time of the 1990 Census, 31.3% (3,751) of the city's housing stock was comprised of single-family units. This percentage is comparatively lower than all of the other municipalities in the New London region. Single-family homes comprised 56.5% of Groton's housing stock and 57.4% of Waterford's housing stock. Of the 3,751 single-family housing units in New London, 3,387 were single-family detached units and 364 were single-family attached (generally condominium-type units). Table 2.3-5 depicts the housing units by structure type based on the 1990 Census. The number of 2- to 4-unit structures in New London provides the opportunity to combine home ownership with rental income availability. This configuration, where the homeowner can offset costs with rental income from tenants in other units within the structure, is a common configuration for affordable housing programs.

**TABLE 2.3-5**
**Housing Units by Structure Type**

| Units in Structure | New London | Waterford | Groton |
|---|---|---|---|
| 1-Unit, Detached | 3,387 | 6,359 | 7,509 |
| 1-Unit, Attached | 364 | 148 | 2,012 |
| 2 to 4 Units | 3,897 | 414 | 2,755 |
| 5 to 9 Units | 1,326 | 150 | 1,146 |
| 10 or More Units | 2,797 | 73 | 2,215 |
| Mobile Home, Trailer, Other | 199 | 213 | 961 |
| **Total** | **11,970** | **7,357** | **16,598** |

Source: 1990 U.S. Census

As a means to reverse the declining trend in home ownership in the city and to ensure long-term housing affordability, New London has established a program whereby deteriorating properties are purchased and rehabilitated and then sold to low- and moderate- income families. Property deeds contain resale restrictions on the price or give the right of first refusal to the city or a trust, which in turn would sell it to another low-moderate income family.

In 1993, the City initiated a purchase and rehabilitation program which has resulted in the reconstruction of several homes. As of October 1998, four homes (3 single-family and 1 duplex) were available through the New London Neighborhood Investment Initiative Program. These homes are being sold for between $62,000 and $80,000. Homes are sold to income-qualified owners (80% of New London Area Median Income) in move-in condition. They have been renovated to meet housing and building code standards as well as local lead-safe standards. Three additional properties were underway as part of the Neighborhood Investment Initiative Program. All three of these units contain at least one rental unit.

In addition to the city's Neighborhood Investment Initiative Program, which provides affordable home ownership opportunities, a special home ownership assistance program is also being offered to households being displaced by municipal development programs through the Connecticut Housing Finance Authority (CHFA). CHFA provides Home buyer mortgages, downpayment assistance and/or rehabilitation mortgage loans to income-eligible households. A special ¼% fee reduction is available for program participants from/or in New London.



*Availability of Rental Housing*

At the time of the 1990 Census, 2,797 housing units were located in structures containing 10 or more housing units. A 1996 inventory of multi-family housing (i.e. those developments containing 10 or more units) was undertaken as part of the Plan of Conservation and Development process. This inventory is included in Appendix B. The majority of the multi-family housing in the city was built during the 1960's and 1970's. Of the 3,748 units in the 1996 inventory, 1,633 (44%) were publicly subsidized in some manner and the remaining were private market units.

In addition to the rental opportunities in large multi-family developments, New London also has a significant amount of rental housing units in buildings with two to four units (3,897 units) and a lesser amount in buildings of five to nine units (1,326 units).

In an attempt to quantify the availability and cost of rental housing in New London and its adjacent communities of Groton and Waterford, the Real Estate Guide published by the *New London Day* was reviewed for a four week period from September 11, 1998 through October 2, 1998. The review of the rental listings is summarized in Appendix B.

According to the real estate listings, the average cost for a one bedroom apartment in New London was just over $500. One bedroom units in Groton averaged $552. Only a limited amount of apartments were listed in Waterford. Of those listed, rents ranged between $500 to $600 for a one-bedroom apartment. Rents for two-bedroom units averaged $589 in New London and $629 in Groton. Rents for two-bedroom units in Waterford ranged between $600 and $700. Based upon the sample analyzed, rents in Groton

were typically $50 more per month than New London rents for similar sized units.

In an average weekly listing, between 15 and 20 one-bedroom units were listed for rent; 10 to 15 two-bedroom units were listed; 5 three-bedroom units were listed; and 5 studio/efficiency units were listed for rent in New London. In addition, the larger apartment complexes in the area advertised unit availability without providing unit characteristics.

The U.S. Department of Housing and Urban Development published the 40th percentile fair market rents for existing housing based upon survey data. The monthly fair market rents for the New London-Norwich area as of October 1, 1998 were $491 for an efficiency unit; $594 for a one-bedroom; $723 for a two-bedroom; $905 for a three-bedroom; and $1,034 for a four-bedroom. These rents include utilities.

*Availability of Ownership Housing*

Since 1990, the City of New London has experienced very little new housing construction. In fact, over the past several years, demolition of substandard and deteriorated properties has offset any true net gains in dwelling units. Due to the lack of developable land for residential purposes in the city, the majority of new housing units brought to the market have been renovated units in existing structures.

Table 2.3-6 presents authorized new housing construction in New London, Waterford, and Groton from 1990 to 1997.



**TABLE 2.3-6**
**Housing Units Authorized (New Construction)**
**1990 to 1997**

| Location | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|---|---|---|---|
| New London | 16 | 5 | 11 | 3 | 1 | 2 | 0 | 0 |
| Waterford | 37 | 42 | 42 | 58 | 110 | 89 | 157 | 79 |
| Groton | 52 | 46 | 121 | 59 | 71 | 40 | 74 | 82 |

As of mid-August 1998, according to the southeastern Connecticut Board of Realtors Multiple Listing Service, 105 residential properties were sold in New London at an average selling price of $102,100. Over the same eight month period, 180 homes were sold in Waterford and 234 homes were sold in Groton.

Average [illegible] prices in Waterford and Groton were slightly higher than New London's sale prices, at $142,000 and $159,900 respectively.

Recent residential sales data (as provided by Commercial Record) for New London, Groton, Waterford and all of New London County are shown in Table 2.3-7. Over the past five years, New London averaged 275 sales per year with median sales prices in the $75,000 to $80,000 range.

**TABLE 2.3-7**
**Residential Sales Data (1993 to 1997)**

| | 1993 | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|---|
| New London | | | | | |
| # of Sales | 209 | 253 | 298 | 286 | 346 |
| Median Sales Price | $80,000 | $75,000 | $80,000 | $82,000 | $74,000 |
| | | | | | |
| Waterford | | | | | |
| # of Sales | 291 | 320 | 323 | 365 | 404 |
| Median Sales Price | $115,000 | $109,900 | $109,900 | $112,500 | $111,100 |
| | | | | | |
| Groton | | | | | |
| # of Sales | 380 | 458 | 489 | 490 | 531 |
| Median Sales Price | $112,000 | $107,000 | $108,000 | $109,000 | $116,500 |
| | | | | | |
| New London County | | | | | |
| # of Sales | 3,438 | 3,951 | 3,935 | 3,983 | 4,494 |
| Median Sales Price | $109,000 | $109,000 | $105,000 | $105,000 | $110,000 |

Source: Commercial Record

As of September 1998, New London had 106 active residential listings. Waterford had 154 and Groton had 220. Average list prices for the three communities are $104,000, $168,100, and $194,000 respectively. A review of published real estate listings in New London showed 19 homes for sale under $70,000 and 23 homes for sale between $70,000 and $90,000. A summarized listing of homes for sale in New London at the time of this report is included in Appendix B.



*City of New London Housing Goals and Policies*

Within both the city's Plan of Conservation and Development and Consolidated Plan for Housing and Community Development, several common themes for future housing goals were voiced. These themes included: improving the existing housing stock through rehabilitation, conservation, and code enforcement. providing more opportunities for home ownership, decreasing the burden on New London taxpayers by seeking a more regional approach to the provision of affordable housing, and providing a more balanced housing supply within the city in terms of cost, type, and ownership.

The overall housing goal for the city, as included in its 1997 Plan of Conservation and Development reads as follows:

> Enhance the city's position as a fine residential community by improving the quality of the city's neighborhoods, providing more opportunities for home ownership, improving the condition of the housing stock, and decreasing the burden on New London's tax payers, while assuring the provision of a quality housing supply that reflects a more balanced distribution of costs, types, sizes, locations, ownership, and supply throughout the city and the region to meet the changing needs of all segments of the city's population.

Compared to other communities in the region and the state, the City of New London contains a disproportionate percentage of publicly-assisted housing as well as rental housing. According to statistics maintained by the State of Connecticut Department of Economic and Community Development, as they relate to the Affordable Housing Appeals Procedure, 18.62% of New London's housing stock is affordable as defined by Connecticut General Statute 8-39a.

### *2.3.3 Building Inventory of the MDP Area*

The MDP area has a diverse inventory of 117 buildings containing approximately 1.04 million square feet of space. The development area at NUWC (which excludes the planned state park and areas to remain with the U.S. Coast Guard and the Navy) is densely developed and is improved with 19 buildings containing nearly 555,200 square feet or 53% of the building area in the Fort Trumbull MDP area. The Gateway Area has 23% of the building inventory, followed by the Fort Area with 21%. The Lower Pequot Avenue Area contains the remaining 3% of the building space.

*NUWC*

Considering that the primary mission at NUWC was research and development (R&D), it is not surprising that nearly 79% of the buildings in the development portion of NUWC were utilized for office and/or R&D purposes. Another 11% of the space was utilized for shop and/or warehouse purposes, followed by 10% for recreational, utility and miscellaneous purposes. All buildings within the development portion of NUWC are considered vacant at this time.

*Gateway Area*

The Gateway Area contains 236,900 square feet in 38 buildings, including 168,600 square feet in 19 non-residential buildings. The residential component consists of 34 dwelling units in 19 buildings (68,300 square feet). It is estimated that 10 units are currently vacant, indicating an occupancy rate of 71%. More than 88,200 square feet of non-residential building space are vacant, resulting in an occupancy rate of 48%. Warehouse use is the most prominent commercial use, followed by office use. To a smaller extent, retail and restaurant uses are also present in this area.



*Fort Area*

The Fort Area contains 57 buildings with 215,200 square feet. Non-residential structures represent 79,800 square feet in this portion of the study area. Residential is the most prevalent use in this district as evidenced by the 135,400 square feet of gross building area in 43 buildings. In total there are 80 dwelling units in this district and 10 are estimated to be vacant, indicating an occupancy rate of 87%. Older multi-level mill buildings are the predominate commercial use, followed by office use, warehouse/shop use, retail/restaurant and other uses. An estimated 30,900 square feet of non-residential building space are vacant, indicating an occupancy rate of 61%. This high vacancy in the Gateway and Fort Area is caused in part by the structural design, age and condition of most of the buildings, which appear inefficient (physically and financially) to support any long-term reuse potential.

*Lower Pequot Avenue Area*

The Lower Pequot Avenue Area is improved with three buildings, totaling 28,200 square feet, with 21,150 square feet contained in one non-residential building. There are two residential buildings, containing four units, totaling 7,100 square feet in gross building area. One of these residential buildings has been condemned and one of the units in the second building is considered an illegal apartment.

*Age and Condition of Building Stock*

Fifty-five percent of the building stock in the MDP area is pre-1950 construction, while only 15% of the building inventory is post-1980 construction. All residential properties were constructed prior to 1940; in fact, most were built between 1890 and 1910. Since 1940, most of the building activity in the MDP area

has occurred at NUWC. Building 2 (1990) at NUWC and 194 Howard Street (1985) in the Gateway Area are the most recent major buildings constructed in the area.

Given the age of the building stock, it is not surprising that 41% (427,200 square feet) is wood framed construction (Class D), and another 18% (185,000 square feet) is wood and masonry framed construction (Class C). There are 423,200 square feet (41%) of masonry/steel construction (Class B or A). reflective of more modern construction techniques. This group includes Buildings 2, 80 and 96 at NUWC, as well as the 194 Howard Street office building.

More than 541,400 square feet of the non-residential building area (66%) is in fair to poor condition. This includes Building 80 as well as the other older, wood framed buildings at NUWC. In addition, almost all of the older warehouse and mill buildings in the other districts are in similar condition. In general, these buildings exhibit a high amount of functional obsolescence, and the cost to improve these structures significantly exceeds their economic viability. On the other hand, nearly 283,300 square feet of non-residential building area (34%) is in average or good condition.

Less than 12% of residential buildings, interspersed throughout the different districts, are considered in average or better condition. Approximately 122,300 square feet of residential properties are considered in fair condition, representing 58% of the residential inventory. The remaining 63,800 square feet (30%) are in poor condition. These properties are similarly scattered throughout the MPD area contributing to a saw-tooth visual impression in the various blocks.



Since 1990, the existing buildings have undergone minimal private investment. In fact, portions of the MDP area appear to have suffered more from disinvestment and owners' neglect than improvements or upgrades. Slightly more than $925,000 in improvement costs, based on assessor's information, has been invested since 1990, and more than 60% of this amount has been for improvements to 14 non-residential buildings. Total improvement costs over these eight years, when compared to current assessments, equate to only 6% of total value. This indicates an average improvement cost of less than 1% of assessment per year, suggesting that many properties suffer from deferred maintenance.

Seven buildings in the future development portion of NUWC (i.e., non-state park area, including Buildings 14, 41, 34, 44, 43, 80 and 96), totaling 407,300 square feet, are located within a proposed historic district. This equates to 74% of the building inventory in the development portion of NUWC. Nearly all these buildings (except Building 96) are in fair to poor condition and appear inefficient, either physically or financially, to support long-term reuse potential.

Only two buildings, containing 141,400 square feet, are ranked high in terms of their long-term market potential as office buildings. This represents nearly 14% of the MDP area inventory. In addition, 13 non-residential buildings, containing 150,800 square feet, are considered to have possible interim and/or medium development market potential, that may complement the proposed reuses for the area. Most of these interim properties, equating to nearly 15% of the inventory, are currently occupied. Alternatively, some, or all, of these buildings could be demolished and their sites assembled for other uses, if retaining them over the long term is not feasible and/or their

redevelopment conflicted with other reuse alternatives. Most, if not all, these buildings would require significant investment to continue and/or upgrade their uses.

It should be noted that the three buildings (Buildings 2, 96 and 99) at NUWC with medium to high reuse potential will require exterior changes, internal fit-up, and mechanical upgrades which may trigger additional costs to flood-proof these buildings, given the grandfathered location within the 100-year floodplain. This could effectively diminish their reuse potential.

The remaining 102 buildings totaling 743,250 square feet (72% of the building inventory) have limited, if any, long-term market potential. This group includes the remaining non-residential buildings and all residential properties. Most of these buildings are in relatively poor condition, vary in architectural style and materials, and exhibit a high amount of functional obsolescence. Because their reuse would require financial investment for modernization, demolition may be considered for these structures. The reuse of these existing buildings may not complement redevelopment opportunities in the MDP area.

*Vacancy of Building Stock*

An estimated 674,300 square feet of non-residential buildings are vacant (including NUWC), indicating a vacancy rate of 82%. There are also 118 residential dwelling units in the MDP area (including two which have been condemned and one which is an illegal apartment). It is estimated that 24 of the residential units are vacant, indicating a vacancy factor of 20%.

### *2.3.4 Relocation Plan and Process*

In July of 1998, the *Relocation Plan for the Fort Trumbull Area Municipal Development Project* was



developed in conjunction with this project. The Plan conforms with the Uniform Relocation Assistance Act (URAA). Since that time, NLDC has been acquiring properties and relocating individuals and businesses in the MDP area on a voluntary basis.

Future acquisition and relocation, if determined to be necessary, will be undertaken to ensure the availability of resources to accommodate displacees. This careful management of the redevelopment process will ensure availability of resources to accommodate displacees. The relocation process will be accomplished by the New London Development Corporation with assistance from others as appropriate. The relocation of site occupants will comply with the Uniform Relocation Assistance Act (Chapter 135 Connecticut General Statutes), the *Relocation Location Plan for the Fort Trumbull Area Municipal Development Project* (July 1988), and local procedures.

In addition to relocation assistance under the URAA, $10 million of Connecticut Housing Finance Authority (CHFA) low rate financing loans will be available to help residents that may be dislocated during or following any proposed redevelopment. The funds will be offered at a rate which is 25 percent lower than CHFA's usual rate in first mortgage financing and can be used by renters and owners to purchase and rehabilitate homes. An additional $250,000 will be available in downpayment assistance for relocated homeowners. The Small Business Assistance Program will also be available, with $250,000 to help small businesses which may be displaced. A detailed discussion of relocation assistance is presented in Section 5.4 of this document.

### *2.3.5 Residential Households, Businesses, and Non-Profit Agencies*

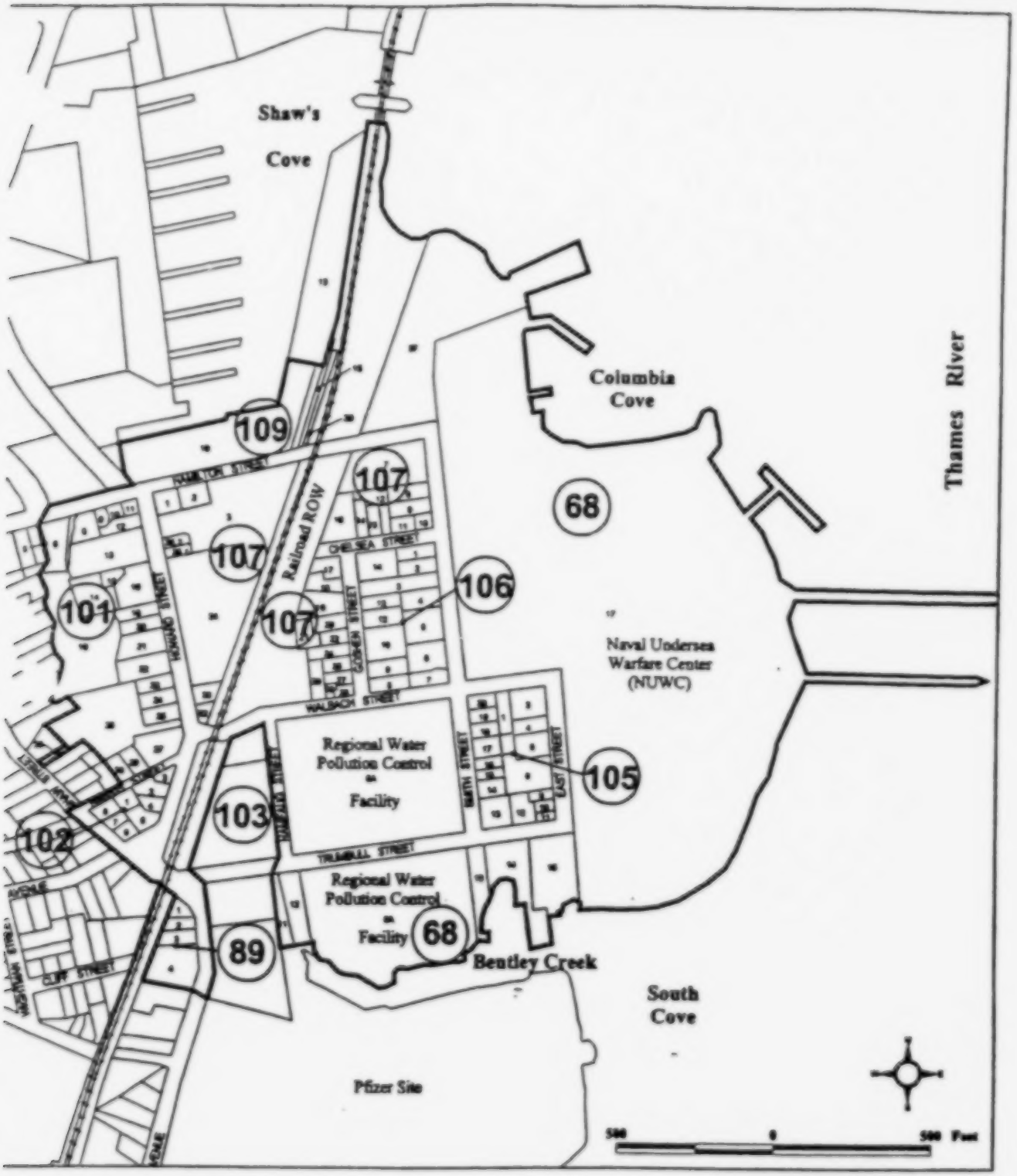
The planning process for creation of a Municipal Development Plan for the Fort Trumbull area has not

been concluded. This is anticipated to be accomplished through the latter part of 1998 and conclude in early 1999. As part of the MDP, a determination will be made of necessary acquisition and relocation of residential households, businesses, and nonprofit agencies, based upon selection of a preferred alternative. Section 4.0 provides a description of the potential impacts of six alternatives with respect to the need to relocate existing project area occupants. The location of properties to be acquired, if any, relative to the project boundaries, will be shown on an acquisition map which will accompany the MDP.

Figure 2.3-1 depicts the project area, with designations of map and block numbers. A basic survey of the project area resulted in the identification of the non-residential uses in the project area as presented in Table 2.3-8. Not all of these spaces are occupied at this time. Appendix C provides a complete listing of properties within the MDP boundary.

**TABLE 2.3-8**
**Summary of Non-Residential Uses by Block Number**

| Assessor's Block No. | Assessor's Map | Business/Non-Profit Agencies |
|---|---|---|
| 68 | 22 | 4 |
| 89 | 22 | 3 |
| 101 | 22 | 4 |
| 102 | 22 | 2 |
| 105 | 22 | 1 |
| 106 | 22 | 3 |
| 107 | 21 & 22 | 10 |
| 109 | 26 | 1 |
| | TOTAL: | 28 |




t Trumbull MDP Area - New London, Connecticut
Environmental Impact Evaluation - November 1998

: GIS coverages developed by Milone & MacBroom,
c. and HMA, Inc. Sources include Connecticut DEP,
ity of New London, FEMA, and US Navy. Intended for planning
nly - not for design use.

**Figure 2.3-1**
**Block and Lot Designations**

MDP Project Border

Residential properties in the project study area are summarized in Table 2.3-9. Future acquisition of residential dwellings and relocation of occupants, if any, would be undertaken in a process to ensure the availability of resources to accommodate displacees.

**TABLE 2.3-9**
**Summary of Residential Uses by Block Number**

| Assessor's Block No. | Assessor's Map | Residential Buildings | Potential Households | Total Dwelling Units |
|---|---|---|---|---|
| 68 | 22 | 0 | 0 | 0 |
| 89 | 22 | 2 | 0 | 4 |
| 101 | 22 | 13 | 14 | 19 |
| 102 | 22 | 4 | 7 | 8 |
| 105 | 22 | 22 | 34 | 41 |
| 106 | 22 | 7 | 12 | 14 |
| 107 | 21 & 22 | 16 | 25 | 29 |
| 109 | 26 | 0 | 0 | 0 |
| | TOTAL: | 64 | 92 | 115 |

Upon completion and approval of the Fort Trumbull Municipal Development Plan by the governing body of the City of New London and initiation of the project, NLDC staff and/or its designees will meet with each resident owner and tenant scheduled to be displaced to conduct a survey. The purpose of the survey will be to document the characteristics of each household or business, (i.e., services or products sold, space occupied) and ultimately determine specifications for a new residence or business site. Based upon this information, alternative dwelling units and commercial sites will be identified for these households, businesses, and non-profit agencies.

At this time, the real estate market, both its residential and commercial segments, appears to have a vacancy rate and turnover rate that will satisfy the requirements of potential displacees from the project area. Project relocation staff and/or its designees will follow the Relocation Assistance Advisory Plan to be adopted by NLDC and the City of New London to carry out relocation responsibilities.

### *2.3.6 Anticipated Relocation Expenses*

The total expenses to relocate residential households, businesses, and non-profit agencies from the project area cannot be estimated at this time. Upon completion of the Municipal Development Plan, a determination of the extent of acquisition, if any, will be made and a budget will be established. The budget will include expenditures for eligible moving payments, fixed payments, replacement housing payments, moving personal property and, when necessary, payments for direct losses of personal property. A contingency account will also be budgeted.

Funding for the relocation program is to coincide with the phasing of the acquisition of properties.

Additional information regarding relocation expenses is presented in Section 5.0 of this document.

## 2.4 Community Facilities and Services

The following information regarding education, health care, public safety, emergency services, and parks and recreation has been taken in part from the City of New London Plan of Development. Personal telephone interviews have been conducted to update



and verify this information, which will serve as the basis for evaluation of potential impacts as presented in Section 4.0 of this document.

### *2.4.1 Education*

The City of New London provides a full range of educational services to its residents. The education system is managed by a seven-member group of elected officials known as the Board of Education. Five elementary schools located throughout the city provide educational services for children in grades K-6. These elementary schools include the Winthrop, Jennings, Edgerton, Harbor, and Nathan Hale Schools. Also included in the school system is the Little Red Schoolhouse, providing special needs programs. Middle school services are provided at the Bennie Dover Jackson Middle School for grades 6-8. The New London High School provides education for grades 9-12.

A number of private schools also exist in the City of New London. Five private schools provide elementary education, including Saint Mary's School, Saint Joseph's School, Solomon Schecter Academy, the Word Center Christian Academy, the Regional Multi-Cultural Magnet School, and the Inter-district School for Arts and Communication (ISAAC). The Williams Memorial Institute provides private education at the junior and senior high school levels.

Both daytime and evening adult education programs are provided to the residents of New London. The city leases a building in the Shaw's Cove Business Park which houses the Adult Education Center. Also located within the city are several institutions of higher learning, including the Sawyer School, Ridley Lowell Business and Technical Institute, Mitchell College,

Connecticut College, and the United States Coast Guard Academy.

The current school enrollment levels are expected to remain relatively stable. As a result, it is not anticipated that any schools will be closed or new schools constructed. At the present time, most of the schools operate at enrollment levels below the rated capacity of the buildings.

Table 2.4-1 lists the grades, current enrollment as of 1998, maximum capacity of each school, and the streets in the Fort Trumbull area of New London in each school district. The majority of the MDP area is allocated to the Harbor School for elementary education. All middle school and high school students in this area would go to Bennie Dover Jackson Middle School and New London High School, respectively.



**TABLE 2.4-1**
**Current Enrollment and Maximum Capacities of New London Public Schools**

| Name | Grade | Current Enroll-ment | Maximum Capacity | Fort Trumbull Area Streets Assigned to School |
|---|---|---|---|---|
| Little Red Schoolhouse (special needs program) | ungraded | | Not Available | None |
| Edgerton School | elementary | 327 | 408 | None |
| Harbor School | elementary | 377 | 476 | Chelsea Street<br>East Street<br>Goshen Street<br>Maple Avenue<br>Pequot Avenue (1-401)<br>Shaw Street<br>Smith Street<br>Trumbull Street<br>Walbach Street |
| Jennings School | elementary | 382 | 377 | None |
| Nathan Hale School | elementary | 259 | 408 | None |
| Winthrop School | elementary | 271 | 383 | Hamilton Street<br>Howard Street |
| Bennie Dover Jackson Middle School | middle school | 683 | 728 | All |
| New London High School | high school | 726 | 800 | All |

Source: City of New London. Board of Education, 1998.

### *2.4.2 Health Care*

The major contributor to the region's health care facilities is the Lawrence and Memorial Hospital located on Montauk Avenue in New London. This facility maintains 350 beds and serves approximately 14,000 hospitalized inpatients and over 100,000 outpatients per year. The hospital is currently under an expansion and modernization project which will bring the facility up to par with some of the other leading hospitals in the state. When the project is complete, the new services will include a new advanced emergency room, a maternity service wing, new operating suites, and a community service center. The expansion project has been divided into three separate phases. Currently, Phase 2 is near completion.

The City of New London is also home to approximately 70 offices of local physicians, dentists, and other health care professionals. The Community Health Center relocated its facility to the Shaw's Cove Business Park in the fall of 1994.

The City of New London Health Department is also active in protecting the health of the public. The Health Department currently oversees a number of programs, including lead abatement, code enforcement, immunization, radon, Aids, teen pregnancy protection, and school dental and health.

### *2.4.3 Public Safely and Emergency Services*

The City of New London provides a variety of police, fire and emergency services in an effort to reduce the loss of life and property and protect the public's safety.



*Police Services*

The New London Police Department headquarters (staffed 24 hours per day) is located on Governor Winthrop Boulevard. In addition to the headquarters, there are two auxiliary police stations (staffed a portion of the day) located on Bank Street and Truman Street. A total of 90 sworn officers and 20 civilian personnel comprise the New London Police Department. The Police Department also operates 14 marked patrol cars and 10 unmarked cars as well as a marine unit that includes a boat and three officers. (Personal communication, Captain Edwards, July 1998)

*Fire and Emergency Services*

The New London Fire Department headquarters is located on Bank Street. Two additional fire stations are located on Broad Street and Lower Boulevard. In all, the Fire Department employs 76 people, including the fire chief, deputy fire chief, fire marshal, a fire inspector, and administrative staff. There are no volunteer firefighters. The Fire Department headquarters located on Bank Street also houses one ladder and one tower engine. The Fire Department possesses two additional fire engines held in reserve. (Personal communication, Fire Department administrative staff, July 1998)

In addition to its firefighting related responsibilities, the New London Fire Department serves as the lead resource necessary to abate hazardous materials incidents, rescue operations, radiological incidents, and other emergency incidents.

The City of New London operates an Ambulance Division as part of the Fire Department. The Ambulance Division operates out of the Fire Department headquarters located on Bank Street as well as at the North Station. Two ambulances are operated full

time, with one additional ambulance in reserve. Each ambulance is operated by a two-person crew, with a total of four employees working per shift providing emergency medical services to the community. (Personal communication, Fire Department administrative staff, July 1998)

From the perspective of fire hazard rating of construction materials, 41% (427,200 square feet) of the building stock in the study area is wood framed construction (Class D), and another 18% (185,000 square feet) is wood and masonry framed construction (Class C). There are 423,200 square feet (41%) of masonry/steel construction (Class B or A), reflective of more modern construction techniques. This group includes Buildings 2, 80 and 96 at NUWC, as well as the 194 Howard Street office building.

### *2.4.4 Parks and Recreation*

*City-Wide Park and Recreation Facilities*

According to information in the 1997 New London Plan of Development, the city owns and operates one regional park, three citywide parks, three beaches, one senior center/auditorium, two historic sites, 11 neighborhood playgrounds, seven neighborhood parks, one pier, one marina, and two open space parks. This park system totals 292 acres at 28 sites and ranges in size from 0.35 acres to 95 acres.

In addition to these public facilities, there are several private and quasi-public facilities located within the city that are available to community residents. These include the Garde Arts Center, Mitchell Woods Park, the U.S. Coast Guard Academy, Connecticut College, the Connecticut College Arboretum, Mitchell College, the BP Learned House, six marinas, a yacht club, a state boat launch, and a number of privately owned



beaches. These facilities add over 220 acres of recreational area to the city. The combination of public and private land held for open space totals 14% of the land area of the city.

Planning for the city park system is currently based upon the Urban Park and Recreation Recovery Action Program. The city is in the process of revising this plan which inventoried and assessed the provision of the parks and recreation services to its residents and established goals and recommendations for future needs.

Greens Harbor Beach and Park is located in the project vicinity. This is a 3.5-acre public recreational facility operated by the City of New London. Caulkins Park is a 12.9-acre park located across the railroad tracks from Greens Harbor Park. Under present day conditions, there are no recreational facilities within the confines of the Fort Trumbull MDP area.

*Planned Facilities by the State Department of Environmental Protection*

The Connecticut Department of Environmental Protection is planning to take over a portion of the NUWC site for use as a historic state park. Tentative activities include removing numerous incompatible buildings, opening the 19th century fort and blockhouse for visitors, and providing waterfront access. The specific planned components of the Fort Trumbull State Park are described in greater detail in Section 3.0 of this document.

The following discussion is based on the Department of Environmental Protection's application to the Federal Lands to Parks Program administered by the United States Department of the Interior, National Park Service, Northeast Region.

Planning is underway by the Department of Environmental Protection with the City of New London and the Town of Groton in the development of the Thames Maritime Heritage Park in New London. New London is one of six "Tier One" State Heritage Parks projects intended to combine historic preservation, promote tourism and economic regeneration and increase the region's recreational opportunity. Each park is based upon a local theme. The Thames Maritime Heritage Park's theme will be local maritime history with a focus on the Thames River Estuary. Because this significant military history is shared by both sides of the river, the Thames Maritime Heritage Park will be unique in Connecticut in being a multi-municipality facility.

The goal of the heritage park is to link the area's many marine-related attractions, unitizing a visitor center/museum as the focal point. Tour boat rides around the harbor and docking at designated locations will allow visitors opportunities to tour key historic attractions along the Thames River. Some of these attractions will include: Fort Griswold State Park, National Submarine Memorial, New London Ledge Lighthouse, Project Oceanology, U.S.S. Nautilus Memorial, U.S. Coast Guard Academy, Customs House, Shaw Mansion, and Fort Trumbull State Park. The addition of Fort Trumbull State Park is seen as a key to the rebirth of the waterfront in New London and as the cornerstone of the Thames Maritime Heritage Park.

## 2.5 Aesthetic/Visual Resources

The following discussion provides background on the aesthetic and visual condition of the project area.



### *2.5.1 Regional Landscape*

The southeastern portion of Connecticut falls into two geological areas, the eastern uplands and the coastal slope. Bedrock, composed of mainly metamorphic rocks like schist and gneiss, make up the eastern uplands. Hills rise out of the eastern side of the Central Valley, running mostly north and south, reaching 1,000 feet at the northernmost reach, while the southernmost part reaches only 500 to 700 feet in height, creating a slope of 10 to 20 feet per mile. At the coast, the slope steepens to 50 feet per mile.

The eastern uplands are composed of the Bolton Range, Mohegan Range, and the Windham Hills. This hilly area, aptly named the uplands, is covered with rich soil that is generally quite good for farming unlike much of New England. Yet another aspect of the eastern uplands is the minerals and metals found beneath the rich soil.

The coastal area of southeastern Connecticut is very unique. Unlike the smooth shores of Rhode Island and the southern side of Long Island, Connecticut's shore is rocky and irregular. Made up of salt marshes, freshwater meadows, and beaches, its many notches are well suited for harbors and are largely responsible for the important role maritime industries have played in the past.

New London Harbor is an industrial port serving southeastern Connecticut. The dry docks and other shipbuilding facilities at Electric Boat and the manufacturing buildings at Pfizer are located on the east side of the harbor in Groton. On the west, the NUWC facility, State Pier, Cross Sound Ferry, and the railroad are predominant waterfront features. Urban downtown New London completes the landscape of the outer harbor.

Upstream along the Thames River, north of Interstate 95 and the Gold Star Memorial Bridge, the industrial waterfront continues, but to a lesser extent. The Navy submarine base occupies the east bank of the Thames River, while the U.S. Coast Guard Academy overlooks the river on the west.

Downstream of the project area, to the south, the roadway along Pequot Avenue provides continuous shoreline views. Moving further south, a transition to residential neighborhoods occurs. Ocean Beach is located further south.

### *2.5.2 MDP Area Landscape*

The entire project area has been used extensively by European settlers since the mid 17th century. Little natural landscape remains. The most spectacular area is the bedrock hill upon which Fort Trumbull was built. It commands a fine view of the Thames River and central New London. Even here, the landscape has been cut, filled, and regraded to meet changing needs.

The lower lying areas north, west, and south of the hill have also seen extensive disturbance, typical of older urban areas. The landscape is dominated by wood frame buildings, several industrial buildings, a sewage treatment plant, and roads. Vegetation is limited to scattered hardwood trees in yards, lawns, and hedges associated with the residential landscape. The rock outcrops and the remnant tidal wetlands associated with Bentley Creek are the only remains of the natural landscape features.

The visual quality of the landscape within the project area is best described as being deteriorated. The streets and sidewalks show a lack of maintenance.



Individual structures in the vicinity of NUWC exhibit a similar lack of care, for the most part. The streetscape character, which is likely to have existed in the 18th and 19th centuries, is no longer apparent.

## 2.6 Public Utilities and Services

Existing utilities are described below. This inventory provides a baseline against which to measure impacts of alternatives, as presented in Section 4.0 of this document.

### *2.6.1 Water*

#### *Source of Supply*

The City of New London has operated its own water supply system since 1873 in accordance with an enabling Act of the General Assembly dated June 5, 1871. On March 28, 1997, the operation of the water supply system was transferred to the Professional Service Group, taking charge of all administrative power except for capital projects. Professional Service Group provides public water service within city boundaries, as well as to portions of the Town of Waterford and the Town of Montville.

New London utilizes surface water sources for its supply system. Table 2.6-1 presents storage, water surface area, and watershed data for the active water supplies. These consist of four active reservoirs: Lake Konomoc, Fairy Lake, Barnes Reservoir, and Bogue Brook Reservoir. Lake Konomoc, the principal storage reservoir of the supply system, is located along Lakes Pond Brook, a tributary to the Niantic River, in Montville and Waterford. Fairy Lake, located in Salem, is located along Latimer Brook, a tributary to the Niantic River, and is upstream of Barnes Reservoir

which is located in Montville, also along Latimer Brook. Bogue Brook Reservoir is located in Montville as well, along Bogue Brook.

**TABLE 2.6-1**
**Active Water Supplies**

| Source | Storage (MG) | Water Surface (acres) | Watershed (sq. mi.) |
|---|---|---|---|
| Lake Konomac | 1,216 | 286.0 | 1.40 |
| Barnes Reservoir | 170 | 42.2 | 2.00 |
| Bogue Brook Reservoir | 212 | 110.0 | 1.65 |
| Fairy Lake | 235 | 121.2 | 0.89 |
| Beckwith Pond | 2 | 3.7 | 2.24 |
| Great Swamp | — | — | 0.68 |
| Totals | 1,835 | 563.1 | 8.86 |

Source: *Comprehensive Water Supply Plan*. City of New London, Water and Water Pollution Control Authority, rev. 1998.
Note: MG is million gallons

Additional supply sources include the Beckwith Pond Reservoir, in Montville at the confluence of Latimer and Bogue Brooks, and the Great Swamp Diversion, northeast of Lake Konomac. An emergency source, Brandagee Lake, owned by the Water and Water Pollution Control Authority (WWPCA), is located at the northern border of New London. An additional emergency source, although restricted and not used, is the small pond known as Bond Reservoir, located immediately north of Fairy Lake.

Future projections provided in the city's Water Supply Plan forecast the population of the New London service area to be relatively stable. However, the adjacent Town of Waterford service population and consumption is growing steadily and is projected to continue to increase. The State Department of Public Heath (DPH) has indicated that system improvements are needed to



increase New London's available water supply in the future. Although the safe yield of the water system meets the current average demands, a water deficit is projected for the 50-year planning period. This supply deficit is projected for systems during a severe drought when the margin of safety falls below 1.0. The margin of safety for a system is defined as the unitless ratio of the water available in the system (safe yield) to the average daily demand. A margin of safety of at least 15% (1.15) relative to a 99% safe yield is recommended by the Department of Public Utility Control (DPUC).

Table 2.6-2 presents safe yield, average daily demand, and margin of safety data for existing conditions and the 5-, 20-, and 50-year planning periods. New London's water supply is projected to fall below the desired margin of safety by the year 2012 and it is projected that the existing safe yield will be exceeded by the year 2030. Even using more conservative population projections, it is anticipated that the margin of safety will be inadequate by the year 2040.

**TABLE 2.6-2**
**Margin of Safety for Current and Projected Consumption Based on Existing Supply Sources**

| Time Frame | Safe Yield (MGD) | Average Daily Demand (MGD) | Margin of Safety |
|---|---|---|---|
| FY 1993-1997 | 7.0 | 5.54 | 1.26 |
| 5-year (2002) | 7.0 | 5.69 | 1.23 |
| 20-year (2010) | 7.0 | 6.01 | 1.16 |
| 50-year (2040) | 7.0 | 7.52 | 0.93 |

Source: *Comprehensive Water Supply Plan*. City of New London, Water and Water Pollution Control Authority, rev. 1998.

To address the forecasted deficiencies, the city has submitted an application for a water diversion permit

to the Department of Environmental Protection to develop the Hunts Brook diversion to increase water supply safe yield. The replacement of the Great Swamp pump station has also been identified as a possible action to increase the available yield to the water supply system. Any future development with high water demands would need to be carefully coordinated with the city to ensure that adequate water supply is available to meet such needs.

Table 2.6-3 presents options for increasing the safe yield through various scenarios. It should be noted that a permitted diversion rate does not equate to safe yield and, in fact, is often considerably greater than safe yield.

**TABLE 2.6-3**
**Various Scenarios for Increasing Safe Yield**

| Description | Safe Yield (MGD) |
|---|---|
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 0.25 MGD Diversion at Great Swamp | 7.0 |
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp | 7.2 |
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp 6.0 MGD Diversion at Hunts Brook | 9.3 |
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp 8.0 MGD Diversion at Hunts Brook | 9.4 |



| | |
|---|---|
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp 10.0 MGD Diversion at Hunts Brook | 9.5 |
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp 8.0 MGD Diversion at Hunts Brook and 5.0 MGD Diversion at Miller Pond | 11.0 |
| Existing Reservoir System with 7.4 MGD Diversion at Beckwith Pond and 1.2 MGD Diversion at Great Swamp 8.0 MGD Diversion at Hunts Brook and 10.0 MGD Diversion at Miller Pond | 11.0 |

Source: *Comprehensive Water Supply Plan.* City of New London, Water and Water Pollution Control Authority, rev. 1998.

Implementation of various combinations of these options would increase safe yield to acceptable levels, with an adequate margin of safety. A regional water supply planning program is currently underway by the State of Connecticut Department of Public Health which will further evaluate supply deficits and potential future supply sources in the southeastern Connecticut region.

*Distribution System*

The New London Plan of Development and the city's Water Supply Plan indicate that the distribution system storage capacity is adequate for the existing and future demands. The Plan of Development further indicates that the Waterford distribution piping is relatively new

and in good condition. The New London distribution system, particularly in the southern half of the city, was constructed in the early 1900's and is in need of substantial repairs. The system has numerous areas of fire flow deficiencies, reduced pipe capacities, undersized mains and low pressure areas.

Fire flow deficiencies are gradually being addressed through the city's main replacement program. Minor repairs and maintenance have been performed on the Lake Konomac Dam, Barnes Reservoir Dam, and Branegee Lake Dam in response to orders issued by the Department of Environmental Protection. Plans also include installation of the additional instrumentation necessary to assure compliance with the 1997 Safe Drinking Water Act Additionally, a comprehensive metering program, intended to assist in the recovery of lost revenues, is underway to replace all customer meters within eight years.

Remaining deficiencies are addressed in the short-term and long-term capital improvement plans. Two programs are outlined in the capital plan: one for projects specific to the New London distribution system, and the second for overall, joint system improvements.

In the project area, water is supplied through a series of water mains located in the surrounding streets. Table 2.6-4 lists the streets in the project area and the size of the existing service mains.

NUWC operates and maintains its own water distribution system. Water supply to the NUWC property is provided by the City of New London through the Professional Services Group. Pipe sizes on the base range from two to eight inches in diameter. The majority of the water mains are ductile iron, with some concrete-lined pipes.

Fire protection is provided through a series of hydrants located throughout the project area. A total of



30 hydrants are known to exist in the vicinity, two of which are located just outside of the MDP boundary. Table 2.6-5 lists hydrants which have been visually inventoried and their locations. Table 2.6-6 presents available data on hydrant flow testing.

**TABLE 2.6-4**
**Water Service Mains for the Fort Trumbull MDP Area**

| Street Name | Water Supply Mains |
|---|---|
| *Chelsea Street* | 6" main |
| *East Street* | 12" main, 6" main |
| *Goshen Street* | 6" main |
| *Hamilton Street:* | |
| from Shaw to Howard St. | 8" main |
| from Howard St. to Amtrak RR | 8" main |
| from Amtrak RR to Smith St. | 6" main |
| *Harris Street* | |
| *Howard Street:* | 12" main, 10" main |
| from Hamilton to Harris St. | 12" main, 10" main |
| from Harris St. to Pequot Ave. | 6" main |
| *Nameaug Street* | 10" main |
| *Pequot Avenue* | 10" main |
| *Shaw Street* | |
| *Smith Street:* | 6" main |
| from Trumbull to Walbach St. | 12" main, 8" main |
| from Walbach to Chelsea St. | 12" main, 8" main |
| from Chelsea to Hamilton St. | |
| *Trumbull Street:* | 6" main |
| from Pequot Ave. to East St. | 8" main |
| to NUWC Base | |
| *Walbach Street:* | 12" and 8" main, 6" main |
| from Howard to Nameaug St. | 12" main, 8" main |
| from Nameaug to Goshen St. | two 12" mains |
| from Goshen to Smith St. | 12" main, 6" main |
| from Smith to East St. | 6" main |
| to NUWC Base | |

Source: Professional Service Group Water Department

**TABLE 2.6-5**
**Hydrant Locations**

| Hydrant Reference | Location |
|---|---|
| | |
| 1 | Eastern side of Pequot Avenue near future Pfizer site |
| 2 | Northwest corner of Maple Avenue and Pequot Avenue |
| 3 | Southeast corner of Trumbull Street and Pequot Avenue |
| 4 | Northeast corner of Trumbull Street and Nameaug Street |
| 5 | Western side of Smith Street near Trumbull Street |
| 6 | Northwest corner of Walbach Street and East Street |
| 7 | Northeast corner of Walbach Street and Smith Street |
| 8 | Northeast corner of Walbach Street and Goshen Street |
| 9 | Northwest corner of Chelsea Street and Smith Street |
| 10 | Southwest corner of Walbach Street and Nameaug Street |
| 11 | Western side of Howard Street near Shaw Street |
| 12 | Eastern side of Howard Street near Walbach Street |
| 13 | Southeast corner of Hamilton Street and Howard Street |
| 14 | Northern side of Hamilton Street near Amtrak railroad line |
| 15* | Western side of Shaw Street near Harris Street |
| 16* | Northern side of Hamilton Street near Community Health Center |
| 17-30 | On the Naval Undersea Warfare Center base |

*Near but outside the Fort Trumbull Development area border.



**TABLE 2.6-6**
**Hydrant Flow Testing**

| Hydrant Reference | Hydrant Flow Testing | | |
|---|---|---|---|
| | Static | Residual | Flow |
| | | | |
| 1 | 102 | 90 | 1,320 |
| 6 | 98 | 70 | 820 |
| 12 | 110 | 95 | 2,900 |
| 15* | 102-110 | — | — |

The Insurance Services Organization (ISO) provides target fire flows for residential areas of between 750 gpm and 1,000 gpm, and between 1,500 gpm and 3,500 gpm for commercial areas. Based on the available hydrant testing in the project area, available fire flows appear to be inadequate for some uses under existing conditions.

### *2.6.2 Sanitary Sewer*

The City of New London has had sewers since approximately 1890 and a sewer plant since 1929. As of March 28, 1997, water and sewer operations were transferred to the Professional Service Group, except for capital projects. The regional water pollution control facility (WPCF) is located at 100 Trumbull Street in the Fort Area. This facility serves the needs of a large percentage of the City of New London, as well as areas in the Towns of Waterford, East Lyme, and Montville. The facility also treats septic wastes delivered to the facility by way of septic hauling tank trucks from the Towns of Waterford, East Lyme and Montville.

An extensive network of sanitary sewers is located in the project area. The major trunk sewer line which receives the sanitary sewage from the network of collector sewer pipes travels along Howard Street, onto

Nameaug Street, and then onto Trumbull Street before reaching the WPCF. Raw sewage flows to the treatment plant via a 30-inch gravity sewer line and a 24-inch force main. After being treated, the effluent is discharged via diffuser which extends from the west bank of the Thames River out approximately 600 feet from the main channel. This outfall extends along the south side of the NUWC property in an easement. Table 2.6-7 list the streets included in the area along with a description of the sanitary pipes located within the street.

The NUWC base operates and maintains its own sanitary sewer collection system, varying between six inches to 12 inches in diameter, as well as a pump station located adjacent to Pier 7 which discharges to the WPCF on Trumbull Street.

New London has recently approved a major sewer system rehabilitation project for the southern half of the city. This $12 million project is designed to prevent rain and ground water from entering the sewer system and involves the repair, replacement and rehabilitation of gravity sewer lines, force mains, and pump stations to avoid overflows into the Thames River, Long Island Sound, and Alewife Cove. These improvements will bring the city into compliance with an order issued by the Connecticut Department of Environmental Protection that requires the city to eliminate overflow into the Thames River.

The City of New London has retained the engineering consulting firm of Camp, Dresser & McKee, Inc. (CDM) to evaluate several improvements to the water pollution control facility. CDM is currently under contract to the city to identify anticipated flows and loadings to the facility over the next 10 years, evaluate capacity and nitrification/denitrification options within the existing aeration basins, and make recommendations to the WWPCA.



**TABLE 2.6-7**
**Sanitary Sewer Mains for the Fort Trumbull MDP Area**

| Street Name | Sanitary Sewer Mains |
|---|---|
| *Chelsea Street* | none |
| *East Street* | 8" sewer main, 6" sewer main |
| *Goshen Street* | 8" sewer main |
| *Hamilton Street:* | |
| from Shaw to Howard St. | 27" sewer main |
| from Howard St. to Amtrak RR | 2" force main |
| *Harris Street* | 15" sewer main |
| *Howard Street:* | |
| from Hamilton to Harris St. | 30" sewer main, 24" force main |
| from Harris St. to Pequot Ave. | 15" sewer main |
| *Nameaug Street* | 30" sewer main, 24" force main |
| *Pequot Avenue* | 15" sewer main |
| *Shaw Street* | 18" sewer main |
| *Smith Street:* | 10" sewer main |
| *Trumbull Street:* | |
| from Pequot Ave. to Nameaug St. | 24" force main |
| from Nameaug to Treatment Plant | 14" sewer main, 24" force main |
| from Treatment Plant to Outfall | New 30" outfall, old 24" outfall |
| from East to Smith St. | 10" sewer main |
| *Walbach Street:* | |
| from Howard to Nameaug St. | none |
| from Nameaug to Goshen St. | 8" sewer main |
| from Goshen to Smith St. | none |
| from Smith to East St. | 8" sewer main |

Source: Professional Service Group Sewer Department

The current plan is to expand the existing CDM scope of work to develop and evaluate several alternatives with respect to permit compliance, odor control, and visual enhancement and process upgrade to meet the goals of the municipal development strategy. The following odor control and visual enhancement issues will be evaluated:

- Evaluate the installation of a security and fire alarm system for the facility and the remote wastewater pumping stations.
- Evaluate alternative ways that activities associated with septage receiving, grit removal and sludge building loading can be accomplished out of sight and under cover from both a visual and odor control standpoint.
- Evaluate the rehabilitation and reactivation of the existing solids dewatering facilities to increase the range of solids disposal options available to improve facility operations and odor control.
- Evaluate installing corrosion resistant covers to completely enclose the three existing primary clarifiers and a new odor control wet scrubber or carbon unit dedicated to contain off-gases from the headworks and primary clarifiers. Redundant odor control equipment will also be evaluated.
- Evaluate the removal of the incinerators and ancillary equipment for visual enhancement.
- Evaluate the removal of the incinerator stacks or incorporation as part of the odor control system to achieve dispersion of treated air for both visual enhancement and odor control.



- Review alternative screen wall concepts at the perimeter of both the north and south treatment areas for visual enhancement and odor control and evaluate installation of windscreens on the primary clarifiers to reduce surface turbulence, improve settling, and reduce odors.
- Evaluate the restoration or repair of perimeter security fencing, including double and pedestrian gate entrances for visual enhancement.
- Evaluate the current lighting levels at the facility, repair or replace area security lighting, and convert photocell operation for visual enhancement.
- Evaluate streetscape improvements to Trumbull, Smith, Walbach and Nameaug Streets, including improvements to the existing riprap slope, installation of street trees, and other potential landscaping improvements.
- Evaluate landscape improvements on the site and recommendations on the cleanup of Bentley Creek and the marina area.
- Evaluate improvements to or removal of the existing one-story brick maintenance building and recommendations on the cleanup of building facades with respect to painting, power washing, or other physical improvements.
- Develop and evaluate alternative methods for screening the sand and gravel storage area and/or providing alternative location(s) for this function.
- Evaluate adding aeration or other measures to the primary effluent wetwell to eliminate dead zones and provide odor control.

- Evaluate ways to screen vehicle or truck parking areas or provide covered and secure parking and storage for vehicles and rolling stock within the existing incinerator building.

### *2.6.3 Storm Sewer*

The existing storm sewer system located in the project area is in poor condition. During several site visits, a total of 45 catch basins were identified in the project area, excluding the NUWC site. Other catch basins may exist on private property. Several of these catch basins were nearly completely silted or filled with standing water. Due to the local topography, additional areas outside of the project boundaries drain into this portion of the storm sewer system.

A number of drainage outfalls exist within the project area as well. Two outfalls empty into Shaw's Cove, north of the project area, one of which empties directly into the cove and the other which first empties into an open channel located at the southern end of Shaw's Cove. Another potential outfall location is in a vacant lot located between Howard Street and Shaw Street. It is believed that another outfall is located in the vicinity of the future Pfizer site near Bentley Creek.

The NUWC base contains its own extensive storm drainage system, including some 86 catch basins which empty into the Thames River at 13 separate outfall locations.

Stormwater quality and discharge issues are discussed in Section 2.9 of this document.



### *2.6.4 Electric/Energy*

Electric service to the project area is provided by Connecticut Light & Power (CL&P). Distribution lines throughout the project area are overhead. Underground distribution lines are located on both Howard Street and Shaw Street north of Hamilton Street. Overhead lines also transport electricity to a power substation located at the northwest corner of the NUWC base. From here, power is distributed to the facilities located on the base. There is no metering of individual buildings at the NUWC site beyond the substation.

Based on the age and physical inventory of the buildings in the MDP area, it is evident that use of energy-efficient appliances and fixtures are generally not in use. However, no detailed data is available regarding current power use or conservation measures in the area.

### *2.6.5 Gas*

The Yankee Gas Services Company provides natural gas service to the City of New London. The NUWC base also receives its natural gas from the Yankee Gas Services Company. All streets except Nameaug Street contain natural gas mains, ranging in size between four to six inches. Pequot Avenue contains one low pressure main and one medium pressure main. All other mains are low pressure.

### *2.6.6 Telephone*

Telephone service to the project area is provided by Southern New England Telephone (SNET) and AT&T. An AT&T fiber optic line runs within the railroad easement to the Walbach Street vicinity and then

proceeds down Howard Street to the north. Telephone service is provided to the project area via a combination of overhead and underground service lines. Overhead lines are located on all streets in the project area. Streets which also contain underground telephone lines include Smith Street, Walbach Street, Hamilton Street, and Howard Street.

### *2.6.7 Cable*

Cable television service to the project area is provided by Eastern Connecticut Cable Television Inc. Cable service is provided via overhead lines to all streets throughout the Fort Trumbull area as well as to the NUWC base.

## 2.7 Cultural Resources

Given the history of the Fort Trumbull area, identification of cultural resources has been a major focus, both on and off the NUWC property. Numerous cultural resources studies and investigations have been conducted in the Fort Trumbull area over the past decade. More recently, archeological assessments and structural analysis has been conducted within the MDP area. Results of these efforts are described herein.

### *2. 7.1 Statewide Cultural Resources Policies*

The *Conservation and Development Policies Plan for Connecticut* identifies the following policies and strategies for cultural resources:

- Identify and protect critical environmental areas of the state.



- Provide a wide variety of high quality outdoor recreational opportunities to all citizens, emphasizing activities that broaden understanding of and contact with the natural environment.
- Encourage management of natural resources that preserves the diversity of habitats and species and achieves sustainable yields of renewable resources. In particular, retain healthy, vigorous forestlands and achieve sustainable yields of resource-based benefits through scientific management of these resources.
- Encourage a wide variety of cultural opportunities for all citizens.

### *2.7.2 Cultural Resources at the NUWC Site*

Important cultural wealth lies in the historical, archaeological and paleontological resources of the state. Fort Trumbull, located at the NUWC property, is listed on the National Register of Historic Places, which provides for preservation and protection of distinctive characteristics of buildings and places associated with history of or indicative of a period or style of architecture of the nation.

An extensive amount of work has been conducted by the Navy to document cultural resources at the NUWC site, including an intensive historic resources survey and a Phase I archaeological survey. The following discussion is based on work conducted for the Navy by TAMS Consultants, Inc. (TAMS).

*Historic Significance of Structures at NUWC*

Based on a review of historic uses at the NUWC property and within specific buildings, TAMS (1998) identified a portion of the NUWC property as a National

Register-eligible historic district. In order to be eligible as an historic district, structures associated with Fort Trumbull must have been associated with events that have made a strong contribution to the history of the United States and/or to naval warfare. Normally, National Register eligibility is determined for structures 50 years old or greater. However, the Department of Defense, under mandate from the U.S. Congress, is also responsible to inventory, protect, and conserve the military's heritage resulting from the Cold War, less than 50 years old (TAMS 1998:4-5, 4-6).

Two buildings are presently listed on the National Register, the Fort (Building 32) and Blockhouse (Building 42), both of which are located on the future state park portion of the NUWC property. Twelve buildings are considered eligible for the National Register associated with 19th century coastal defense, including five buildings in the future state park area: (Buildings 13, 27 and the Rodman Guns). Coast Guard and Merchant Marine training (Building 28), and the Cold War (Building 94), and seven buildings in the future development area: (Building 14), Coast Guard and Merchant Marine training (Buildings 34, 41, and 44), and the Cold War (Buildings 43, 80, and 96). The proposed National Register eligible historic district also contains two noncontributing structures (Building 36 in the state park area and Building 37 in the future development area) (TAMS 1998).

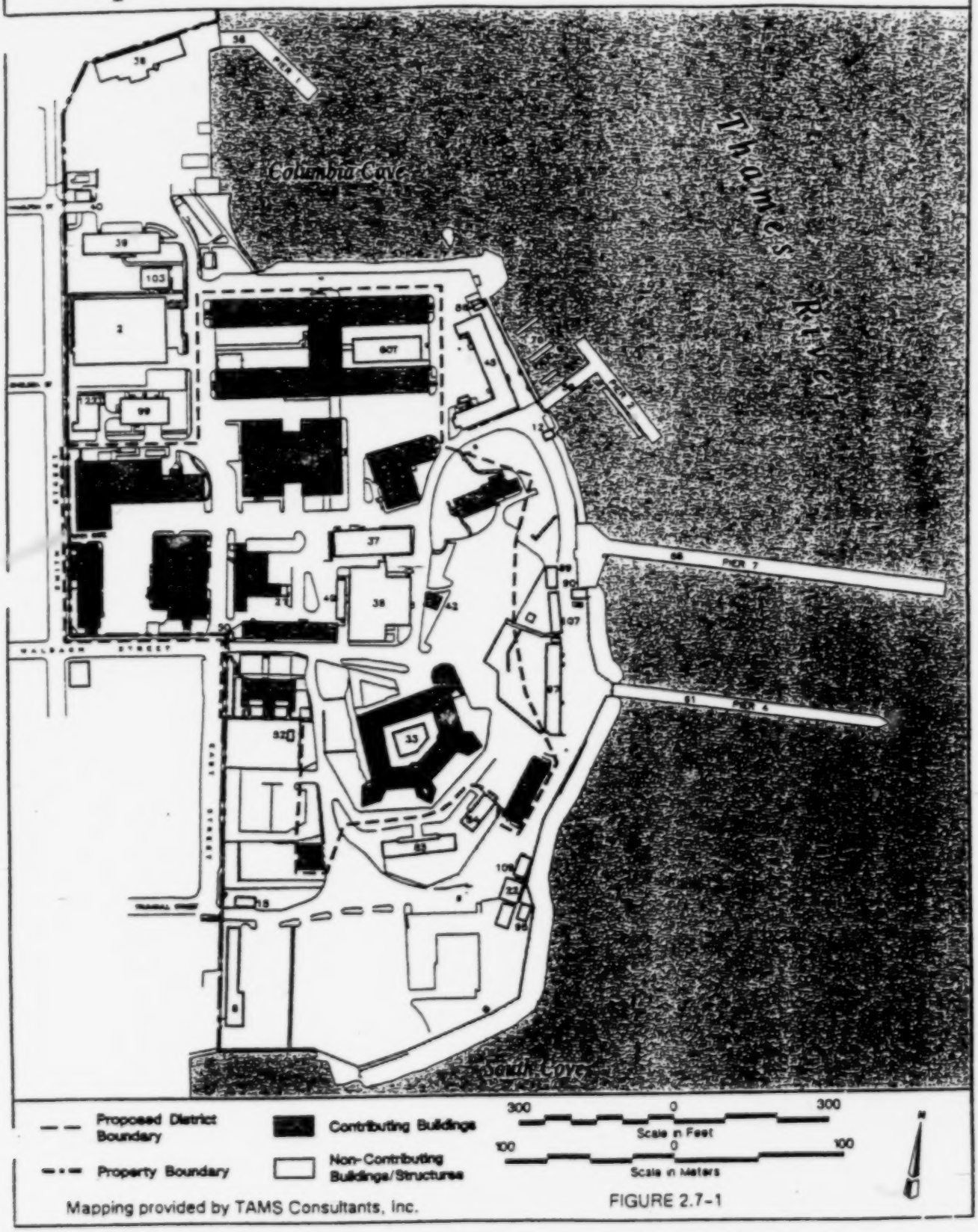
In telephone communications (David Poirier 9/8/98), the Connecticut Historical Commission (CHC) has indicated that designation of a historic district may not require retention of all of the buildings within it. Only one building exclusive of the state park parcel has been identified by CHC as potentially having historic architectural value. This is Building 34 (Bowditch Hall). Documentation of activities at this building



may be adequate for historic preservation purposes. Figure 2.7-1 shows the area which may be eligible for a historic district as well as potentially contributing buildings. CHC has concurred with the TAMS identification of eligibility of these buildings.

Numerous mitigative recommendations have been made by CHC in an October 13, 1998 letter to the Department of the Navy regarding documentation, interpretation, and preservation at the NUWC property. Only two buildings in the future development area are specifically referenced in these recommendations. These are Building 34 (Bowditch Hall) and Building 14. Documentation of Bowditch Hall was recommended. Additionally, preservation covenants were recommended for Bowditch Hall and Building 14 within the future development area to require consultation with the State Historic Preservation Office prior to any proposed alteration, including demolition. A complete copy of CHC correspondence is included herein as Appendix F.

# Proposed Historic District at NUWC New London




Mapping provided by TAMS Consultants, Inc.

FIGURE 2.7-1



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An Environmental Impact Statement for the disposition of the NUWC property is currently being prepared by the Department of the Navy but has not yet been issued. Final recommendations for National Register nominations, deed restrictions, and/or future land use development options have not yet been indicated by the Navy.

*Archeologic Sensitivity at NUWC*

To clarify and confirm the results of background research regarding archaeological potential, archaeological field work was conducted in August and September, 1997 by TAMS Consultants, Inc. and Historical Perspectives, Inc. This work consisted of a surface reconnaissance of the NUWC facility coupled with a limited program of shovel testing.

Five areas were assigned a high sensitivity level because of their potential to contribute to the knowledge of NUWC New London's history and their low level of documented disturbance. These are shown graphically in Figure 2.7-2 and are summarized as follows:

- the tunnel in the southwest bastion;
- the subterranean chamber in the south bastion;
- the subterranean chamber in the southeastern bastion;
- the well located west of Fort Trumbull; and
- the blockhouse basement.

All of these areas are located on the future state park portion of the NUWC site.

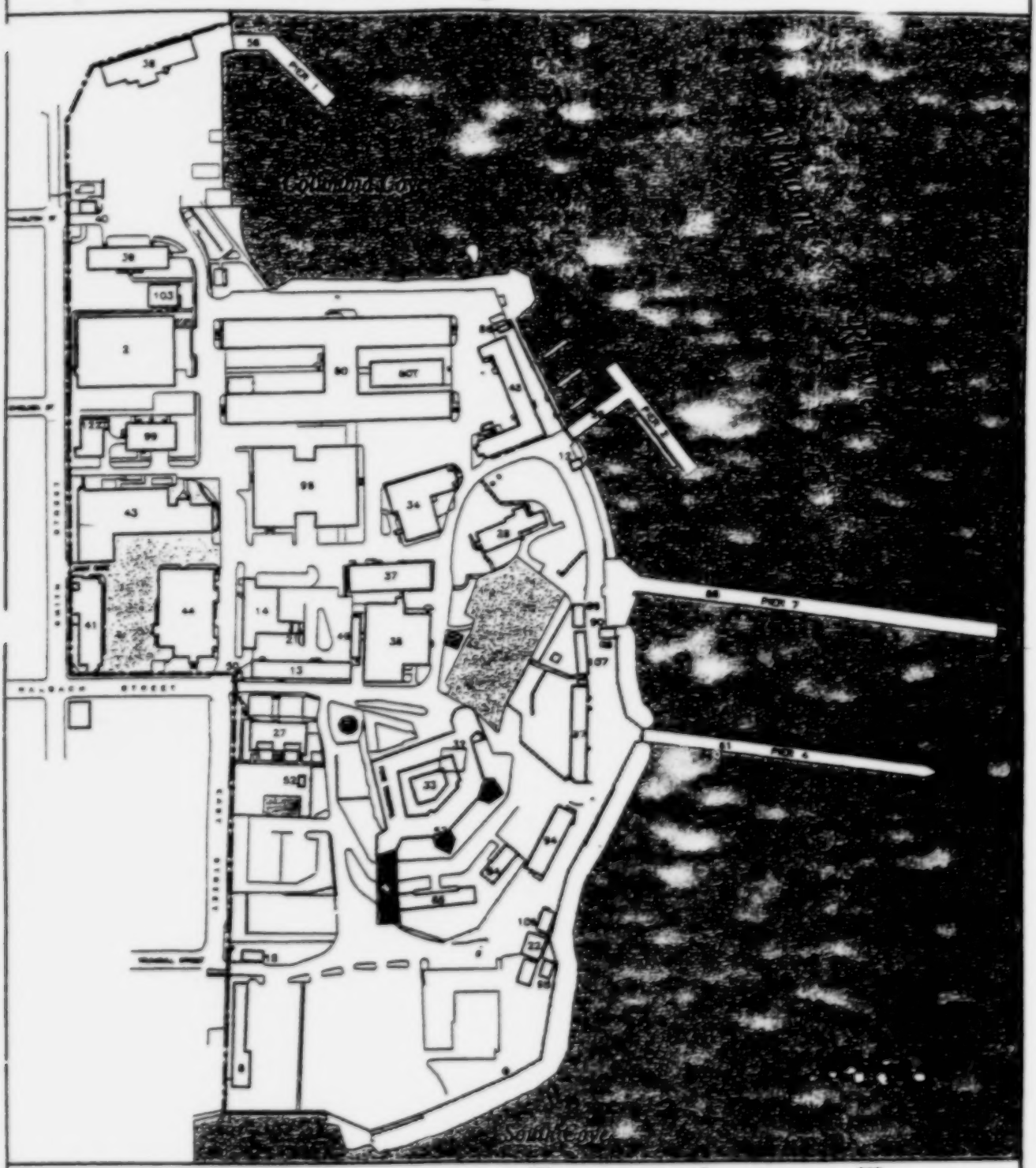
Four areas of medium archeological sensitivity were identified. The first three were assigned a medium level of sensitivity because development has likely diminished their integrity, but their exact state is unknown. No subsurface testing was conducted in these

areas due to extensive paving. A portion of the backyards of Buildings 27 and 52 was also assigned a medium level of sensitivity, as sheet midden dating back to the 19th century was encountered. This archaeological feature can provide information concerning the historic past of the Officers' quarters. Areas of medium archeological sensitivity are as follows:

- the paved area east of Building 34;
- the paved area between Buildings 13, 14, and 49;
- the well located beneath Fort Trumbull (Building 32); and
- a portion of the backyard of Building 27 and 52.

These areas are almost entirely located on the future park portion of the site. The paved area east of Building 34 and the paved area between Buildings 13, 14, and 49 are very close to the proposed park boundary and overlap into the area contemplated for future development.

# Archaeological Assessment




Mapping provided by TAMS Consultants, Inc.

FIGURE 2.7-2

Areas of low sensitivity were assigned when there was a potential for buried cultural resources but there was a high likelihood that any buried cultural resources had been highly disturbed by 19th and 20th century development. These include:

- the paved area between Buildings 41, 43, and 44 in the future development area; and
- the paved area east of the Blockhouse (Building 42) in the future state park area.

### *2.7.3 Cultural Resources in the MDP Area*

Staff of the Connecticut Historic Commission (CHC) recommended that a professional cultural resource assessment of the Fort Trumbull MDP area be performed with respect to potential historic and archaeological resources, although, according to CHC, on cursory field review, the existing residential and commercial structures in the area appeared to lack architectural significance and integrity. Such a cultural assessment has been performed in accordance with the Connecticut Historical Commission's *Environmental Review Primer for Connecticut's Archaeological Resources* (Porier 1987). The full document is entitled *Archeological Assessment Survey, The Fort Trumbull MDP Area, New London, Connecticut* authored by Stuart A. Reeve, Ph.D., Archeological Consultant, with the assistance of William F. Keegan and Kristen Nobel Keegan, Keegans Associates, LLC and is dated September 1998. Two copies of this document were forwarded to the Connecticut Historical Commission for their review. A summary of this document follows:

*Introduction*

An archeological assessment survey was conducted for the Fort Trumbull MDP area, New London,

Connecticut. This assessment survey was conducted to identify sensitive areas for prehistoric and historic archeological resources and to document the development history of the project area.

*Study Area*

The land area in the MDP vicinity was formerly known as Fort Neck, due to its proximity to historic Fort Trumbull. The MDP project area contains approximately 90 acres, including portions of nine city blocks in what is presently a mixed residential, commercial, and industrial neighborhood. The eastern portion of the project area (approximately 32 acres) was historically occupied by the Naval Undersea Warfare Center (NUWC) facility, which was closed in 1996.

The NUWC site has been studied extensively by the Navy through its consultants. A comprehensive study entitled *Draft Cultural Resources Survey Naval Undersea Warfare Center, New London, Connecticut* by TAMS Consultants, Inc., and Historical Perspectives, Inc. was published in April 1998. There has been no attempt to duplicate the efforts previously undertaken at the NUWC property. Therefore, the cultural assessment focused on the boundary within the MDP area, exclusive of the NUWC site. (See Section 2.7.2 for more information regarding cultural resources on the NUWC property.)

*Resources Utilized*

Nearly 100 historic maps, aerial photographs, and historic photographs were collected. Historic maps and aerial photographs were compiled using Geographic Information System (GIS) technology to evaluate information concerning changing landforms, environments and historic development of the project area. Local histories, New London City records, City



Directories, architectural surveys, archeological site files and archeological reports were consulted to establish historic and cultural contexts for the project area. Connecticut State repositories for archeological, historical, and environmental information were visited. In addition, local historical societies and libraries, and individuals with knowledge of the project area's prehistory, history, and environments were consulted. These sources are briefly listed below.

Office of the State Archeologist, Storrs, archeological site files.
Connecticut State Archives, Hartford.
Connecticut Department of Environmental Protection, Hartford.
University of Connecticut, Special Collections Library, Storrs.
New London Tax Assessors Office, New London.
New London Department of Economic Development and Planning, New London.
New London Public Library, New London.
New London Historical Society, New London.
Connecticut Historical Society, Hartford.
Fairfield Historical Society, Fairfield.
Milone and MacBroom, Inc., Cheshire.
Keegans Associates, LLC, Willington, historic map collections.
Steven Bedford, former Project Manager for TAMS, Consultants (9/1/98).
Sally Ryan, New London Landmarks (9/1/98).
Dale Plummer, architectural historian (9/1/98).
Dr. David Poirier, Connecticut Historical Commission, Hartford, CT (9/8/98).
Tina Deininger, Historic Preservation Officer, Northern Division, Naval Facilities Engineering Command, Dept. of the Navy, Lester, PA.

### *Archeological Modeling*

The objective of the archeological assessment survey was to identify important cultural and historic contexts that affected the lives of prehistoric and historic peoples who lived within the Fort Trumbull MDP area. Historic maps and aerial photographs provide invaluable insights into the changing ecology of Fort Neck and the surrounding area. Architectural data, maps, photographs, and city records also provide information about the historic development of communities in the project area. Archeological sensitivity reflects both the likelihood that important events occurred at specific locations, and that material remains of those events have been preserved through succeeding ages.

The significance of archeological sites is measured not only by the cultural importance of people or events, but also by the quality of site preservation. Good site preservation provides clearer contextual evidence for time periods when specific places were utilized. Archeological preservation may be poor within the Fort Trumbull MDP area. Approximately 80% of the project area is covered by disturbed urban soils. Shorelines have been filled, and numerous buildings have risen and been demolished over the years. Older ground surfaces or structures may have been buried under fill, or destroyed by bulldozers. House and factory foundations, new roads, water lines, sewer lines, gas lines, telephone cables, television cables and fiber optic cables have been dug deeply through the community, often disturbing earlier archeological remains.

Historical and environmental information from the MDP area allows preliminary assessments of archeologically sensitive areas. Areas of intensive recent disturbances are likely to have no archeological sensitivity. Major disturbances include railroad bed



construction, new buildings, and most streets that have been subject to utility installation and maintenance. Areas of shoreline filling, at least since 1934, are also not likely to contain historically significant archeological remains.

The archeological assessment involved identifying areas of high, moderate and low archeological sensitivity. High sensitivity includes areas that are considered historically significant, and are *likely* to be preserved. Moderate sensitivity includes areas where significant archeological sites are *possible*. Many areas have been classified for low sensitivity based on prior soil disturbances and/or low historical research potentials. Areas of intensive land disturbances are likely to have *no* archeological sensitivity.

### *Prehistoric Sensitivity*

Urban development during the late 19th and 20th centuries probably disturbed most evidence for earlier prehistoric occupations in the project area. Well-drained rocky knolls were probably graded for railroad beds, and lowland areas were filled. Shoreline areas, including Shaw's Cove, were also filled, and houses and factories were constructed on former meadows and marshes. All historic structures caused ground disturbances from foundation excavations, reducing the possibilities for preserved prehistoric sites. Thus, large areas of the project have no sensitivity for preserved prehistoric archeological sites. Formerly well-drained locations, east of Howard Street and west of Pequot Avenue, probably maintain only moderate to low sensitivity for prehistoric archeological sites due to the likelihood of recent disturbances and filling. Areas of former marshes or wet meadows, portrayed on 1848 and 1897 maps, are classified as low sensitivity for prehistoric sites.

Figure 2.7-3 depicts prehistoric archeological sensitivity in the Fort Trumbull MDP area.

Approximately 52% of the project area (excluding NUWC) is presently classified as having no sensitivity for prehistoric archeological sites due to severe land disturbances. Approximately 42% of the area is classified as having moderate to low sensitivity for prehistoric archeological sites due to the likelihood of prior disturbances. Approximately 6% of the area is classified as having low sensitivity for prehistoric sites, due to the presence of former wetlands. More detailed soils and geological testing might reduce the areas of moderate-low and low sensitivity by demonstrating depths of land filling and processes of disturbances. In some locations, urban filling may have buried and preserved prehistoric archeological sites.

***Historic Sensitivity***

Fort Neck may have been utilized throughout the 17th and 18th centuries for salt marsh harvesting and fishing, although references to specific site locations have not been located, and archeological evidence for these historic activities is likely to be sparse (low sensitivity).

The first intensive historic use of the project area occurred following the construction of Fort Trumbull during 1776-77. Fortifications constructed during the Revolutionary War were probably restricted to the NUWC property (TAMS 1998). Benedict Arnold attacked the fort in 1781, but the battle for the fort was brief and not likely to have resulted in significant archeological remains.

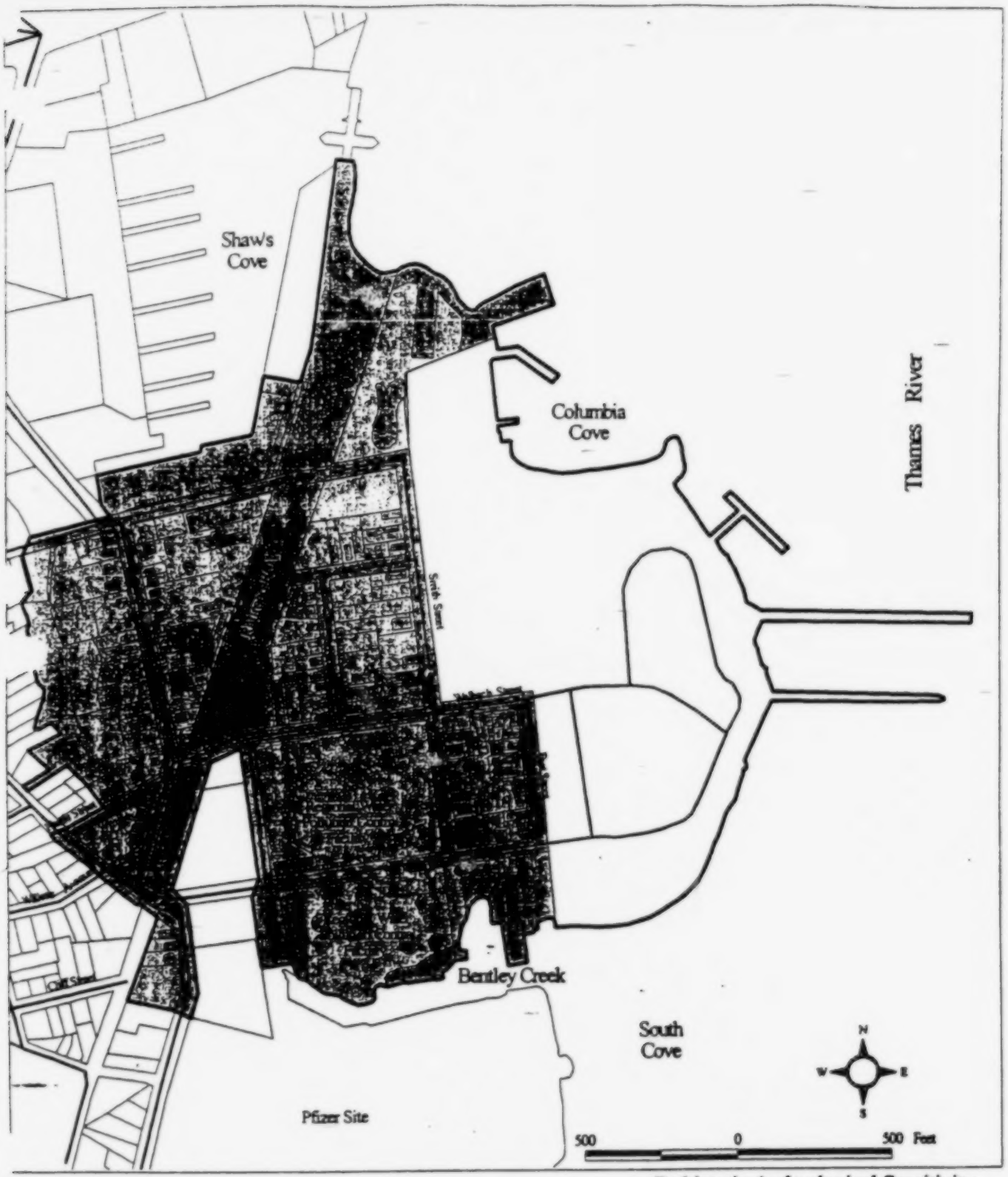



Figure 2.7-3

Prehistoric Archeological Sensitivity

MDP Project Border
Moderate/ Low prehistoric sensitivity
Low prehistoric sensitivity
No prehistoric sensitivity

Fort Trumbull was greatly enlarged during the 19th century. The 1848 Coastal Survey map indicates that fortifications were expanded west of the NUWC property, in the MDP area. The fortifications were probably earthworks, designed to protect the fort from another land attack. Earthworks were probably associated with deep trenches that were later filled and may be preserved in areas of superficial soil disturbances. Historic mapping suggests that fortifications were constructed within the regional Water Pollution Control Facility, north and south of Trumbull Street. The fortifications apparently extended east toward the fort along the south side of Walbach Street. Smith and Walbach Streets have been disturbed by residential construction. Areas possibly containing preserved fortifications are classified as highly sensitive for historic archeological sites.

Residential and industrial development began during the 1850's. Most early industrial sites have been greatly disturbed by expanded facilities during the late 19th and 20th centuries. However, portions of the Fort Trumbull Glass Company factory, on the property of regional Water Pollution Control Facility (between Trumbull and Walbach Streets), and portions of the A. Bragan Ship Yard (north of the NUWC property) may be preserved. These sites are classified as highly significant for historic archeological sites.

Remarkably, most of the earliest residential structures identified on the 1868 Beers maps have survived to the present. Architectural preservation allows an assumption that archeological resources relating to the earliest periods of neighborhood development have also been preserved. Properties dating from 1840 to 1870 are, therefore, considered of high sensitivity for significant archeological sites. Household refuse (ceramics, bottles, tools, and food remains) would be expected to document aspects of

socio-economic statuses, occupations (tools and supplies), and material lifestyles (personal artifacts) of specific families who first occupied the project area.

Many urban lots were intensively utilized, often involving complex changes in the numbers and configurations of buildings on specific properties. New construction usually destroyed evidence for earlier occupations. Yard areas surrounding historic structures were rarely unaffected by utility installations, or brief maintenance episodes. Midden deposits relating to specific periods of occupation often are not preserved in urban settings.

One type of potentially significant archeological feature associated with 19th and early 20th century neighborhoods was the construction of privies (McCarthy et al. 1985; Blomberg 1991). Prior to the development of municipal sewer systems, privies were often located in the rear portions of urban lots. Privy holes were often excavated deeply and were often relocated when filled or when becoming noxious. One strategy for maintaining privies was to deposit household refuse to promote ventilation and oxidation of human waste. Privies, therefore, were repositories for a wide range of household artifacts and food remains that might relate to the material lifestyle of homeowners. Deeply dug privies are likely to be preserved in areas of superficial ground disturbances.

Detailed Sanborn Insurance Maps (1911, 1921-31) were examined for indications of very small outbuildings that may have been privies. Lots that contained possible privies were noted. Historic maps do not reflect the total number of privy features that were probably present in the project area before the construction of the first municipal sewage plant on Fort Neck in 1929.



One of the most significant historic processes that occurred in the MDP area was the ethnic transition from an Irish-English neighborhood during the late 19th century, to an Italian neighborhood during the early 20th century. This process of neighborhood change can be examined archeologically by studying the material remains of different ethnic groups that occupied specific properties in the project area (Cheek and McCarthy 1990). Structures dating to the end of the 19th century (Plummer 1983; Assessor 1998), and/or structures pictured on the detailed 1897 Coastal Survey map, are classified as having moderate sensitivity for archeological deposits that may contain information about neighborhood ethnic changes. Moderate sensitivity is also attributed to lots that have possible mapped privies, properties where ethnicity of homeowners has been identified (Plummer 1983), and properties where specific trades were practiced (e.g., New London City Directory 1915, 1925, and 1930).

Low archeological sensitivity is presently ascribed to most early 20th century houses and lots where ethnicity of residents cannot be demonstrated and where privies or other potential archeological features cannot be documented.

Areas with no archeological sensitivity again include areas of intensive land disturbances, such as streets, railroad beds, large industrial complexes, structures constructed after 1940, and areas of shoreline filling after 1934.

Figure 2.7-4 depicts historic archeological sensitivity in the Fort Trumbull MDP area. Approximately 52% of the project area (excluding NUWC) is presently classified as having no sensitivity for historic archeological sites. Approximately 6% of the area is classified as highly sensitive for historic archeological sites

related to early 19th century fortifications of Fort Trumbull, mid-19th century industries, and early residential neighborhoods. Approximately 9% of the area is moderately sensitive for historic sites relating to late 19th century transition of ethnic neighborhoods. Approximately 33% of the area is characterized with low sensitivity for historic archeological sites, including most early to mid 20th century structures.

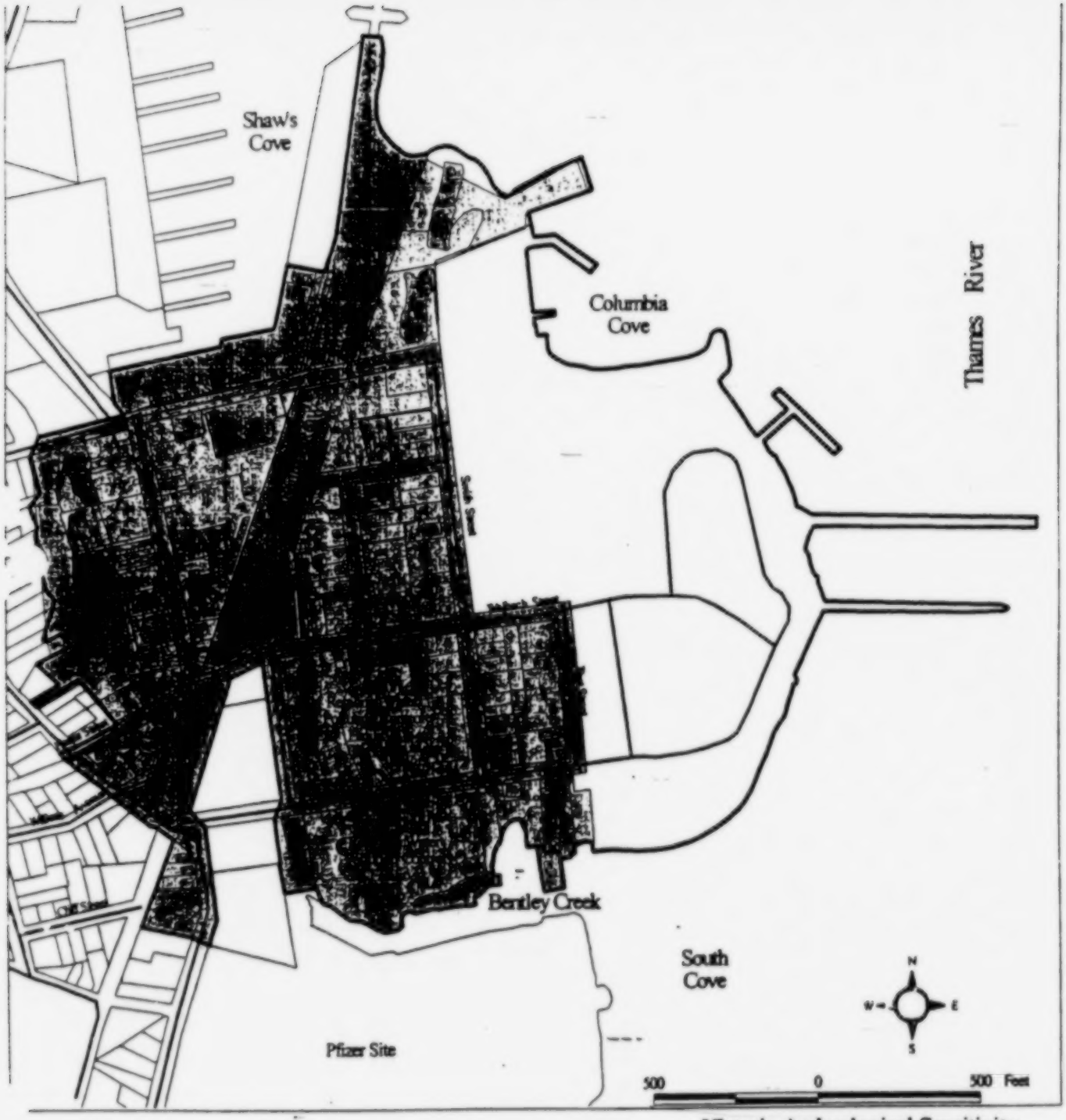



Figure 2.7-4

Historic Archeological Sensitivity

- High historic sensitivity
- Moderate historic sensitivity
- Low historic sensitivity
- No historic sensitivity
- MDP Project Border



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***Historic Significance of Structures off NUWC***

The CHC has concluded the following: "Cursory field inspection suggests that the extant residential and commercial structures lack architectural significance and integrity with respect to the National and State Registers of Historic Places. However, the historic importance and archeological sensitivity of the study area warrants further investigation." (Maddox 1998).

Several military-related buildings were identified on the 1919 map of Fort Trumbull and the adjacent neighborhood that is outside the present NUWC property. These include structures south of Trumbull Street (Map 21, Block 68, Lot 15) and west of 16 East Street (Map 21, Block 105, Lot 8). These former military buildings have not been evaluated for National Register eligibility. Following submittal of the Archeological assessment survey, the State Historic Preservation Office recommended that additional historic and architectural evaluation be professionally undertaken with respect to these military-related structures (October 14, 1998 correspondence from Dawn Maddox to Jeanine Armstrong Bonin). Accordingly, this level of study will be undertaken. On previous occasion, CHC has indicated that this type of work could be conducted coincident with or following the development of the MDP for this area.

## 2.8 Traffic and Parking

An understanding of existing traffic and parking conditions in the MDP area provides a baseline against which future land use activities can be measured with respect to traffic volumes and levels of service. Accordingly, existing traffic and parking conditions are described in this section.

### *2.8.1 Roadway Network*

Howard Street, Pequot Avenue, Hamilton Street, Walbach Street and Trumbull Street are the primary streets serving the Fort Trumbull MDP study area. Other streets in the vicinity include Shaw Street, Harris Street, Bank Street, and Willetts Avenue.

There are seven intersections within the project area, including:

- Bank Street at Howard Street, Reed Street and Blinman Street;
- Bank Street at Truman Street;
- Howard Street at Hamilton Street;
- Howard Street at Walbach Street;
- Howard Street at Shaw Street, Willetts Avenue and Pequot Avenue;
- Shaw Street at Hamilton Street; and
- Pequot Avenue at Trumbull Street.

The roadways within the MDP area are described below.

**Bank Street** – Bank Street is an urban arterial oriented east to west along the northern boundary of the study area. It connects the New London Central Business District to the east with U.S. Route 1 to the west. It is a two-way, four-lane street, with a posted speed limit of 25 miles per hour. It provides three and four lane approaches at its signalized intersection with Shaw Street/Truman Street and with Howard Street/Reed Street, respectively. The principal access to the MDP area will be via the Bank Street/Howard Street intersection.

**Howard Street** – Howard Street, oriented north to south between Bank Street and the Pequot Avenue/Shaw Street/Willetts Avenue intersection, is a two-way, two-lane street with a posted speed limit of 25 miles per hour. Between Bank Street and Hamilton Street, Howard Street is 48 feet wide and is striped for two lanes in each direction. From Hamilton Street to Pequot Avenue, Howard Street varies from 31 to 35 feet wide and provides one travel lane in each direction.



**Shaw Street** – Shaw Street is a two-way, two-lane street parallel to Howard Street to the west of the MDP area. The street is typically 31 feet wide with parking permitted on the west side of the street. Shaw Street has a posted speed limit of 25 miles per hour, except in the vicinity of Bank Street where it is 15 miles per hour through a school zone.

**Hamilton Street** – Hamilton Street is an east-west oriented two-way, two-lane roadway starting at Shaw Street and running east across Howard Street and terminating on the west side of the Amtrak railroad right-of-way. Hamilton Street is approximately 30 feet wide.

**Pequot Avenue** – Pequot Avenue is a two-way, two-lane street measuring 34 feet in width. It is oriented in a north to south direction and is located at the south end on the MDP area. It begins at the intersection of Howard Street/Shaw Street/Willetts Avenue and proceeds south along the west shore of the Thames River. Pequot Avenue has a posted speed limit of 25 miles per hour between its intersection with Trumbull Street and Shaw Street/Howard Street/Willetts Avenue where it underpasses Amtrak's Northeast Corridor mainline. The road is approximately 46 feet wide at this bridge between an elevated sidewalk on the west, and a curb/vertical abutment on the east. The posted vertical clearance is 12 feet 10 inches.

**Walbach Street** – Walbach Street is a two-way, two-lane local road providing access to the former Naval Underwater Warfare Center (NUWC) and current U.S. Coast Guard station on the Fort Trumbull peninsula. It is approximately 30 feet wide at its western end and has a posted speed limit of 25 miles per hour. Where Walbach Street underpasses the Amtrak Northeast Corridor mainline, the road is 30 feet wide between the abutments with five foot wide sidewalks on each side of the road. The horizontal alignment of the roadway at the bridge is a series of angular 'S' curves. The bridge at this location has a posted vertical clearance of 10 feet, 0 inches.

**Trumbull Street** – Trumbull Street is a 32-foot wide, two-way, two-lane local street providing access to the NUWC/Coast Guard facilities. It begins at Pequot Avenue south of the Amtrak bridge and is oriented in an east-west direction.

**Willetts Avenue** – Willetts Avenue is a 30 foot wide, two-way, two-lane road with a posted speed limit of 25 miles per hour. It provides site access to and from the west toward the Town of Waterford and U.S. Route 1, and terminates at the junction of Howard Street, Shaw Street, and Pequot Avenue.

**Harris Street** – Harris Street is a westbound, one-way street connecting Howard Street and Shaw Street. The road is approximately 19 feet wide at its eastern end and 17 feet wide at its western end. On-street parking is prohibited on the south side of the street. Harris Street is a conventional three-way intersection at Shaw Street, but has no STOP sign at this location.



### *2.8.2 Existing Traffic Conditions*

The two intersections on Bank Street are under traffic signal control, and the Shaw Street/Hamilton Street intersection is an all-way STOP sign controlled intersection. The remaining intersections are under STOP sign control on the minor street approaches.

The intersection of Howard Street/Shaw Street/Pequot Avenue/Willetts Avenue is operationally confusing, with three raised channelizing islands routing traffic through the intersection. Although Howard Street intersects Pequot Avenue at approximately a 90° angle, these two streets are the main travel routes and are not under STOP sign control. Willetts Avenue and Shaw Street are under STOP control.

In general, all streets in the study area have sidewalks on one or both sides of the street. The notable exceptions are Harris and Trumbull Streets which have no sidewalks.

Capacity analyses at eight study area intersections for existing year 1998 indicate that Levels of Service B or better prevail during the weekday A.M. and P.M. peak highway hours. Level of Service B represents a stable traffic flow with operating speeds beginning to be restricted somewhat by traffic conditions. Drivers still have reasonable freedom to select their speed and lane operations. Traffic counts are presented in Section 2.8.5 and Appendix D.

### *2.8.3 Public Transportation*

The project area is connected to downtown New London via the South East Area Transit (SEAT) bus service which operates approximately every hour along Howard Street and Pequot Avenue. SEAT has authorized the execution of appropriate route changes to

provide public transportation bus service to Fort Trumbull when it becomes open to the public (SEAT staff, personal communication, October 26, 1998).

### *2.8.4 Existing Parking*

Based on a review of aerial photographs and NUWC reports, there are an estimated 1,817 off-street and on-street parking spaces within the study area, consisting of approximately 1,707 off-street spaces and 110 designated on-street spaces. On-street parking is not typically designated by pavement markings and/or signing, and in the absence of observed parking on many of the study area streets, the number of on-street parking spaces is approximate.

There are an estimated 35 designated on-street parking spaces on Howard Street, plus an estimated additional 75 parking spaces within the NUWC area, for an estimated total of 110 on-street parking spaces. There are approximately 632 off-street parking spaces in the Gateway and Fort Areas, plus an additional 1,075 off-street parking spaces in the NUWC Area, for an estimated total of 1,707 off-street parking spaces.

### *2.8.5 Historic Traffic*

Trumbull and Walbach Streets provide the only vehicular access to the peninsula. Historical traffic counts when NUWC was active were obtained for comparative purposes. Traffic counts were performed in April of 1984 as presented in a June 1987 report entitled *Traffic Study; New London Mills Property; New London, Connecticut* during a period which NUWC was believed to be fully operational.

Based on 1984 traffic volumes on Trumbull and Walbach Streets, there were over four times the number



of vehicles accessing the peninsula area during the 1984 A.M. peak hour as compared to a similar time period in August of 1998. During the P.M. peak highway hour, over three times the number of vehicles accessed the peninsula area in 1984 as compared to 1998. Table 2.8-1 provides a comparative presentation.

**TABLE 2.8-1**
**Comparison of Traffic Volumes (1984 and 1998)**

| Access Route | 1984 Traffic Volumes (NUWC Active) | | | 1998 Traffic (NUWC Inactive) | | |
|---|---|---|---|---|---|---|
| | In | Out | Total | In | Out | Total |
| Walbach Street | | | | | | |
| A.M. Peak Hour | 411 | 74 | 485 | 41 | 46 | 87 |
| P.M. Peak Hour | 50 | 280 | 310 | 41 | 44 | 85 |
| | | | | | | |
| Trumbull Street | | | | | | |
| A.M. Peak Hour | 72 | 52 | 124 | 23 | 28 | 51 |
| P.M. Peak Hour | 29 | 56 | 95 | 17 | 21 | 38 |

### *2.8.6 Amtrak Operations*

The Amtrak rail line runs through the project area, separating the Gateway Area from the Fort Area. Currently, 16 train trips per day run on this line (eight in each direction). Electrification of the rail line is planned and is projected to be operational by the summer of 2000. At that time, 22 trips per day (11 in each direction) are projected. Usage could increase up to 50 trips per day by the year 2010. However, this would be predicated upon meeting conditions, dictated by the Connecticut Department of Environmental Protection.

Amtrak ridership out of New London is currently 150,000 passenger trips per year and is projected to

increase to 300,000 by the year 2010. The speed of trains in the area is not anticipated to increase significantly, since they will be slowing down to stop at the New London station that is located approximately ¼ mile from the project area.

Electric poles will be installed approximately 200 feet on center and be 30 feet high.

## 2.9 Water Resources

Given the location of the MDP area in relation to the Thames River and Long Island Sound, water resources have been evaluated in the study area as described in the ensuing text.

### *2.9.1 Surface Water Resources*

The dominant water resource in the project area is the Thames River. The project area is located adjacent to the lower Thames River which is influenced by both tidal and freshwater flows. The majority of the freshwater flow stems primarily from three tributaries. These are the Shetucket, Quinebaug, and Yantic Rivers. Several smaller tributaries also feed the river. The Thames River is formed near Norwich, Connecticut and flows approximately 15 miles before it empties into Long Island Sound. Recreation is a primary focus of the river. It supports numerous marinas and yacht clubs and is host to the annual Yale-Harvard Regatta. The Thames River has also been a commercial and industrial shipping port and support for military operations for many decades, including building, docking, and operation of submarines.

The lower Thames River is an estuary and so possesses the qualities which are characteristic of this type of aquatic system. Tidal exchange of the lower



Thames River is from Long Island Sound. The mean tidal range in the Thames River varies from 2.6 feet at New London to 3.1 feet at Norwich. Greens Harbor and Shaw's Cove are both located within this estuary and border the south and north portions of the Fort Trumbull area, respectively.

Tidal flood profiles, developed by the Hydraulics and Water Quality Section of the New England Division of the Army Corps of Engineers, were analyzed to assess the tidal elevations in the vicinity of Fort Trumbull. The mean low water elevation at New London Harbor, immediately south of the project area, was determined to be -0.9 feet NGVD (National Geodetic Vertical Datum). The mean high water elevation at this location is 1.7 feet NGVD. The one-year return frequency tidal flood occurs to elevation 3.6 feet NGVD, while the 100-year frequency flood occurs to elevation 10 feet NGVD. The latter flood events are due to tidal surges rather than riverine runoff.

Any work or construction activity within tidal, coastal, or navigable waters (at or waterward of the high tide line) will require a permit or certificate of permission from the Office of Long Island Sound Programs (OLISP) pursuant to Section 22a-361 or 22a-363b of the Connecticut General Statues and from the Army Corps of Engineers.

### *2.9.2 Hydrology*

The city's land area is divided into three drainage basins. The vast majority of the city is located in the Thames River drainage basin. A small area of the northwestern corner of the city drains into Nevins Brook in Waterford and a larger area on the city's western border drains into Fenger Brook and into

Alewife Cove. Both Nevins Brook and Fenger Brook are part of the Niantic River drainage basin.

The project area is located in the Thames Major Basin; the Thames Main Stem regional basin; and the Thames River sub-regional basin. The Thames Major Basin drains approximately 1,473 square miles, including most of eastern Connecticut as well as parts of Massachusetts and Rhode Island.

### *2.9.3 Water Quality*

#### *Surface Water*

Surface water quality may be influenced by both point and non-point sources of pollution. Point sources are well defined, discrete locations such as sewage treatment plant discharges or combined sewer overflows. Non-point sources of pollution include urban storm drainage, surface runoff, erosion, and leachate from broader areas and human activities.

The State of Connecticut has set forth a policy for the management of water quality through the Water Quality Standards and Criteria, wherein criteria and a classification system are applied to all surface water and ground water resources in the state. These classifications establish designated uses for surface and ground water resources and identify the criteria necessary to support those uses. Criteria have been established with respect to desirable use, antidegradation, allowable types of discharges, waste assimilation, and a variety of physical and chemical constituents.

The Thames River, located east of the project area, has been classified as an SC/SB surface water resource. Surface waters designated as Class SC/SB do not presently meet Class SB water quality criteria or



do not support one or more assigned designated uses. The goal for such surface water is to reach Class SB designation. The water quality criteria of the classification goal are applied to any new uses of the waterbody unless, through an approved use attainability analysis, it is demonstrated that one or more uses are not attainable. The Thames River is not used for potable (drinking) water due to its salinity and its classification.

Designated uses of Class SB surface waters include recreational use, industrial and other legitimate uses including navigation. Wastewater discharges are permitted from municipal and industrial wastewater treatment systems as well as cooling water discharges. Class SB surface water is suitable for marine fish, shellfish, and wildlife habitat as well as shellfish harvesting for transfer to a depuration plant or transplant to approved areas for purification prior to human consumption.

Federal law prohibits a state from lowering surface water quality classifications or standards in order to accommodate new or increased wastewater discharges or land use practices which impact a particular watercourse. Therefore, the state must attain and maintain the most sensitive existing and potential use for a respective waterbody.

#### *Ground Water*

Ground water sources beneath the project area have been designated as Class GB. Class GB ground waters are classified as those within highly urbanized areas or areas of intense industrial activity and where public water supply is available. Designated uses of Class GB ground water include industrial process water and cooling water. Class GB sources are presumed

not suitable for direct human consumption due to waste discharges, spills or leaks of chemical, or land use impacts. These sources are known or reasonably presumed to be degraded due to pollution from a variety of sources.

Permits may be granted for discharges of treated industrial process waters amenable to further treatment by soils or for the siting of land disposal facilities. The resultant discharges may not cause ground water degradation that could preclude its future use as a drinking water source or prevent maintenance or attainment of adjacent surface water designated uses.

### *Coastal Stormwater Quality Issues*

The *Conservation and Development Policies Plan for Connecticut* recognizes the expanding significance of non-point pollution sources in water quality concerns. In rebuilding or expanding urban infrastructure, the Plan recommends incorporating appropriate stormwater management technologies to minimize adverse impacts of runoff on surface or ground waters. For new development, the Plan promotes the design and engineering approaches to stormwater handling that minimize the amount of impervious cover that results and incorporate non-structural design features and management techniques to renovate runoff.

Adverse impacts on water quality are defined in CGS Section 22a-93(15)(A) as degrading water quality through the significant introduction into either coastal waters or ground water supplies of suspended solids, nutrients, toxics, heavy metals or pathogens, or through the significant alteration of temperature, pH, dissolved oxygen or salinity. Stormwater management and the protection of coastal water quality



have been identified by the Department of Environmental Protection as comprising a principal resource concern for any development in this area.

Stormwater runoff is composed of excess precipitation that flows over the ground surface and impervious areas to storm drains or watercourses. Its quality will reflect the land uses and surfaces it contacts. Stormwater runoff from urban areas, including roadways, parking lots, and lawns, has been found to be a significant source of contamination in Long Island Sound. Stormwater management and treatment will therefore likely be required under any future development plan. Specific proposed measures are described in Section 4.7 of this document

## 2.10 Flood Hazard Potential

### *2.10.1 Flood History*

The project area is located along the west bank of the Thames River, approximately 2.5 miles upstream of Long Island Sound. River estuaries can be subject to two types of flooding: riverine runoff and coastal storm surges that raise tide levels along the shore to create wave run-up.

The Thames River has a watershed area of 1,473 square miles, consisting of rural woodlands, farmland, and moderately developed areas in eastern Connecticut. The river has a length of only 15 miles to Norwich, which is both the head of tide water and the confluence of three major tributaries (the Yantic, Quinnibaug, and Shetucket Rivers). The Thames River does not have significant freshwater runoff related flood problems due to its large width and depth. The principal concern is thus coastal flood hazards.

The hurricane of September 21, 1938 caused tremendous damage in southeastern Connecticut, including coastal sections of New London. The reported water elevation was 9.7 NGVD, just below the forecast 100-year frequency event. This event caused tidal surges of seven to 10 feet higher than predicted tides, destroying hundreds of cottages and buildings and leading to a total of 700 deaths.

Hurricane Carol on August 31, 1954 also struck the project area, with water levels at elevation 8.9 NGVD, and surges of five to eight feet. The center of the storm passed over New London. Winds of 135 mph were recorded at nearby Block Island.

### *2.10.2 Astronomical Tide Levels*

The U.S. Army Corps of Engineers (1988) has developed tidal water profiles for Long Island Sound that are also generally representative of water levels in coastal estuaries and harbors. The predicted tidal water elevations published for New London are presented in Table 2.10-1.

**TABLE 2.10-1**
**ACOE Predicted Tidal Water Elevations**

| Parameter | Elevation, NGVD |
|---|---|
| Mean Low Water | -0.9 |
| Mean Tide Level | 0.4 |
| Mean High Water | 1.7 |
| Mean Spring High Water | 1.9 |
| One-Year Frequency Tidal Flood | 3.6 |

### *2.10.3 Tidal Flood Levels*

Statistical data on historic tidal floodwater levels and forecasts of flood height probabilities are available



from both the U.S. Army Corps of Engineers and the Federal Emergency Management Agency (FEMA). The FEMA program is the basis of local floodplain zoning regulations. Jurisdiction is also provided to the Department of Environmental Protection via the Connecticut Coastal Management Act (CCMA) for management and regulation of development and activities adversely affecting the coastal waters of the state. The permit and certification process of the coastal management program considers potential damage to and destruction of life and property to further reduce the necessity of public expenditure to protect future development from such hazards.

The published Army Corps of Engineers tidal flood profiles provide data for Long Island Sound, including the Connecticut shoreline. Their analysis of 340 years of tidal data is a comprehensive evaluation of historic trends, with a sea level adjustment to 1975 for comparative purposes. The tidal flood profiles were revised and reissued in 1988 and are presented in Table 2.10-2.

**TABLE 2.10-2**
**Still Water Flood Levels (NGVD)**

| Average Frequency | 1980 Forecast | 1988 Forecast |
|---|---|---|
| 10-year | 6.3 feet | 6.5 feet |
| 50-year | 8.5 feet | 8.9 feet |
| 100-year | 9.5 feet | 10.0 feet |

The height of the storm surge above normal tide levels depends on several factors, including atmospheric pressure, wind direction and magnitude, fetch, wave set-up, storm location and rate of approach, and coastal geometry.

### *2.10.4 FEMA Regulatory Program*

Portions of Fort Trumbull and the surrounding areas contain flood hazard areas as delineated by the Federal Emergency Management Agency (FEMA) Flood Insurance Maps. These are shown graphically in Figure 2.10-1.

Both 100-year V-zones and A-zones are located within the project boundary. The hazard zones designated as zone V represent those highly exposed areas subject to flooding, caused by the combination of coastal waves superimposed upon the 100-year frequency stillwater coastal flood level. Zone A hazard areas are subject to the 100-year storm event caused by the Thames River flooding which, in this case, is the backwater area of the coastal floodway on Long Island Sound. Any reuse proposed for these areas must include plans for flood-proofing any structures within these zones.

Small areas of Zone B – areas subject to the 500-year frequency event – are also located in the project area. All other areas are designated as Zone C, which are areas of minimal flood hazard.

In reviewing the FEMA mapping, it is apparent that the flood hazard boundaries do not fully agree with present topography. Additionally, some of the roads have been altered.

Table 2.10-3 gives a brief explanation of the FEMA map zone designations pertinent to the project area.



**TABLE 2.10-3**
**Explanation of Flood Zone Designations**

| Zone | Explanation |
|---|---|
| A1-A30 | Areas of 100-year flood; base flood elevations and flood hazard factors determined. |
| B | Areas between the limits of the 100-year and 500-year flood; or certain areas subject to 100-year flooding with average depths less than one (1) foot or where the contributing drainage area is less than one square mile; or areas protected by levees from the base flood. (Medium shading) |
| C | Areas of minimal flooding. (No shading) |
| V1-V30 | Areas of 100-year coastal flood with velocity (wave action); base flood elevations and flood hazard factors determined. |

Source: FEMA Flood Insurance Rate Map, City of New London, Aug. 2, 1995

Note: "Base Flood" means the flood having a one percent chance of being equaled or exceeded in any given year.

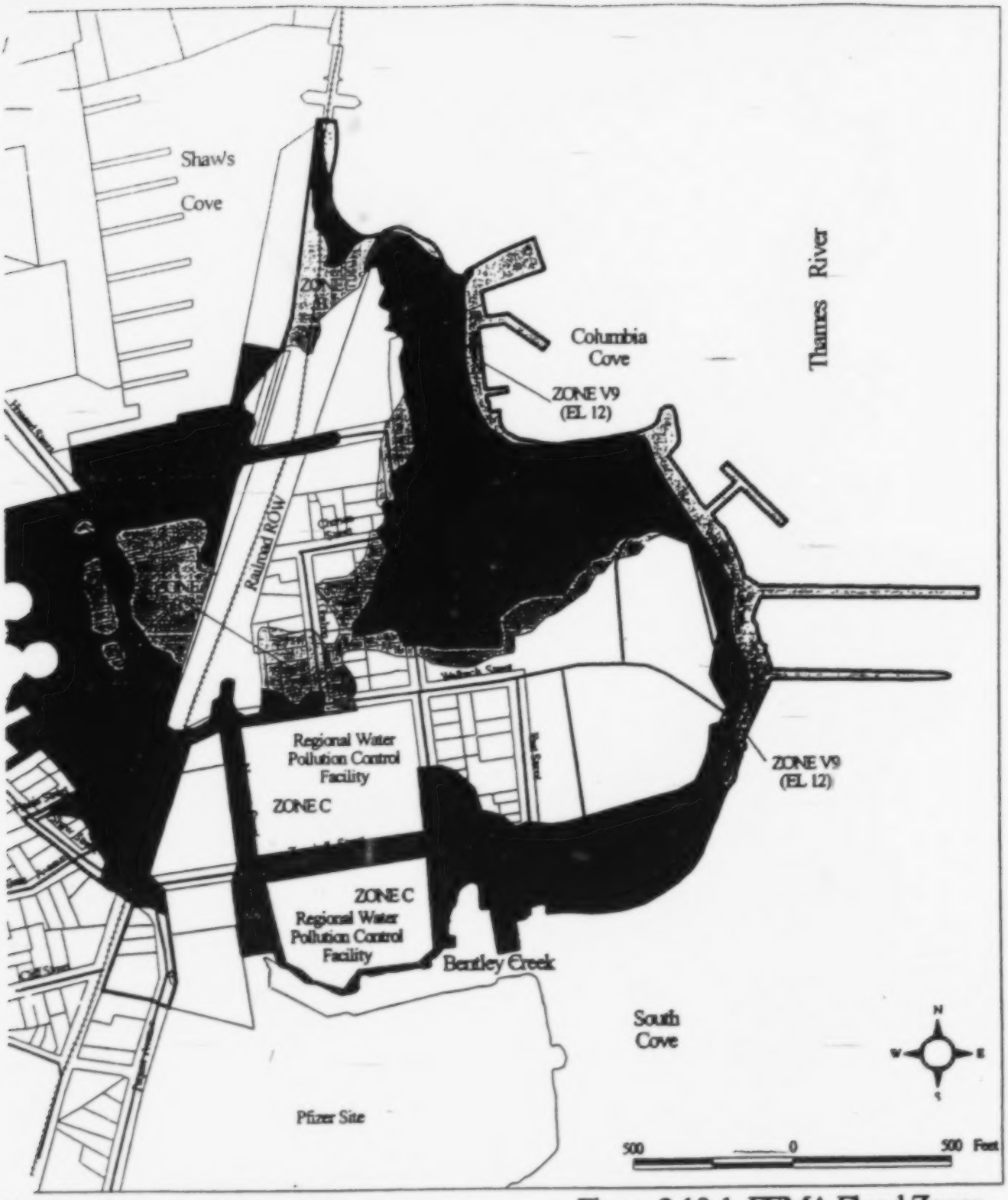


Figure 2.10-1 FEMA Flood Zones

MDP Project Border
Zone A7 - Areas of 100-year flood
Zone B - Areas between limits of 100-year flood and 500-year flood
Zone C - Areas of minimal flooding
Zone V - Areas of 100-year coastal flood with velocity (wave action)

: GIS coverages developed by Milone & MacBroom, and HMA, Inc. Sources include Connecticut DEP, of New London, FEMA, and US Navy.

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The 100-year frequency floodplain is extensive and covers much of Fort Trumbull and surrounding areas. A brief discussion of the major project areas follows:

***Gateway Area***

Almost all of the Gateway Area is within the 100-year floodplain. Several small pockets of Zone B (areas subject to flooding during the 500-year flood) have been mapped on either side of Howard Street.

***Fort Area***

Many local roads in the Fort Area are located within the FEMA 100-year flood zone (Zone A7), including a portion of Hamilton Street; the western portion of Walbach Street between Howard Street and Goshen Street; all of Trumbull and Nameaug Streets; and most of Smith Street.

Several areas of low flooding hazard exist on the higher ground in the central part of the Fort Area. One area exists in the vicinity of the elevated wastewater treatment facility which spans both sides of Trumbull Street. Much of the area bounded by the railroad, Nameaug Street, and Smith Street is mapped either Zone B or Zone C, subject to low frequency flooding. The southwest corner of the Walbach/East/Trumbull/Smith Street block is mapped A7, meaning it is within the 100-year floodplain.

***Lower Pequot Area***

Almost all of the land in the Lower Pequot Avenue Area is mapped as Zone C (areas of minimal flooding).

***NUWC Area***

According to the FEMA mapping, the central portion of the NUWC site is located on high ground, including the area within the local roadway system on the base.

The northern portion of the site and the perimeter is mapped as either A-zone or V-zone, and would be expected to experience severe flooding during coastal storms.

### *2.10.5 Conservation and Development Policies Plan for Connecticut*

Portions of the project area have been designated as Conservation or Preservation Areas under the *Conservation and Development Policies Plan for Connecticut* (1998-2003). These areas appear to correlate with the mapped FEMA flood prone areas. The state policy for flood fringe development is that it should be planned or supported only when:

- such development will not be of a scale or use as would severely disrupt or burden the economy during flood periods;
- such development will not require future public expenditures for flood control facilities other than those environmentally acceptable local structures that can be incorporated in the project design or financed through benefit assessments by the identified flood fringe users;
- adequate flood insurance protection can be obtained;
- development is in full compliance with building, excavation, and other floodplain and coastal management policies and regulations; and
- adequate civil preparedness (forecasting, notification, evacuation, sheltering) will ensure protection of life and continuance of essential services.



### *2.10.6 State and Federal Regulations and Statutes*

Because state funds are involved, this project must be certified by the Department of Economic and Community Development as being in compliance with flood and stormwater management standards specified in Section 25-68 of the Connecticut General Statutes and Section 25-68h-2 through 25-68h-3 of the Regulations of Connecticut State Agencies.

State policy promotes long-term non-intensive uses for projects within flood hazard areas, with utilities located to discourage floodplain development. The determination of whether a specific proposal is considered non-intensive requires examination of numerous factors, including the existing state of the floodplain and its natural resources, the types of uses proposed for the floodplain area, the design of the entire proposal and the extent of encroachment into the floodplain, and the availability of alternatives to siting within the floodplain. In order to ensure compliance with state policy, any proposed development must not result in more intensive uses of the floodplain than presently exist.

Intensive floodplain uses have been interpreted to include:

- new residential uses within the floodplain;
- any increase in the square footage of office, retail, industrial, or business uses; and
- conversion of non-residential use to residential uses.

Uses that are classified as intensive would preclude use of state funding unless an exemption is granted. Exemptions are unlikely for residential uses. Note that an "intensive floodplain" classification would not be made if the area were first filled (without state funds) and then reclassified through a FEMA map amendment.

In order to comply with the FEMA National Flood Insurance Program management standards and to be consistent with coastal management policies concerning coastal flood hazard areas, the lowest floor (including basement and utilities) of all new construction of non-residential structures must:

(i) ~~have~~ the lowest floor (including basement) elevated to or above the base flood level; or

(ii) together with attendant utility and sanitary facilities, be designed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capacity of resisting hydrostatic and hydrodynamic loads and affects of buoyancy.

In order to comply with Section 25-68 of the flood management standards, which are stricter than FEMA standards for residential buildings, the lowest floor of residential structures must be elevated to one foot above the 500-year flood elevation. These criteria must be incorporated into the design of any structures proposed for the A-Zone portions of the project area. The DEP has indicated that, since portions of the project area access and egress are within the flood zone, a flood management plan with evacuation measures will likely be required.

Of special interest to the Fort Trumbull development is that the access roads pass beneath the Amtrak railroad lines. The Walbach Street underpass near Howard Street is at elevation 4.5 NGVD, and the underpass at Pequot Avenue at Trumbull Street and Howard Street is at elevation 6.8 NGVD. Finally, the old Hamilton Street underpass is at elevation 3.4 NGVD. Consequently, extreme coastal floods could isolate portions of the area and prevent vehicular access for short durations.



## 2.11 Biological Environment

### *2.11.1 Coastal Management Policies*

The Connecticut Coastal Management Act (CCMA) (CGS Sections 22a-90 through 22a-112) establishes the basis for Connecticut's coastal management program and policies. Specifically, it provides for the protection and enhancement of the wildlife, finfish, and shellfish habitats of coastal waters. Any impact such as significant alteration of the composition, migration patterns, distribution, breeding, or other populations characteristic of the natural species, or significant alterations of the natural components of the habitat, is considered an adverse impact and is subject to state agency jurisdiction (CGS Section 22a-93 (15)(G)).

### *2.11.2 Fisheries*

The Connecticut Coastal Management Act (CCMA) empowers the Department of Environmental Protection (DEP) to manage the state's fisheries for promotion of economic benefits of commercial and recreational fishing; enhance recreational fishing opportunities; optimize yield of all species; prevent the depletion or extinction of indigenous species; maintain and enhance the productivity of natural estuarine resources; and preserve healthy fisheries resources for future generations.

The nearshore estuarine environment provides spawning, nursery, and productive feeding grounds for many of Connecticut's freshwater and marine resources. Finfish are high level consumers in coastal food webs and many are of commercial and recreational importance. Estuarine systems like the Thames River typically provide spawning and feeding habitat for adults of several species as well as feeding and refuge habitat for juveniles (Pellegrino, 1989).

The Thames River estuarine waters extend 15 miles northward from the river's mouth and include the reach adjacent to the project area. A study of nearshore habitat was conducted in the Thames River estuary by the DEP, Fisheries Division in 1996. The study focused on the larvae distribution of winter flounder *(Pleuronectes americanus)*. The total number of winter flounder larvae in the Thames River estuary was estimated at 111 million. The lower third of the estuary, including the area immediately adjacent to the project area, is estimated to support 65.389 million or 59% of the total number of larvae (DEP Fisheries Division, 1996).

In addition to winter flounder, larvae of 20 other finfish were collected in the river during the DEP study. American sandlance *(Ammodytes americanus)* and grubby *(Myoxocephalus aenaeus)* were the most abundant, and were the only species taken in any number in the lower third of the river.

Other DEP studies have shown that winter flounder juveniles use the entire river from head of tide to the mouth of the river. Juvenile densities are highest in the upper reaches of the Thames River near the head of tide.

A lift designed to pass fish at the Greenville Dam on the Shetucket River in Norwich, located approximately 12 miles upstream of the project area, passed the following fish species and numbers in 1998 through June (David Simpson, DEP Marine Fisheries Office, personal communication, July 13, 1998):

| | |
|---|---|
| American shad: | 4,707 |
| alewife: | 334 |
| blueback herring: | 126 |
| striped bass: | 10 |



Pellegrino (1989) compiled fisheries survey data from a long-term Trawl Survey Program conducted by Project Oceanology (PO), and a Marine Angler Creel Census Survey conducted by the DEP. The area extending from the Coast Guard Academy south to Fort Trumbull was described as follows:

> A total of 27 species were reported from this area of the Thames River. The PO trawl data from 1982-1986 revealed the two most important species to be winter flounder and sanddab *(Scopthalmus aquosus)*. A general seasonal trend in abundance is apparent, with winter flounder being most important in the fall and the sanddab in the spring. Other frequently encountered species were the porgy *(Stenotomus chrysops)*, searobin *(Prionotus sp.)*, spotted hake *(Urophycis regius)*, cunner *(Tautogolabrus adspersus)*, skate *(Raja erinacea)*, and sculpin *(Myoxocephalus anus)*.
>
> The DEP Angler Survey reveals the following species to be important recreational species utilizing this area: cunner, blackfish *(Tautoga onitis)*, mackerel *(Scomber scombrus)*, juvenile (snapper) bluefish *(Pomatomus saltatrix)*, winter flounder, porgy, and butterfish *(Peprilus triacanthus)*.

Fisheries survey data from Fort Trumbull south to Eastern Point was described as follows:

> A total of 22 species were reported from this area of the Thames River. The PO trawl data again revealed the dominants in this region to be winter flounder and sanddab, with the same general seasonal abundance pattern evident. Other species of importance in this area were the sea raven *(Hemitripterus sp.)*, fluke *(Paralicthys*

*dentatus),* four-spotted flounder *(Paralicthys oblongus),* sculpin, and sea robin.

The DEP Angler Survey revealed general recreational species in this area as described for the area upstream of Fort Trumbull with snapper blues, blackfish, porgy, and winter flounder being most important.

According to DEP, the Atlantic sturgeon *(Acipenser oxyrhynchus),* a state threatened species, is found in the Thames River. The Natural Diversity database also notes that a duck wintering area is located in the river immediately south of the project area (Appendix F). Chasko (DEP) has conducted studies in this area (1989). Any future in-water work would need to be evaluated accordingly. Construction controls on erosion and sedimentation will be important with respect to impacts on fisheries potentially caused by stormwater runoff which discharges into the Thames River.

### *2.11.3 Living Marine Resources*

Shellfish concentration areas, such as those in the New London area of the Thames River, are defined as those actual, potential, or historic areas in coastal waters, in which one or more species of shellfish aggregate. According to the map entitled, "Shellfish Concentration Areas" prepared by the Connecticut Department of Environmental Protection, shellfish in the Thames River in the area of the project area primarily consist of hard clams.

The lower Thames River provides habitat for several shellfish species, the most economically important being the hard clam *(Mercenaria mercenaria).* The eastern oyster *(Crassostrea virginica),* which depends upon hard-bottomed substrate, is of less economic



importance in the lower Thames River (Pellegrino, 1989).

Pellegrino (1989) reported on dominant members of the epifaunal community in the area between the Coast Guard Academy and Fort Trumbull. This included starfish *(Asterias forbesi),* spider crab *(Libinia sp.),* lobster *(Homarus americanus)* rock crab *(Cancer irroratus),* sand shrimp *(Crangon septemspinosa),* and blue crab *(Callinectes sapidus).* The lobster is of major commercial importance, while the blue crab is of recreational importance.

The rock crab dominated most of the sampling periods in the area between Fort Trumbull and Eastern Point, with the starfish and lobster ranking second and third in importance. The mantis shrimp *(Squilla empusa)* was reported in low numbers in this area (Pellegrino 1989).

The Department of Public Health (DPH) has jurisdiction to close shellfish concentration areas if determined that tidal flats, shores or coastal waters are contaminated or polluted to the extent that the waters are not meeting established standards of purity. Such a prohibition of the taking or harvesting of shellfish in these areas may be permanent, temporary, or contingent upon the occurrence of specified events. However, commercial harvesters are not prohibited from taking shellfish from permanently closed areas if they are transplanted to approved areas under permit of the DPH and supervision of other state and local health agencies.

The DPH is empowered to inspect shellfish beds and areas in Connecticut where shellfish are grown or harvested for market; all boats, tools, and appliances used in the production and preparation of shellfish for market; and all wharves or buildings where shellfish

are packed and prepared for sale or shipment for market.

The 1996-1997 Annual Assessment of all shellfish growing waters in New London was completed by the Department of Agriculture Bureau of Aquaculture. This assessment provides the results of monitoring and evaluation of pollution sources and water quality data in accordance with the National Shellfish Sanitation Program Manual of Operations.

The Bureau of Aquaculture Annual Assessment indicates that there are limited oyster and hard-shell clam resources in the Thames River in New London. Soft-shell clams are found in Alewife Cove in eastern New London. There were no active leased shellfish beds or commercial harvesting activities in New London prior to 1995. In 1995, one Bureau of Aquaculture licensed shellfish harvester leased shellfish grounds in New London city waters between Shore Rock off Ocean Beach north to Mamacoke Cove. There is no recreational shellfish harvesting allowed in New London.

The Thames River, in the area immediately surrounding the project area, is classified as a prohibited shellfish area by the Bureau of Aquaculture. The prohibited classification extends from the southbound side of the Interstate 95 Gold Star Memorial Bridge to approximately White Rock. Prohibited areas are state waters that have been classified as prohibited for the harvesting of shellfish for any purpose except depletion and aquaculture operations licensed by the Bureau of Aquaculture. A prohibited shellfish growing area is closed for the harvesting of shellfish at all times. This classification reflects the presence of conditions that could pose a health hazard such as biotoxins.



South of the project area, from approximately White Rock to the Quinnipeag Rocks, the Thames River is classified as a conditionally restricted relay area. This classification indicates that the area is classified and has been determined to meet restricted area criteria. A conditionally restricted relay shellfish growing area is closed when the area does not meet the restricted growing criteria and is temporarily closed by the shellfish control authority. The relay period for this area has been established at 45 days.

### *2.11.4 Vegetation*

The project area can be characterized as an urban setting that has been developed to very near its maximum density. The majority of the project area consists of commercial and industrial buildings, residences, sidewalks, parking lots, and roads. Interspersed throughout the project area are relatively small, vegetated areas consisting of maintained lawns, some with ornamental trees.

The area contains several undeveloped parcels that have become overgrown with invasive plant species. Most of the plant species that characterize these sites are aggressive, non-native species that tend to thrive in areas that have been disturbed.

### *2.11.5 Inland Wetlands*

According to the New London Conservation and Development Plan, relative to other communities in the region, New London contains very few undisturbed inland wetland soils as regulated by Sections 22a-36 through 22a-45 of the Connecticut General Statutes. These soil types include poorly drained, very poorly drained, alluvial and floodplain soils. There are

approximately 12 mapped wetland areas in the city which comprise approximately 140 acres of the city's land area. These areas are regulated by the New London Conservation Commission through the issuance of permits for development activity.

The project area is highly developed and contains many areas that are underlain by artificial fill. A small ephemeral watercourse occurs on a vacant parcel located between Howard Street and Shaw Street in the Gateway Area. The watercourse is approximately six feet wide and conveys stormwater approximately 350 feet from a corrugated metal pipe that inlets at its eastern end to a corrugated metal pipe that outlets at its western end. The watercourse is situated in a depressed channel with steep banks of fill material. Dense vegetation, predominantly Japanese knotweed *(Polygonum cuspidatum)* and common reed *(Phragmites australis),* occurs along the banks of the channel. However degraded, it is likely that this area would be a regulated watercourse under local inland wetlands regulations. Based on field investigations by a certified soil scientist, minimal areas of regulated wetland soils have been identified in this area.

Any future proposed work in areas of potential wetlands would need to be field identified by a certified soil scientist and wetland biologist, and field surveyed.

### *2.11.6 Tidal Wetlands*

The Thames River in the vicinity of the project area is influenced by tidal fluctuations due to its close proximity to Long Island Sound. Mean tidal range at State Pier, New London, located approximately 1.5 miles upstream of the project area, is 2.6 feet. The



spring range is 3.0 feet (NOAA tide tables). Much of the riverbank along the project area consists of fill material that slopes steeply to the river. Most of this steep embankment has been armored with riprap to prevent erosion. Additionally, piers and marinas have been constructed along the Thames River. As a result of this highly modified and intensely developed shoreline, tidal marshes within the project area are limited to one area.

Tidal wetlands occur at the western end of the South Cove near Bentley Creek, located to the south of the project area between the regional Water Pollution Control Facility and the Pfizer site. This area consists of intertidal mudflats bordered by a marsh area dominated by tidal salt marsh vegetation, including saltwater cordgrass *(Spartina alterniflora),* salt hay grass *(S. patens),* spike grass *(Distichlis spicata),* and black grass *(Juncus gerardii).* Landward of this area is a marsh border consisting of high-tide bush *(Iva frutescens)* and common reed *(Phragmites australis).* The common reed is quite pervasive in this area and extends into the dirt parking area located adjacent to the regional Water Pollution Control Facility. This area is planned for restoration in conjunction with one or more related projects occurring in the area.

An open, concrete-lined drainage channel carries stormwater runoff from the Trumbull Street area to the tidal marsh area, running alongside the regional Water Pollution Control Facility. The downstream end of the channel contains a dense growth of common reed.

### *2.11.7 Wildlife*

Following is a characterization of the wildlife habitat within the different project planning areas:

### *NUWC Facility*

NUWC is located in an urban environment within the limits of the City of New London. The facility contains 44 structures and the majority of the site has been filled and paved for development. The minimal open space remaining at the NUWC property is characterized by maintained grass lawns and ornamental trees. As a result of the intensive level of development at the site, there is insufficient natural habitat to support most wildlife species (TAMS 1998).

### *Regional Water Pollution Control Facility*

The regional Water Pollution Control Facility consists of the sewage treatment tanks and equipment, associated buildings, a parking lot, and maintained lawn. This site contains no significant habitat for most wildlife species.

### *Business/Commercial Parcels*

The project area contains many parcels occupied by commercial establishments. These parcels are generally dominated by buildings, walkways, parking lots, roads, and small areas of maintained lawns and ornamental trees. Due to the highly developed character of these areas, they provide no significant natural habitat for most wildlife species.

### *Single- and Multi-Family Residential Parcels*

Many of the residential parcels within the project area contain lawns, some with ornamental trees. These vegetated areas are small, contain very little vegetative diversity, and are not interconnected by wildlife corridors. Therefore, they are not considered



to offer significant wildlife habitat, and it is unlikely that they can support most wildlife species.

### *Undeveloped Parcels*

The project area contains several undeveloped vegetated parcels. Most of the plant species that characterize these sites are aggressive, non-native species that tend to thrive in areas that have been disturbed. Although these areas do not offer significant natural habitat, and are unlikely to support most wildlife species, they are likely to support a limited number of wildlife species that have adapted to life in an urban or near-urban environment. Potential wildlife habitat is likely to exist on the undeveloped parcels for the following species:

*Amphibians*

- red-backed salamander *(Plethodon cinereus)*

*Reptiles*

- northern brown snake *(Storeria dekayi)*
- eastern garter snake *(Thamnophis sirtalis)*

*Birds*

- rock dove *(Columba livia)*
- northern flicker *(Colaptes auratus)*
- American robin *(Turdus rnigratorius)*
- northern mockingbird *(Mimus polyglottos)*
- European starling *(Sturnus vulgaris)*
- song sparrow *(Melospiza melodia)*
- house finch *(Carpodacus mexicanus)*
- American goldfinch *(Carduelis tristis)*
- House sparrow *(Passer domesticus)*

*Mammals*

- Virginia Opossum *(Didelphis virginiana)*
- gray squirrel *(Sciurus carolinensis)*
- white-footed mouse *(Peromyscus leucopus)*
- Norway rat *(Rattus norvegicus)*
- house mouse *(Mus musculus)*
- raccoon *(Procyon lotor)*

The wildlife species listed above are species that have adapted to life in an environment that has been highly altered by human development. Several of these species benefit due to their interaction with humans.

### *2.11.8 Species of Special Concern*

The Connecticut Department of Environmental Protection's Natural Diversity Data Base (NDDB) was accessed in order to determine if any areas of special concern for endangered and threatened species or significant natural communities exist within the project area. NDDB data indicate that the Thames River adjacent to the project area is an area of concern due to the presence of Atlantic sturgeon *(Acipenser oxyrhynchus)* in the vicinity. Atlantic sturgeon is listed as State Threatened in freshwater.

There is no information to suggest that Atlantic sturgeon spawn in the Thames River. The nearest documented spawning area is the Hudson River in New York. It is believed that young sturgeon remain in the Hudson River for approximately three years before moving out of the river and into an estuarine or marine environment. Immature sturgeon between the ages of three and eight years of age may be seasonally present in the Thames River between April



and September. Presently, there is very little data available on Atlantic sturgeon populations in the Thames River (Tom Savoy, DEP, personal communication):

## 2.12 Physical Environment

### *2.12.1 Topography*

The topography of the study area is generally flat, with maximum elevation reaching approximately 43 feet NGVD atop a raised area between East Street and Smith Street. Most of the NUWC site is at an elevation of approximately eight feet NGVD, and slopes slightly towards the Thames River, with the exception of the southern portion of the site, where Fort Trumbull is located. This area rises to nearly 40 feet NGVD and has several bedrock outcroppings. The portion of the study area west of the railroad tracks (the Gateway Area) generally ranges in elevation between six feet and 12 feet NGVD. The storm drainage watercourse that occurs on an undeveloped rear parcel along Howard Street is at a low elevation of 1.3 feet NGVD. The remainder of the study area generally ranges between six feet and 40 feet NGVD.

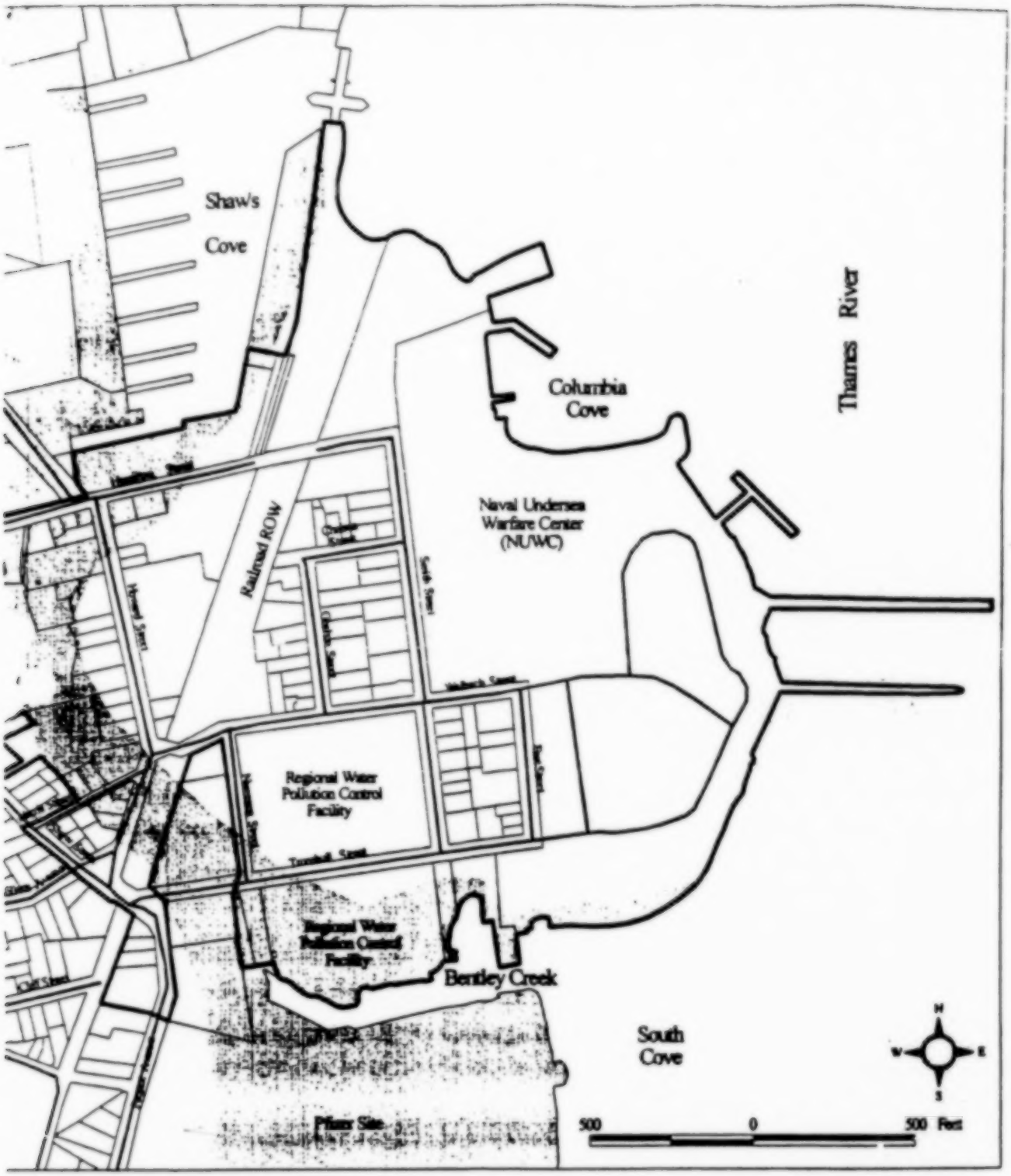
### *2.12.2 Geology*

The City of New London is located in the Eastern Highland physiographic section of Connecticut. The bedrock geology is primarily composed of metamorphic rock such as "gneiss" or "schist." These bedrock formations are overlain by two types of materials primarily deposited by the Wisconsin glaciation which occurred about 15,000 years ago. The dominant material deposited over the bedrock in New London is "till" which is composed of rock particles that tend to be sandy, very stony, and will contain a large percentage

of boulders. Smaller, isolated areas of "stratified drift" contain deposits of sorted layers of sand and gravel primarily along valleys and streams. In New London, this stratified drift is found along Interstate 95, Fenger Brook, Alewife Cove and the Thames River. As a result of the glacier and like much of the surrounding area, the major topographic features of the city are north-south oriented, elongated hills called drumlins. The most notable of these drumlins is the feature which is generally centered along Ocean Avenue in the southern portion of the city. (New London Conservation and Development Plan)

### *2.12.3 Surficial Geology*

Figure 2.12-1 depicts surficial materials in the project area. The surficial materials underlying the project area and the surrounding vicinity have been mapped and described in the publication "Surficial Geology of the New London Quadrangle" by Richard Goldsmith (1962), as published by the U.S. Geological Survey.




ort Trumbull MDP Area - New London, Connecticut
t Environmental Impact Evaluation - November 1998

Figure 2.12-1
Surficial Materials

. coverages developed by Milone & MacBroom,
nd HMA, Inc. Sources include Connecticut DEP,
of New London, and US Navy. Intended for planning
ly - not for design purposes.

MDP Project Border
Artificial Fill
Till
Water

412

503

The majority of the Fort Trumbull project area is underlain by a glacial deposit designated as *Qt* till. *Qt* material consists of compact sandy and gravelly till with a relatively smooth surface. Also included are a few thin masses of loose till and small lenses of stratified material.

Areas of artificial fill, designated as *af,* are also included in the project area. These are generally earth fill and contain little or no amounts of trash. The artificial fill areas include the southern portion of project area, adjacent to Greens Harbor. A narrow band of artificial fill extends to the northwest corner of the project area adjacent to Shaw's Cove. The northeast corner of the peninsula is also underlain by a narrow band of artificial fill along the shore of the Thames River as well as a small section located along the rail line. Much of this area is also floodplain.

A small lens of salt marsh deposits designated as *Qm* located in the southeast portion of the peninsula, adjacent to the sewage treatment plant and Trumbull Street. The *Qm* deposit consists of partly decomposed organic material mixed or interbedded with estuarine silt and sand.

Many outcrops of bedrock formations are located throughout the project area as well. Most occur at the NUWC property and along Walbach Street.

The U. S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS), formerly the Soil Conservation Service (SCS), has developed soil mapping of New London County, Connecticut. Figure 2.12-2 presents soil mapping of the project area.

The project area is underlain predominantly by urban land, Udorthents-urban land complex, and Hollis-Chatfield rock outcrop complex. Less predominant

soil types include Charlton-Chatfield complex and Sutton fine sandy loam.

Urban land consists of land where more than 85% of the surface is covered by streets, parking lots, buildings, and other structures. Most of the original soils underlying these areas have been altered by excavating or have been covered with fill material.

The Udorthents-urban land complex consists of excessively drained to moderately well drained soils that have been disturbed by cutting or filling, and areas that have been covered by buildings or pavement. Both the urban land and the Udorthents-urban land complex mapping units require on-site soil investigation and evaluation for most uses.

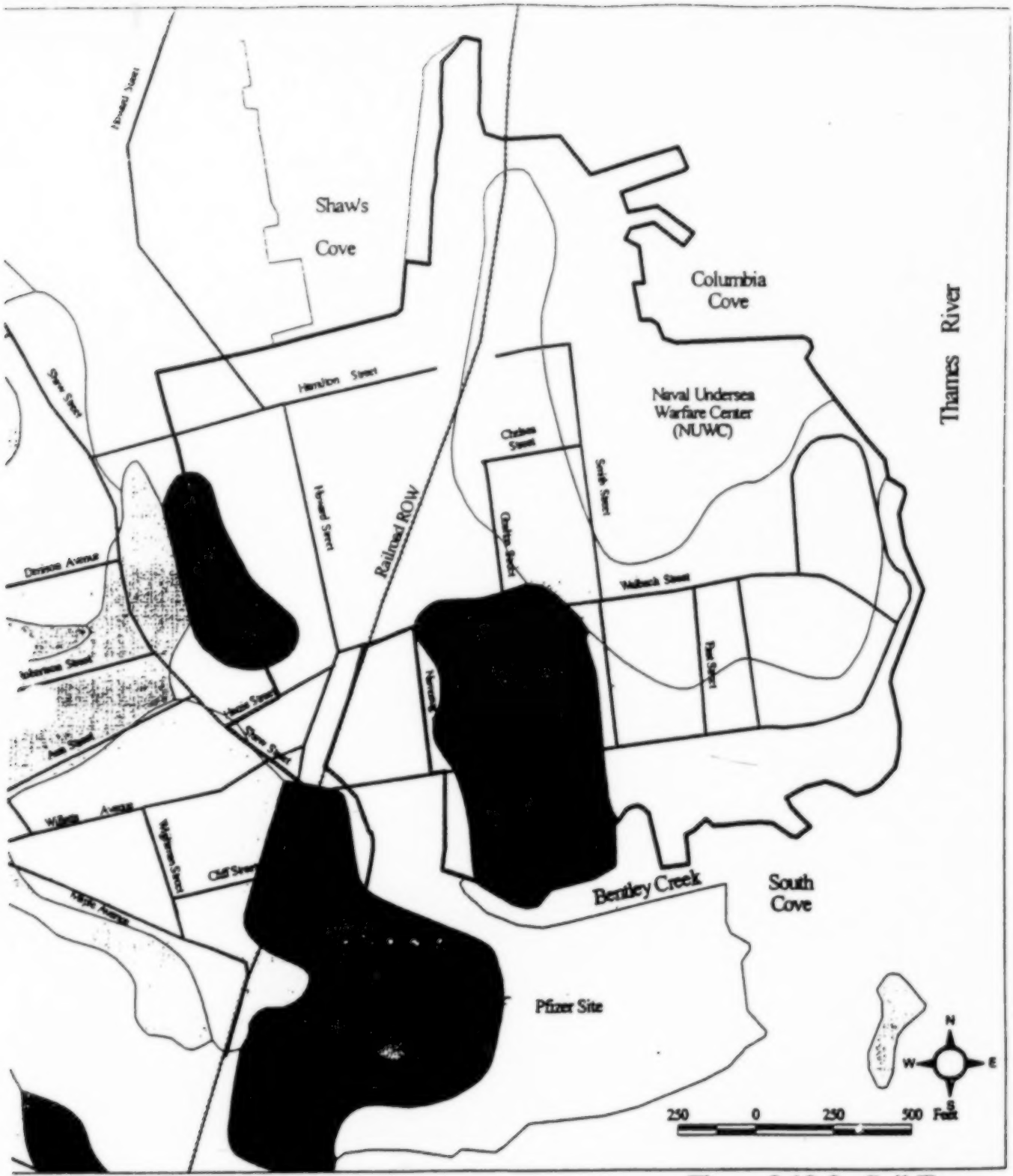



Figure 2.12-2 Soil Types

Trumbull MDP Area - New London, Connecticut
. Environmental Impact Evaluation - November 1998

MDP Project Border
CANTON AND CHARLTON SOILS
CHARLTON-CHATFIELD COMPLEX
HOLLIS-CHATFIELD ROCK OUTCROP COMPLE
ROCK OUTCROP-HOLLIS COMPLEX
SUTTON FINE SANDY LOAM
UDORTHENTS-URBAN LAND COMPLEX
URBAN LAND

.IS coverages were developed by Milone & MacBroom, and HMA, Inc. Coverages are based on data provided by necticut DEP, US Navy, NRCS, and City of New London. ning purposes only - not for design use.

The Hollis-Chatfield rock outcrop complex consists of somewhat excessively drained and well-drained soils and rock outcrop on glacial till uplands. This complex is approximately 40% Hollis soil, 25% Chatfield soil, 20% rock outcrop, and 15% other soils.

The project area generally contains gentle slopes. The majority of this area is covered by buildings and pavement, or by maintained lawn. The predominant soils present consist of artificial fill materials and rock outcrop complex. The general erodibility of the soils which occur in the project area is low.

### *2.12.4 Bedrock Geology*

The bedrock geology underlying the project area and the surrounding vicinity have been mapped and described in the publication "Bedrock Geology of the New London Quadrangle" by Richard Goldsmith (1967), as published by the U.S. Geological Survey.

The Fort Trumbull area is entirely underlain by New London Gneiss, a rock formation designated as *nb*. This formation is a light gray medium-to-fine grained massive gneissic granodiorite with locally quartz monzonite peppered with brilliant black biotite and scattered prominent magnetite grains. The main constitutes are oligoclase and quartz with subordinate microcline. Also present are tabular inclusions of amphibolite, which are most abundant near the contact with the New London Layered Gneiss, *n*. The foliations found in this formation are produced by the parallelism of biotite flakes and streaks of slightly different mineral composition.

## 2.13 Air Quality

### *2.13.1 Federal Air Quality Regulations and Criteria*

The Federal Clean Air Act was passed by Congress in 1970 and signed into law by President Nixon. This Act required the Environmental Protection Agency (EPA) to ensure that all Americans have safe air to breathe. The Act requires the EPA to: (1) review the public health standards for six major air pollutants every five years; (2) update the standards as necessary to "protect the public health with an adequate margin of safety" based on the most recent studies available and; (3) consider only the public health, not the cost of compliance, when setting air quality standards.

In an effort to achieve the Clean Air Act goals, in 1971 the EPA promulgated primary and secondary national ambient air quality standards (NAAQS) for six pollutants: carbon monoxide (CO), lead (Pb), nitrogen dioxide ($NO_2$), ozone ($O_3$), sulfur dioxide ($SO_2$), and particulate matter smaller than 10 micrometers in diameter ($PM_{10}$). With the exception of ozone and particulate matter, these standards have not been revised since their inception.

In July 1997, the EPA issued the first update to the NAAQS since the development of these standards. These updated standards were developed as a result of scientific evidence that the existing standards did not adequately protect public health. In the case of ozone, long term exposure at levels below the primary standard were found to cause significant health impacts including asthma, respiratory problems and loss of lung function. The new 8-hour ozone standard became effective 60 days after promulgation of the standard in June 1997. The 1-hour standard will remain



in effect until the EPA determines that an area has met this 1-hour standard.

In the ease of particulate matter, it was determined that significant health effects, including premature mortality, hospital admissions and respiratory illnesses were likely to occur at levels below the existing standards. Evidence indicated that "fine" particles (smaller than 2.5 micrometers in diameter) are more likely than "coarse" particles (those ranging from 2.5 to 10 micrometers in diameter) to contribute to adverse health effects. This evidence led to the development of air quality standards for particulate matter less then 2.5 micrometers in diameter.

Monitoring associated with the new particulate matter standard is hindered by the lack of a monitoring network capable of measuring fine particles. Currently, the EPA is seeking resources to fund the development of a monitoring system capable of measuring fine particulate matter. This network is to be phased into service over a three to four year period beginning in 1997, beginning with major metropolitan areas of over 500,000 persons. After monitoring locations in the major metropolitan areas are established, each state will be required to have two $PM_{2.5}$ monitoring locations by the end of 1998. Compliance with this new standard will not be determined until three years of monitoring data have been developed for each specific sample location. As such, compliance with the $PM_{2.5}$ standard has not been established in Connecticut.

Table 2.13-1 provides a summary of the NAAQS.

**TABLE 2.13-1**
**Summary of NAAQS**

| Pollutant | Primary Standard[1] ($\mu g/m^3$) | Secondary Standard[2] ($\mu g/m^3$) |
|---|---|---|
| Carbon Monoxide* | | |
| (8-hour max.) | 9,000[3] | NA |
| (1-hour max.) | 35,000[3] | NA |
| Nitrogen Dioxide (mean) | 100 | 100 |
| Ozone | | |
| (8-hour max.) | 0.08 ppm[4] | 0.08 ppm |
| (1-hour max.) | 0.12 ppm[5,6] | 0.12 ppm |
| Particulate Matter ($PM_{10}$) | | |
| (annual mean) | 50 | 50 |
| (24-hour max.) | 150[8] | 150[7] |
| Particulate Matter ($PM_{2.5}$)[9] | | |
| (annual mean) | 65[7] | 15 |
| (24-hour max.) | 65[7] | 65 |
| Lead (quarterly mean) | 1.5 | 1.5 |
| Sulfur Dioxide (annual mean) | 80 | NA |
| Sulfur Dioxide (24-hour max.) | 365[3] | NA |
| Sulfur Dioxide (3-hour max.) | NA | 1300[3] |

Notes:
1. Primary standards were established with goal of protecting human health. 1 $\mu g/m^3$ is equivalent to 1 ppb. 10,000 $\mu g/m^3$ is equivalent to 10 ppm.
2. Secondary standards are intended to prevent environmental and property damage.
3. Limit not to be exceeded more than once per year.
4. Defined in 1997 by EPA as the three year average of the annual 4th highest daily maximum.



5. Level not to be exceeded more than once per year.
6. 1-hour ozone standard to be replaced with new 8-hour standard.
7. Twenty-four hour average, not to be exceeded more than once per year.
8. Established in 1997 as an update to the NAAQS.
9. Compliance is achieved when the 3-year average of the annual arithmetic mean is less than or equal to standard.
10. Compliance is based on the 98th percentile of 24-hour concentrations in a year (averaged over 3 years).

### *2.13.2 Statewide Air Quality Policies and Regulations*

The *Conservation and Development Policies Plan for Connecticut* recognizes that Connecticut has seen major improvements in air quality over the past 20 years. However, additional affects of air pollution are being identified, and new concerns are emerging that will require greater control efforts. Balancing air quality gains with the costs of such controls and the ability to provide for economic development is a critical planning concern.

Reported air emissions of toxic substances declined from 12,700 tons in 1988 to approximately 4,000 tons in 1994. A major hazardous pollution issue under intensive study is the airborne transport of mercury that is ultimately deposited on land or in surface waters. Fish from several state lakes show unsafe levels of the metal and the DEP has issued advisories

concerning eating them. Emissions from outside the state may play a significant role.

Below is a list of the policies and strategies for air quality from the State of Connecticut Conservation and Development Plan.

- Seek to attain National Ambient Air Quality Standards by the applicable deadlines with emphasis on cost-effective strategies and effective enforcement.
- Develop strategies to achieve and maintain healthy air quality that will enable and foster economic development within the urban areas of the state as designated within this Plan.
- Foster transportation and development plans and projects that promote attainment and maintenance of healthy air.
- Establish and maintain standards that will protect citizens from the dangers of hazardous air pollutants and integrate monitoring and regulation of such pollutants into air quality enforcement activities.
- In order to reduce the risk of global climate change, seek to reduce statewide carbon dioxide emissions to 1990 levels and to reduce further where technically and economically feasible. Also, seek to reduce emissions of other substances that contribute to global warming.

Air quality monitoring is performed on a regular basis in Connecticut by the Department of Environmental Protection for the following parameters:

- Particulate matter smaller than 10 micrometers (μ) in size ($PM_{10}$)
- Ozone



- Sulfur Dioxide ($SO_2$)
- Nitrogen Dioxide ($NO_2$)
- Lead (Pb)
- Carbon Monoxide (CO)

The results of this monitoring are published in an annual report summarizing air quality in Connecticut. The most current published data, presented in the 1996 annual summary of air quality data, indicates that Connecticut has achieved attainment of EPA criteria for $NO_2$, Pb, and $SO_2$. Attainment has not been achieved for CO, ozone and $PM_{10}$. Non-attainment occurs when one or more of the standards for that pollutant (24-hour average, daily maximum) have not been attained in one or more regions of the state.

Air quality monitoring shows that Connecticut now meets health-related standards for five of the major pollutants regulated under the federal Clean Air Act. The New London area is not currently monitored for nitrogen dioxide, lead or sulfur dioxide concentrations. However, all monitoring locations in the state are in attainment for these criteria and, consequently, the state is said to have attained compliance with EPA criteria. These pollutants are transported via wind from west to east and their concentrations in ambient air are considered to be a direct result of activities which occur in metro New York and New Jersey. The effects of the pollutants from the Metro New York area decrease to the east along the Connecticut shoreline, with the highest concentrations typically measured in lower Fairfield County.

Air quality monitoring data for 1997 is available on the DEP internet web site. Results of air monitoring indicate that the majority of the State of Connecticut is classified as serious non-attainment for ozone concentrations, while Fairfield County (less Shelton),

New Milford, and Bridgewater are considered to be in severe non-attainment. Ozone monitoring is conducted in 12 locations throughout the state and, in 1997, eleven of these monitoring locations were in non-attainment for exceedance of the primary 1-hour ozone standard. An exceedance of this standard is defined as an hourly concentration of 0.125 ppm or greater. Only one monitoring location, located in Torrington, was in compliance with the ozone standard. The Groton monitoring location exceeded the 1-hour ozone standard on four days in 1997. This is an increase over the one day of exceedance in 1996. Of the twelve monitoring locations in the state, only Madison, Stratford and Westport exceeded the 1-hour ozone standard more frequently than Groton. Each of these monitoring stations reported six days of non-compliance in 1997. Groton and Danbury each had four days of non-compliance.

Preliminary 1998 data (partial year) indicates the 1-hour standard was exceeded once at the Groton station, as compared to the four exceedances recorded in 1997. Other data collected during the 1998 ozone monitoring season indicates that the Groton station exceeded the 8-hour ozone standard on three days. The 8-hour standard was exceeded 25 days in the state in 1998. All 1998 ozone monitoring information was taken from data posted on the DEP Air Management Bureau internet web site. However, this data is considered to be preliminary and has not been validated.

Variations in ozone concentrations are attributed to variations in weather patterns, including wind direction, ambient temperature, and amount of sunlight. The DEP database indicates that the highest ozone levels occur on days with persistent winds out of the southwest. During the period between 1981 and 1995, 74% of the annual ten highest daily 1-hour average



concentrations of ozone occurred when southwesterly winds prevailed. This is attributed to two features of southwest winds, one being that these winds are usually associated with high temperatures and bright sunshine which increase ozone production, the other being that they transport precursor contaminants from the New York metropolitan area to southern area of Connecticut. The occurrence of high ozone levels on non-southwest wind days indicates that continuation of the pollution control programs in the state are required to reduce ozone generation within the state.

Particulate monitoring was conducted at 21 locations throughout the state in 1997. Measurements at all monitoring locations did not exceed the primary or secondary annual standards for particulate matter. The 24-hour standards were not violated in 1997 at any monitoring locations. Results of monitoring completed in 1997 follows the trend documented in 1996, when all monitoring locations were considered in attainment, except the City of New Haven. The maximum 24-hour concentration at the New London monitoring location was measured as 66 $\mu g/m^3$ in 1996 and 65 $\mu g/m^3$ in 1997, well below the EPA limit of 150 $\mu g/m^3$. Historical monitoring data from the New London station indicates the arithmetic mean of the $PM_{10}$ for the 1995, 1996 and 1997 monitoring years was 16.7, 18.3 and 17.9 $\mu g/m^3$, respectively. These concentrations are well below the NAAQS of 150 $\mu g/m^3$. These means are consistently among the lowest in the state, with the exception of other monitoring locations, located in the eastern portion of the state such as Voluntown and Willimantic.

Connecticut did not report any exceedances of the one-hour or the eight-hour carbon monoxide NAAQS at any of the five monitoring locations in 1997.

According to the 1996 Annual Air Quality Summary, Connecticut has a mixture of attainment and non-attainment areas for carbon monoxide. Fairfield County, Bridgewater, and New Milford are classified as moderate non-attainment. New Haven County, Bethlehem, Watertown, Woodbury, and Shelton are considered as unclassified non-attainment. These areas were formerly considered to be part of the New Haven/Hartford/Springfield air quality region that had been designated as non-attainment due to air quality in New Haven. Carbon monoxide levels have not, however, been measured in the recent past in these areas at levels that exceed the air quality standards. Hartford, Tolland, and Middlesex Counties and Plymouth were classified by the EPA as attainment areas in 1996. Remaining areas of the state, including New London, are classified as unclassified attainment. This designation reflects the fact that, although carbon monoxide monitoring has not been conducted in the region, the status of attainment can be inferred from population and traffic density data.

Carbon monoxide concentration is generally considered to be a function of land use, land use density, and transportation related activity. Background CO levels in the project area are not available through published reports.

### *2.13.3 Site Specific Air Quality Analysis*

A local air quality analysis was conducted by consultants under contract to the Navy for carbon monoxide to establish existing levels in the project area. Local CO concentrations were estimated through the use of computerized mathematical models. Worst-case CO levels were calculated for the peak one-hour and eight-hour time periods, which correspond to the averaging periods of the state and federal ambient CO



standards. Modeling results are included in Table 213-2.

**TABLE 2.13-2**
**Estimated Carbon Monoxide Levels in the Project Area**

| Receptor | One-Hour Concentration (ppm) | Eight-Hour Concentration (ppm) |
|---|---|---|
| Bank Street and Truman/ Shaw Street | 8.6 | 6.0 |
| Bank Street and Howard Street | 8.9 | 6.2 |

Note: 1. CO levels include background concentrations of 4.3 ppm (1-hour) and 3.0 ppm (8-hour).
2. Values are for the pm peak period.
3. 10 ppm is equivalent to 10,000 µg/m3.

Comparison of these values to the NAAQS indicates the carbon monoxide levels in the project area are well below the national standards.

The dominant emission sources on the NUWC base are reported to be the three major heating boilers which operate under air permits issued by the DEP. These boilers provide heat and hot water for NUWC buildings. Other sources, such as small heating boilers being used by the Coast Guard, are considered minor emission sources that do not require air permits.

The regional WPCF is also an emission source. Between January 1995 and October 1997, a total of 13 odor complaints were recorded by the DEP (Schuler, 1997). All of these complaints were from residents located within a 100-foot radius of the facility. Additional odor control measures are currently being evaluated for this facility.

## 2.14 Noise

### *2.14.1 Local Noise Policies and Regulations*

The Plan of Development adopted by the City of New London in 1997 identifies the development of a noise control program to reduce levels of harmful noise as a goal of the city. Noise is regulated in the city via police patrol, as required by the New London Code and the Zoning Regulations. These ordinances authorize the control of sound amplifying devices. construction activities, and all other operations that may be viewed as a nuisance to neighboring properties or the general public. Motor vehicles and railroad noise are considered to be principal sources of noise, with the major emitters considered to be Interstate 95, State Route 32 and other major roads.

The City Zoning Ordinances limit the sound level of all activities except the following:

- noise created as the result of an emergency;
- construction and demolition activities during the daytime;
- blasting other than that associated with construction activities between the hours of 8:00 a.m. and 5 p.m.;
- city sponsored recreation activities such as parades and fairs;
- noise generated by maintenance activities for landscaping and snow removal; farming activities;
- noise generated by transmission and distribution facilities and substations of public utilities; and
- noise that is caused by the flight operations "specifically preempted by the Federal Aviation



Administration" shall not exceed the standards of the State Statutes.

The zoning ordinance limitations are presented in Table 2.14-1.

**TABLE 2.14-1**
**City of New London Noise Restrictions**

| Zone | WC-1, L1-O | C-1, C-2, CBD, WD | R-1, R-2, R-3, R-4. WD, INST, NB |
|---|---|---|---|
| Noise Limit | 70 dBA | 66 dBA | Day: 61 dBA/Night: 51 dBA |

Note: Night is defined as 10 p.m. to 7 a.m. (10 p.m. to 9 a.m. on Saturday)
Day is defined 7 a.m. to 10 p.m. (9 a.m. to 10 p.m. on Sunday)

### *2.14.2 Noise Measurements in the Project Area*

A noise measurement survey was conducted in the project area in conjunction with the planned disposition of the NUWC site. The following information has been obtained from the Navy's consultant:

Four monitoring locations were selected to provide measures of the existing noise levels. Figure 2.14-1 is a location map showing these locations. Locations are as follows:

- Site 1 – Along the east side of Pequot Avenue between Trumbull Street and Maple Avenue;
- Site 2 – West of NUWC near the property boundary along East Street;
- Site 3 – At 202 Shaw Street between Denison Street and Ann Street; and
- Site 4 – At 211 Howard Street between Hamilton Street and Walbach Street.

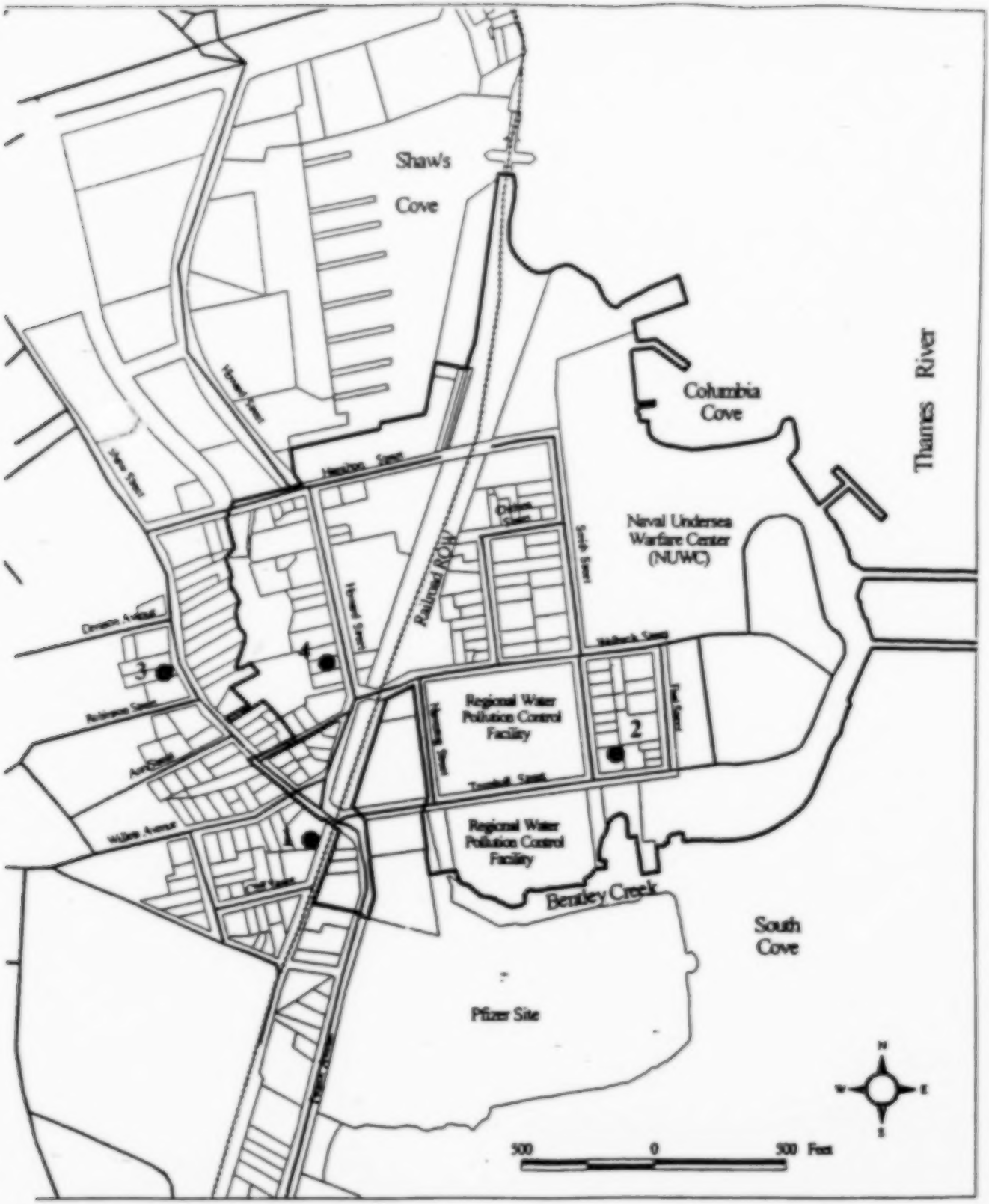
A sampling measurement program for weekdays was conducted during four time periods on October 7 and 8 and November 6, 1997. Measurements were taken five feet from the existing building walls of the receptor locations. Microphone height for all receptors was eight feet above ground level.

Measurements at each sampling location were made on the A-scale (A-weighted decibel or dBA) for a sampling period of 30 minutes. A wind screen was used to minimize wind noise across the face of the microphone. The data were digitally recorded by the noise analyzer and displayed at the end of the measurement.

The one-hour equivalent noise levels ($L_{eq}$) measured at sites 1 through 4 are presented in Table 2.14-2. The predominant source of noise was vehicular traffic at all measurement locations. The measured noise levels are common for residential areas, reflecting the level of vehicular traffic present. While not directly applicable, the U.S. Department of Housing and Urban Development (USHUD), the Federal Highway Administration (FHWA), and City of New London noise criteria provide a useful yardstick by which to assess the existing noise environment in the area.

- The USHUD criterion for residential land use is exceeded when the $L_{dn}$ exceeds 65 dBA. Based on existing noise levels, the $L_{dn}$ = 65 (day/night sound level) was exceeded at sites 1, 3, and 4.

- The FHWA criterion for Activity Category B land uses (residential, parkland, hospitals, etc.) is 67 dBA. Existing noise levels exceeded the FHWA criteria at Site 1 during the a.m. period and Site 4 during the p.m. period. At the other two sites, the existing noise levels did not exceed the FHWA criteria; however, the measured ambient levels at all receptors reflect typical suburban area noise conditions.

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nbull MDP Area - New London, Connecticut
Environmental Impact Evaluation - November 1998

Figure 2.14-1
Noise Monitoring Locations

GIS coverages developed by Milone & MacBroom, nd HMA, Inc. Sources include Connecticut DEP, f New London, FEMA, and US Navy. Intended for planning not for design use.

1● Noise Monitoring Location

MDP Project Border

511

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The City of New London performance standards for noise control in residential areas do not apply to noise generated by vehicular traffic.

**TABLE 2.14-2**
**Measured Noise Levels in the Project Area**

| | One-Hour $L_{eq}$ in dBA | | | |
|---|---|---|---|---|
| **Time Period** | **Site 1** | **Site 2** | **Site 3** | **Site 4** |
| A.M. Peak (7-9 am) | 67 | 62 | 65 | 66 |
| Midday (10am-2pm) | 64 | 60 | 63 | 65 |
| P.M. Peak (5pm-7pm) | 66 | 62 | 66 | 67 |
| Pre-Midnight (9pm-12am) | 60 | 58 | 61 | 63 |
| 24-Hour $L_{eq}$ | 63 | 59 | 63 | 64 |
| $L_{dn}$ | 66 | 62 | 66 | 67 |

Note: $L_{dn}$ refers to day/night sound level.

## 2.15 Solid Waste and Hazardous Materials

### *2.15.1 Solid Waste*

According to the Connecticut Conservation and Development Plan, Connecticut has put into place most of the components of a new system for the management of municipal solid waste. This system has largely replaced past reliance on landfills, with a new emphasis on reducing the amount of waste generated and on capturing reusable materials and energy before disposal. Waste avoidance, recycling, composting, resource recovery, and properly sited and regulated landfills constitute an integrated system for solid waste management in Connecticut.

In 1995-96, 23% of the municipal solid waste generated in the state was recycled; 60% was processed at resource recovery facilities; and 17% was landfilled. The recycling percentage is a conservative number, as it does not include data on automobiles, commercial

scrap metal recycling, and backyard composting. The state's objective is to recycle 40% of the waste stream by the year 2000 and thereafter to offset any potential growth of the waste stream by either waste avoidance or recycling. Resource recovery has been an effective method of capturing available energy from the waste stream, replace fossil fuels with a renewable fuel, and significantly reduce the volume of the waste to be disposed.

The statewide policy on solid waste is to continue the timely planning, financing, construction, and operation of a statewide, integrated recycling, composting, resource recovery, and landfill system.

The State of Connecticut passed a mandatory recycling law in 1987 that prohibits glass bottles, cans, and newspapers from being disposed of at landfills or at resource recovery facilities. This legislation was specifically designed to reduce Connecticut's solid waste stream by 25%. According to the New London Conservation and Development Plan, the city has almost achieved the 25% goal, and the recycling program continues to improve and expand. Office paper, backyard composting, and school paper recycling still have great potential for significant expansion and will continue to be the focus of the city's recycling efforts.

New London has three refuse packers and two recycling vehicles which are assigned to daily collection routes with supplemental assistance for leaves, yard waste, and commercial recycling. Private waste haulers serve many of the city's commercial properties and most of the city's large apartment and condominium complexes. Refuse collected by the city is then delivered to the Preston waste-to-energy incinerator via transfer trailers from the Transfer Station on Lewis Street. Recyclables are delivered to a private contractor in Willimantic.



### *2.15.2 Hazardous Materials*

Hazardous wastes are defined by their corrosive, reactive, ignitable, or toxic characteristics that can potentially harm human health or the environment when improperly managed. Hazardous waste generation, treatment, storage, and disposal is regulated by the federal Resource Conservation and Recovery Act (RCRA).

According to the *Conservation and Development Policies Plan for Connecticut,* common waste streams among the state's hazardous waste generators include heavy metal-bearing sludges, used solvents, and inorganic liquids such as spent acids and caustic solutions. Connecticut generators rely on out-of-state access to disposal capacity because increased federal regulatory requirements imposed in the mid-1980's effectively ended in-surface disposal practices. Previously, industrial wastes were often directly discharged to surface impoundments adjacent to manufacturing plants or disposed in municipal landfills that accepted such wastes.

As in-state disposal options disappeared, exports of hazardous wastes rose from 42,200 tons to 121,000 tons between I983 and 1989. During the same period, generation of recurrent waste, which includes waste from ongoing production processes, declined from 188,100 tons to 127,000 tons. In addition, one-time waste generation from spill clean-ups and site. remediations in the 1980's has slowed as surface impoundments, landfill and plant closures have been completed.

New London participates in a household hazardous waste collection day each year. Prior to the designated collection day, the Public Works office mails out brochures and advertises the event on the radio and in

newspapers. Brochures are also distributed in public places such as the library. The content of the brochure and advertisements educate the public on why they should participate, what are the acceptable materials, how to package the hazardous wastes, and where to take the hazardous waste products on the designated day.

### *2.15.3 Applicable Environmental Regulations*

The following Connecticut and Federal environmental regulations may apply, at least in part, to the Fort Trumbull MDP area:

#### *The Connecticut Transfer Act (Connecticut General Statutes (C.G.S.) Section 22a-134 et. seq.)*

The property transfer law requires certain real properties and/or businesses defined as establishments (as defined below) to disclose environmental conditions of the property upon its transfer. When an establishment is transferred, one of four forms must be executed and a copy must be filed with the Department of Environmental Protection. When there has been a release of hazardous waste, a party associated with the transfer must certify to investigate and remediate the property.

An establishment means any real property at which or any business operation from which (A) on or after November 19, 1980, there was generated, except as the result of remediation activities, more than one hundred kilograms of hazardous waste in any one month or which recycled, reclaimed, reused, stored, handled, treated, transported or disposed of hazardous waste generated by another person or municipality, or (B) the process of dry cleaning was conducted on or after May 1 1967, (C) furniture stripping was



conducted on or after May 1, 1967, or (D) a vehicle body repair shop or vehicle painting shop is or was located on or after May 1, 1967.

#### *The Remediation Standard Regulations (C.G.S. Section 22a-134K-1 to 3)*

The Connecticut Remediation Standard Regulations (RSR), effective on January 30, 1996, are used to determine whether sufficient remediation has been conducted at sites which have been required to be cleaned up by statute regulation or administrative order (C.G.S. Chapter 445 or 446K). The RSRs also apply to properties undergoing remediation pursuant to voluntary remediation (C.G.S. Sections 22a-133X and 22a-133Y). The regulations provide baseline numeric criteria (standards) for soil, ground water and surface water that may be used to determine whether remediation is necessary. Remediation standards for soils and ground water are based in part on current and future land uses, often allowing a less restrictive standard in non-residential settings. Alternatives, exceptions, and variances to these criteria are available under certain circumstances, and the opportunity exists for self-implementation of such alternatives. The regulations are applied where the site has been properly characterized, which includes a representative sampling program of the environmental media. The overall goal of the RSRs is to protect human health, public welfare, and the environment.

#### *Regulations for Underground Storage of Oil and Petroleum Liquids (C.G.S. Section 22a-449(d)-1)*

These regulations apply to any non-residential underground tank that stores petroleum and petroleum products. The "UST system" includes the tank,

piping, underground ancillary equipment, and containment system. If greater than 10% of the system is below ground, then it is considered underground. The regulations generally have the following provisions: performance standards; notification requirements; operating requirements such as spill control, corrosion protection, reporting and record keeping; release details, reporting, investigations, corrective action; closure; financial responsibility; upgrading; life expectancy; removal; and transfers. There are specific requirements and exemptions for certain systems.

### *Spill Reporting Requirements (C.G.S. Section 22a-450)*

These statutes require that whenever there is a discharge, spill, uncontrolled loss, seepage or filtration of contaminants that poses a potential threat to human health or the environment from any ship, boat, barge, or other vessel, or from a terminal, establishment, vehicle, trailer, or other machine, the Commissioner shall be immediately notified. The statute mandates the reporting of "such facts as the Commissioner by regulation may require," but also provides minimum components of such a report. Spills also include leaks from underground and above-ground tanks. The party that caused the spill and the property owner are responsible to contain the spill immediately.

### *Superlien (C.G.S. Section 22a-452a(a))*

On or after June 3, 1985, any amount paid by the Commissioner pursuant to Section 22a-451(b) of the statutes to mitigate the effects of a spill may be recovered by the DEP through a "Superlien." Superlien takes its name from the superior nature of the encumbrance, since the lien "shall take precedence over



all transfers and encumbrances recorded on or after June 3, 1985, in any manner affecting such interest in such real estate."

Avoiding the lien by selling off contaminated parcels of real estate will not relieve the owner from the provisions of the statute, since the lien applies to "real estate which has been included, within the preceding three years, in the property description of such real estate and is contiguous to such real estate. Amendments to the statute, however, restrict the lien to "the real estate on which the spill occurred or from which it emanated." The Commissioner must first expend money or resources to create the lien.

There are certain exemptions, including residential real estate, a mortgage acquiring title by foreclosure, or a deed in lieu of foreclosure and certain transfer act filings.

### *The National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 CFR 61, Part M*

Although EPA Asbestos Regulations generally apply only to schools and training facilities, they are extended to the private sector through the National Emission Standards for Hazardous Air Pollutants (NESHAP, 40 CFR 61, Part M). NESHAP regulates the application, removal, and disposal of asbestos containing materials. NESHAP requires abatement of asbestos containing material prior to demolition or renovation activities, and assigns responsibility to owners/operators.

### *The Resource Conservation and Recovery Act (RCRA)*

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 and provided the U.S.

Environmental Protection Agency (EPA) with the authority to issue and enforce rules governing hazardous waste management. The first set of hazardous waste regulations were published on May 19, 1980, and went into effect on November 19, 1980.

The primary objective of the RCRA is to protect human health and the environment from the mismanagement of hazardous waste. To achieve this objective, EPA has developed a comprehensive "cradle-to-grave" system which regulates the generation, transportation, storage, treatment, and disposal of hazardous waste.

The specific RCRA requirements that apply to a facility are dependent primarily on their hazardous waste generation rate, on-site storage frequency and treatment/disposal operations. Listed below are typical RCRA requirements for facilities that generate small volumes of hazardous wastes.

- Hazardous waste determinations
- Manifests for all wastes
- Regularly scheduled inspections of wastes and waste areas
- Container management
- Contingency planning
- Training of requisite personnel
- Record keeping requirements

### *The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which is commonly



known as "Superfund" was enacted on December 11, 1980. The primary purposes of the 1980 act were to: (1) provide funding and enforçement authority for the cleanup of old hazardous waste sites (prior to 1980); and (2) provide response to hazardous waste spills. After 1980, sites were to be covered by the RCRA Program. Due to the problems associated with the 1980 Act, CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). The new provisions added by SARA included:

- Preference for remedies that incorporate permanent treatment or destruction of wastes
- Codifying existing cleanup standards and expansion to include the application of state standards
- Increased opportunities for state and citizen involvement
- Expansion of removal authorities
- Focus on public health
- Increased focus on research and training
- Special attention to the roles and requirements of other federal agencies
- New enforcement authorities and procedures
- Requirements for community and state preparedness
- Requirements for implementation of corrective actions for underground storage tanks

Under CERCLA, EPA has the authority to respond to releases or to threat of releases of hazardous substances that pose an imminent and substantial threat to the public health or to the environment. To address

a release or threat of a release, EPA has the following two options:

1. Take direct action and administer the cleanup work and then sue the responsible parties to recover the cost. Under this option, the responsible parties are given a chance to assign responsibility for the cleanup.

2. Issue orders or sue the responsible parties in a civil suit to force them to clean up the site themselves.

### *The Connecticut Lead Poisoning Prevention and Control Regulations (C.G.S. Sections 19a-111-1 through 19a-111-11)*

These regulations apply to residential properties (including apartment units and complexes) where a child under the age of six resides; and for child day-care centers, group day-care homes, and family day-care homes. For a residential property with a child present, defective lead-based paint surfaces in the dwelling unit, exterior areas, and common areas must be abated. If a lead-poisoned child is present on the property, then lead based chewable surfaces must also be abated, whether or not the surface is defective. Intact surfaces which are lead-based require a lead management plan if a child resides on the property. Interior dust and exterior soil shall be assessed if a child resides in a dwelling requiring lead abatement, and shall be abated if found to be a source or potential source of elevated blood lead to a child. These regulations specify the approved methodologies for conducting lead paint inspections by state licensed inspectors and approved methods for lead paint abatement which must be conducted by licensed abatement contractors, when required.



### *The Residential Lead Based Paint Hazard Reduction Act of 1992 (known as Title X)*

Title X applies to most residential structures built before 1978 (target housing). It requires property owners who are renting or selling target residential housing to disclose all known lead-based paint and lead-based hazards in the housing and provide any available reports on lead, provide an EPA/HUD pamphlet on lead, include certain warning language in the lease/contract as well as signed verification statements from all parties, retain signed acknowledgements for 3 years verifying compliance, and for sales only, give buyers a 10-day opportunity to test for lead.

Agents in a real estate transaction involving target housing must ensure that sellers/landlords are made aware of their obligations, ensure that sellers/landlords disclose the proper information to buyers/tenants, ensure that sellers give purchasers the opportunity to conduct an inspection, and ensure that lease and sales contracts contain the appropriate notification and disclosure language and proper signatures. Title X does not require that an inspection take place before a sale transaction, only that the opportunity be given. Also, abatement is not required under Title X if lead-based paint or other hazards are identified from an inspection.

### *Guidance for Disposal of Building Materials Coated with Lead Based Paint*

The CT Department of Environmental Protection (DEP) has prepared a November 4, 1994 (revised October 18, 1996) guidance document entitled "*Guidance for the Management and Disposal of Lead Contaminated Materials Generated in the Lead Abatement, Renovation, and Demolition Industries.*" Activities

which the document covers include renovation activities and whole house demolition. The document suggests that any lead removal begin with proper characterization, and seven different strategies for sampling and characterization are provided. This includes strategies which initially make use of a portable x-ray fluorescent (XRF) instrument and strategies which involve the selection of representative samples of the material to be disposed for analysis for lead via the toxicity characteristic leaching procedure (TCLP) analysis. Once the material to be disposed is classified, then an appropriate disposal option can be selected.

### *2.15.4 Potential Environmental Contamination in the Project Area*

A preliminary evaluation of the potential for environmental contamination of properties within the MDP has been performed. Current and historical land uses have been reviewed, Connecticut Department of Environmental Protection files have been searched, and federal environmental databases have been examined. Appendix E presents a summary of the findings of the property reviews. A high, medium, or low risk categorization has been assigned to each property in the MDP area.

- High risk properties are current or former manufacturing operations, documented underground tank sites, or high risk commercial activities such as gasoline stations, auto body, painting shops, and the like.
- Medium risk properties are current or former commercial operations which may have utilized chemical or petroleum products or residential properties with underground storage tanks;



- Low risk parcels are benign commercial or residential properties (without underground tanks) and no reported history of waste generation or releases.

Figure 2.15-1 presents the risk classifications of properties in the MDP area. Of the 115 properties reviewed, twenty-six (26) have been characterized as High Risk, twelve (12) as Medium Risk, and the remaining seventy-seven (77) as Low Risk

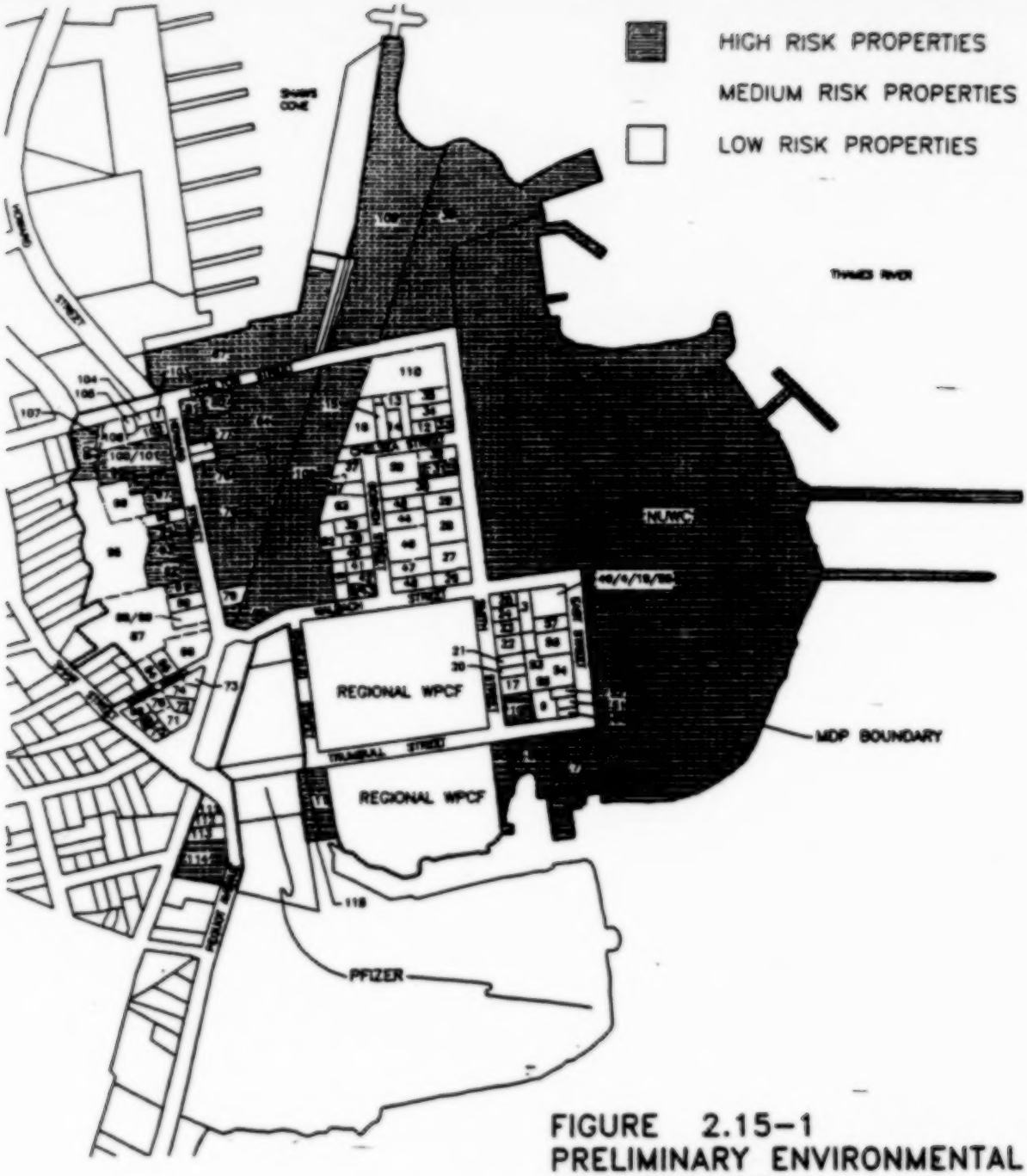


FIGURE 2.15-1
PRELIMINARY ENVIRONMENTAL
RISK RATINGS
FORT TRUMBULL MDP AREA
NEW LONDON, CT.
DRAFT ENVIRONMENTAL IMPACT
EVALUATION NOVEMBER 1998
HRP #NEW2900.P1

NEW290P1\PARCELS (M)

## 3.0 ALTERNATIVES CONSIDERED

### 3.1 Overview

Prior to evaluating alternatives for the Fort Trumbull MDP area, an extensive environmental inventory was conducted, as presented in Section 2.0 of this document. Review of existing conditions and pertinent policies and programs which could affect future implementation of the MDP were also evaluated prior to completion of the alternatives analysis.

Certain uses were identified early on as being incompatible with the project area and/or local or statewide planning policies and were, therefore, not pursued. Included among these uses were the following:

*Floating Hotel / Floating Restaurant* – Although these uses are attractive waterfront uses and have the potential to bring in large numbers of both tourists and the local community, they have been reviewed unfavorably by the Department of Environmental Protection (DEP). DEP does not consider floating hotels and restaurants as public access amenities, and these types of uses have not been viewed by the DEP and others as being water-dependent uses. Major concerns have been raised about permanently utilizing public trust land and waterways of the state for the sole purpose of economic gain. Accordingly, these uses were not pursued.

*Shopping Mall* – There are numerous issues associated with locating a major shopping mall in the Fort Trumbull area. This type of use is not water dependent and would be better located at an inland location. Large volumes of traffic would likely be generated to and from such a facility, particularly during peak weekend and holiday periods. This use is not consistent with existing nearby development, the planned clinical research facility by Pfizer, or with a state

park. Such a use would likely pull the focus away from downtown New London and potentially displace uses which currently occur there. For these and other relevant reasons, a shopping mall was not considered.

*Heavy Manufacturing/Industrial Uses* – It is recognized that any future reuse or redevelopment of the Fort Trumbull area must be consistent with floodplain policies and regulations. Heavy manufacturing generally requires intensive ground floor use for operation and storage of heavy equipment. Heavy truck traffic associated with deliveries and shipping are also common in industrial uses. Although site access and roadway network improvements are proposed, the Fort Trumbull area is not particularly well suited for heavy manufacturing or industrial uses. Barge and boat access is attractive for certain types of operations, however, proximity to the waterfront is not required for many manufacturing and industrial applications. For these reasons, heavy manufacturing and/or industrial uses were not considered in the alternatives analysis.

*Ferry Terminal* – Previous land use concept analysis of the Fort Trumbull area evaluated development of a high speed ferry terminal along the Thames River at the NUWC property. Since that time, numerous projects have been planned in the downtown New London area which will offer these same types of services. Additional ferry operations would duplicate services which are currently, or in the near future will be, provided in the downtown New London area. Therefore, a ferry terminal was not considered as part of the land use alternatives analysis. It is, however, included as part of the No Action alternative for reasons described in Section 3.2.

In an effort to responsibly pursue alternatives, few options were ruled out in the evaluation of a broad



range of diverse alternatives. At the same time, it is possible that certain aspects may not meet the test of consistency with state and local planning policies, identified project goals and objectives, economic viability, environmental impacts, or compatibility with existing physical and environmental site conditions. These issues are fully evaluated in Section 4.0 of this document.

The following broad land use categories were considered as part of the land use concept alternatives analysis:

*Educational/Cultural*
Nautical Education
Culinary/Hospitality
Museums
Wetlands Education

*Recreation*
Athletic Fields/Faculties
Indoor Athletic
Harbor Walk/Promenade
Boat/Sail Center
Boat Launch
Day Boat/Sport Fishing
State Park Extension
Botanical Garden

*Marina*
Conventional
Transient
Teaching

*Transportation*
Water Taxi
Hydrofoil Mooring
Parking

*Housing*
Adult Living
Residential (Single and Multi)
Rehabilitation

*Commercial/Industrial*
Office
Retail/Professional Services
Incubator/Commercializer
Flex Space
Fishing Related
Hotel/Lodging
Restaurants

*Light Industrial*
Warehousing
Fish Processing

In addition to minimizing environmental impacts, alternatives were measured against the identified project goals and objectives. These goals have been carried through the development and evaluation of alternatives. They are:

1. To create a world-class development that will complement the undertakings of Pfizer, Inc. and set a standard for development in New London.
2. To create an economic asset for the City of New London that will create jobs, generate tax revenue, and result in spin-off economic activity.
3. To maximize public access to the waterfront and, in doing so, encourage uses which are water dependent or which will be enhanced by water access and views.
4. To develop a project which will help build momentum for the revitalization of downtown New London and the balance of the city to the benefit of the city's residents and visitors.

It is understood that not all of the alternatives will meet all of these goals and objectives. Each alternative is measured against them in Section 4.0 of this document.

## 3.2 Land Use Concept Alternatives

The organizational structure of the discussion of alternatives is as follows: Section 3.2.1 presents a brief overview of alternatives and fixed program elements. Section 3.2.2 presents program elements that are common to Alternatives 2 through 6. Section 3.2.3 presents roadway improvement options which are also common to Alternatives 2 through 6. Sections 3.2.4 through 3.2.9 present detailed descriptions of the six alternatives.



### *3.2.1 Overview of Alternatives and Fixed Program Elements*

#### *Overview of Alternatives*

A series of six general land use alternatives have been developed based upon input from project consultant team members, city and state officials, and public input at various neighborhood meetings. The intent was to examine a broad range of likely land use combinations which could occur in the project area as described in Section 3.1. Broad categories include educational/cultural uses, recreation (including the proposed state park), marina, transportation, residential housing, commercial (retail and office space), and light industrial.

Alternatives were developed based upon the requirement to evaluate no action, an interest in possibly expanding the state park to include the entire NUWC property, and to examine residential and commercial land uses. The six alternatives are referenced as follows:

- Alternative No. 1 – No Action
- Alternative No. 2 – Recreation/Tourism
- Alternative No. 3 – Residential/Commercial
- Alternative No. 4 – Business Campus
- Alternative No. 5 – Mixed Use 1
- Alternative No. 6 – Mixed Use 2

A brief description of the six alternatives follows, with more detailed descriptions in the ensuing text. The proposed state park and many of the waterfront uses that are common to most alternatives are described in Section 3.2.2.

***Alternative 1 – No Action*** – One of the requirements of CEPA is to evaluate a no action alternative. In this particular instance, no action is somewhat unusual in that other activities and plans would likely proceed even if there were no MDP action.

Under the no action scenario, it is assumed that the Navy would proceed with disposition of the NUWC property as planned prior to the introduction of the MDP process, in accordance with the approved Local Reuse Authority's (LRA) preferred plan. On April 17, 1997 two plans (the *Redevelopment Strategy* and the *Implementation Strategy*) were published for the NUWC property. These documents were developed by Economics Research Associates (ERA) and Sasaki Associates, Inc. under contract to the City of New London. Based on the work by ERA and Sasaki Associates, Inc., a preferred plan was selected by the LRA.

The LRA's preferred plan indicated disposition of the NUWC property through conveyance of the southern portion to the Department of Environmental Protection for future development of a state park, public benefit conveyance of a portion of the property near Columbia Cove for maritime uses, with the remaining area to be publicly sold. The Plan includes development of almost 380,000 square feet of office space for research and development incubator uses, resulting in some 950 to 1,520 direct jobs, as well as an additional $270,000 in property tax revenue. Details of the LRA plan and no action alternative are presented in Section 3.2.4.

***Alternative 2 – Recreation/Tourism*** – This alternative capitalizes and expands upon the proposed Fort Trumbull State Park, concentrating recreational, educational, and cultural uses east of the railroad in the



Fort Area and at NUWC. Office and retail uses are proposed west of the railroad in the Gateway Area.

***Alternative 3 – Residential/Commercial*** – This alternative highlights a residential component throughout the MDP area, intermixed with the state park and open space recreational areas, and minor amounts of office and retail uses proposed in the Gateway Area.

***Alternative 4 – Business Campus*** – This alternative focuses the majority of land use in the form of office campus and a supporting hotel/conference center, with small amounts of retail and residential uses in the Gateway Area.

***Alternatives 5 & 6 – Mixed Use 1 & 2*** – These two mixed use alternatives incorporate recreational, residential, commercial office, retail, and hotel/conference uses in different proportions and arrangements.

The six land use alternatives are shown graphically in Figures 3.2-1 through 3.2-6. These plans represent general land use areas and density of development. They are not intended to be exact geographic limits or configurations. A preferred alternative has not been selected and it is anticipated that the ultimate selected preferred plan may be a hybrid of several alternatives.

The land use concepts are shown graphically as more or less conforming to existing roadway patterns. Some roadway locations are fixed by the shoreline, bridges, boundaries, and topography. However, it is not the intent to stick rigidly to this roadway network. A design level refinement will be presented in the MDP which follows the CEPA process. A required public hearing and local approval process will be adhered to during adoption of the MDP.

***Fixed Program Elements***

Certain elements are common to all six alternatives. A description of each follows:

***State Park*** – The adopted LRA reuse plan identified a portion of the Naval Undersea Warfare Center (NUWC) around the historic fort to be used for open space and recreation. Following adoption of the reuse plan, the State of Connecticut chose to acquire part of the NUWC property to create a new state park. The proposed amount of state park land is larger than that identified for open space and recreation in the reuse plan. Based on the Fort Trumbull State Park Feasibility Report (June 18, 1997 and amended December 1997), the new park will be 16 acres and includes nearly the entire southern half of the NUWC property, including Piers 4 and 7. The park is depicted in this way on all alternatives, except on Alternative 2 where it is shown as a larger area (30± acres) for reasons noted in the description for this alternative.

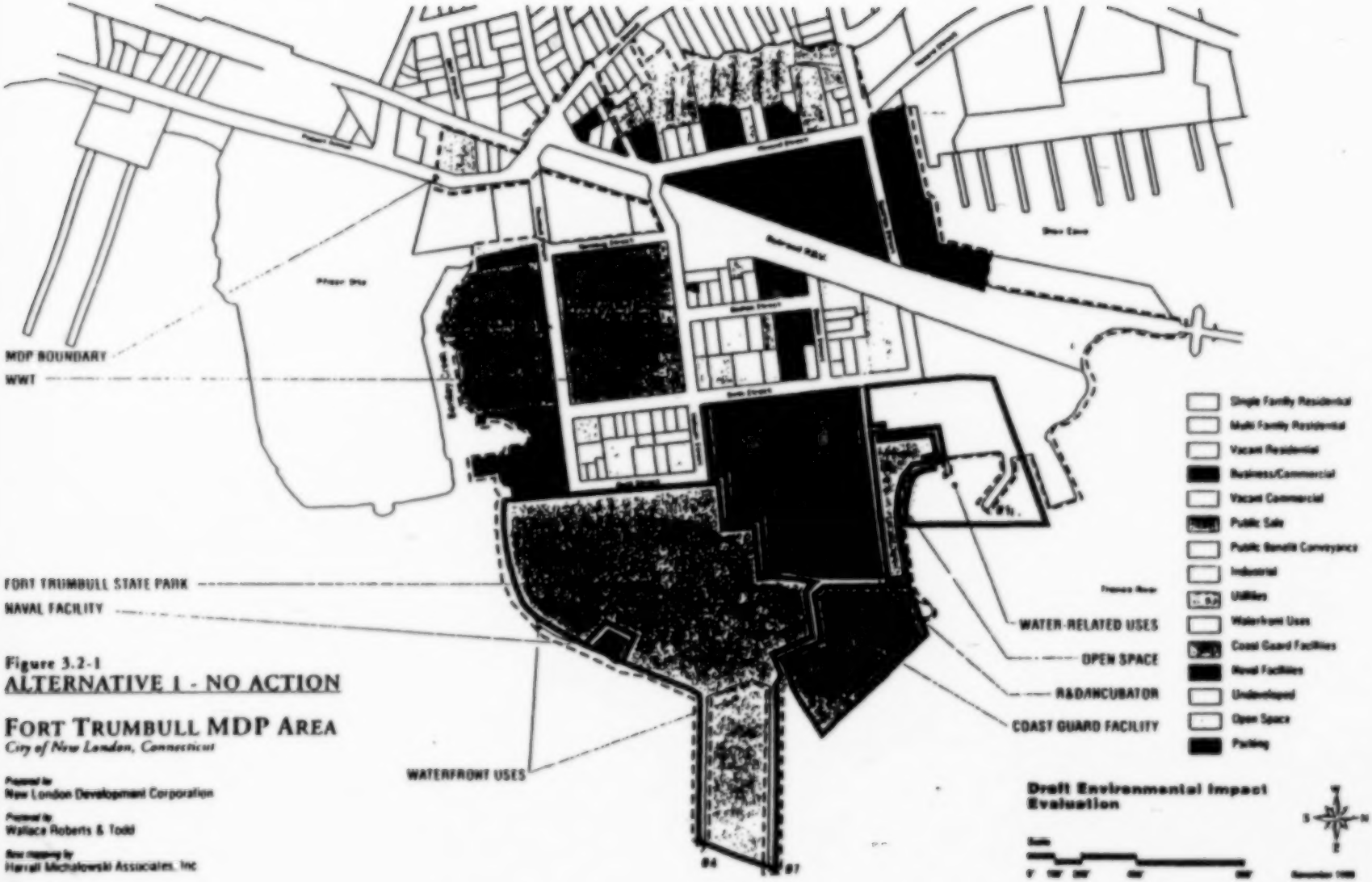


Figure 3.2-1
ALTERNATIVE 1 - NO ACTION

FORT TRUMBULL MDP AREA
*City of New London, Connecticut*

Prepared for
New London Development Corporation

Prepared by
Wallace Roberts & Todd

Base mapping by
Harrall Michalowski Associates, Inc

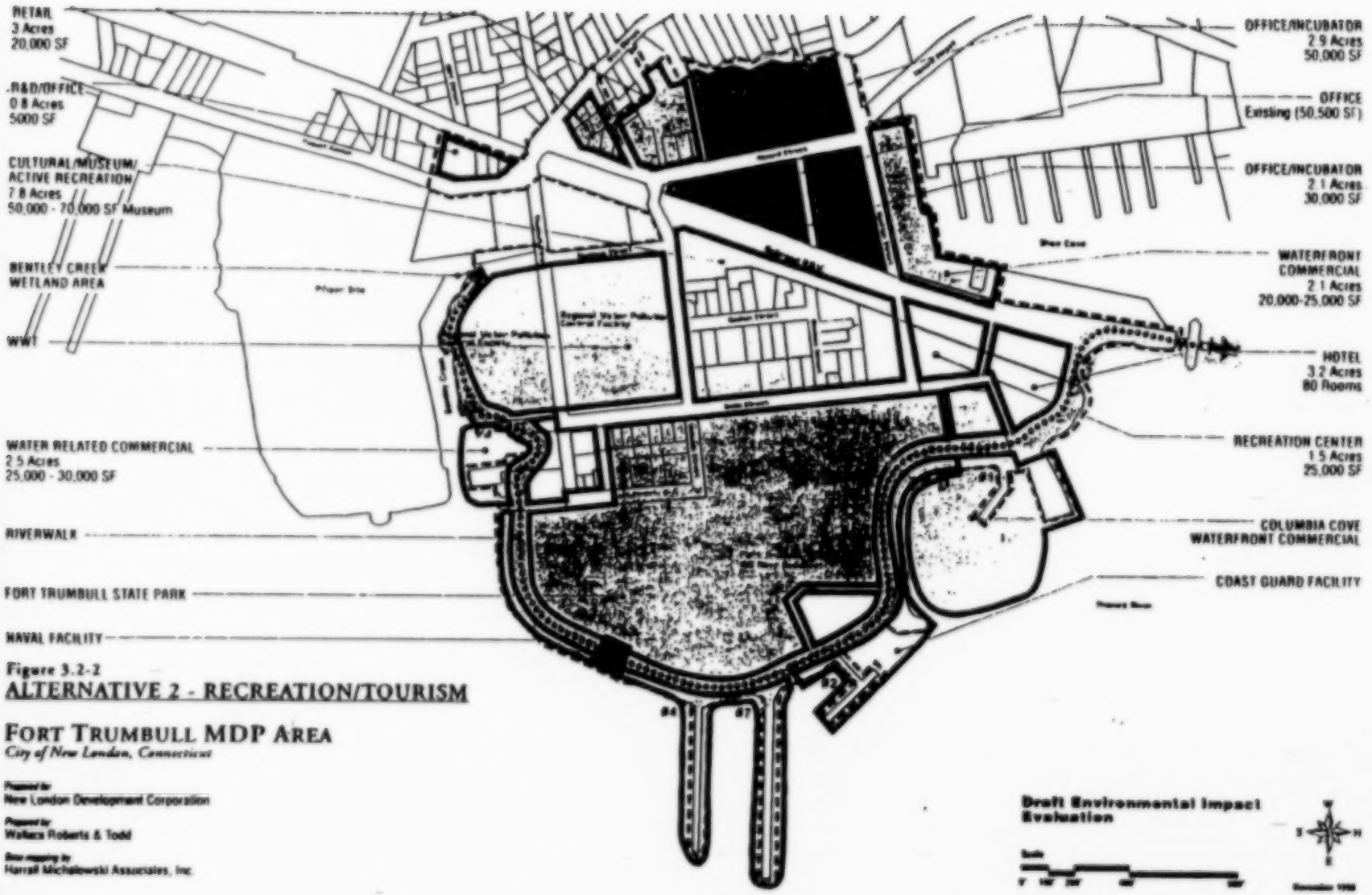


Figure 3.2-2
**ALTERNATIVE 2 - RECREATION/TOURISM**

**FORT TRUMBULL MDP AREA**
*City of New London, Connecticut*

Prepared for:
New London Development Corporation

Prepared by:
Wallace Roberts & Todd

Base mapping by:
Harrall Michalowski Associates, Inc.

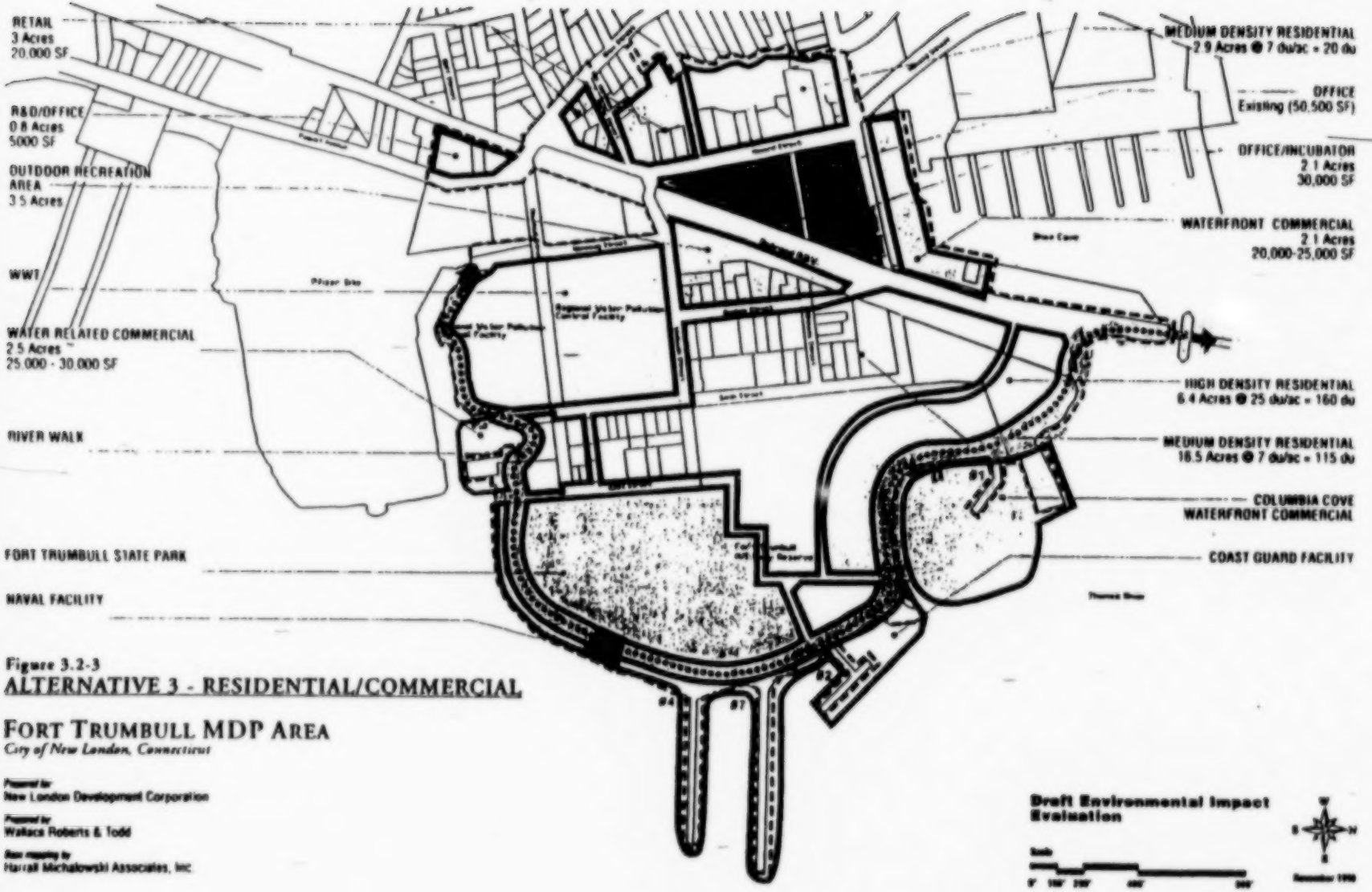


Figure 3.2-3
ALTERNATIVE 3 - RESIDENTIAL/COMMERCIAL

FORT TRUMBULL MDP AREA
*City of New London, Connecticut*

Prepared for
New London Development Corporation

Prepared by
Wallace Roberts & Todd

Base mapping by
Harrall Michalowski Associates, Inc.

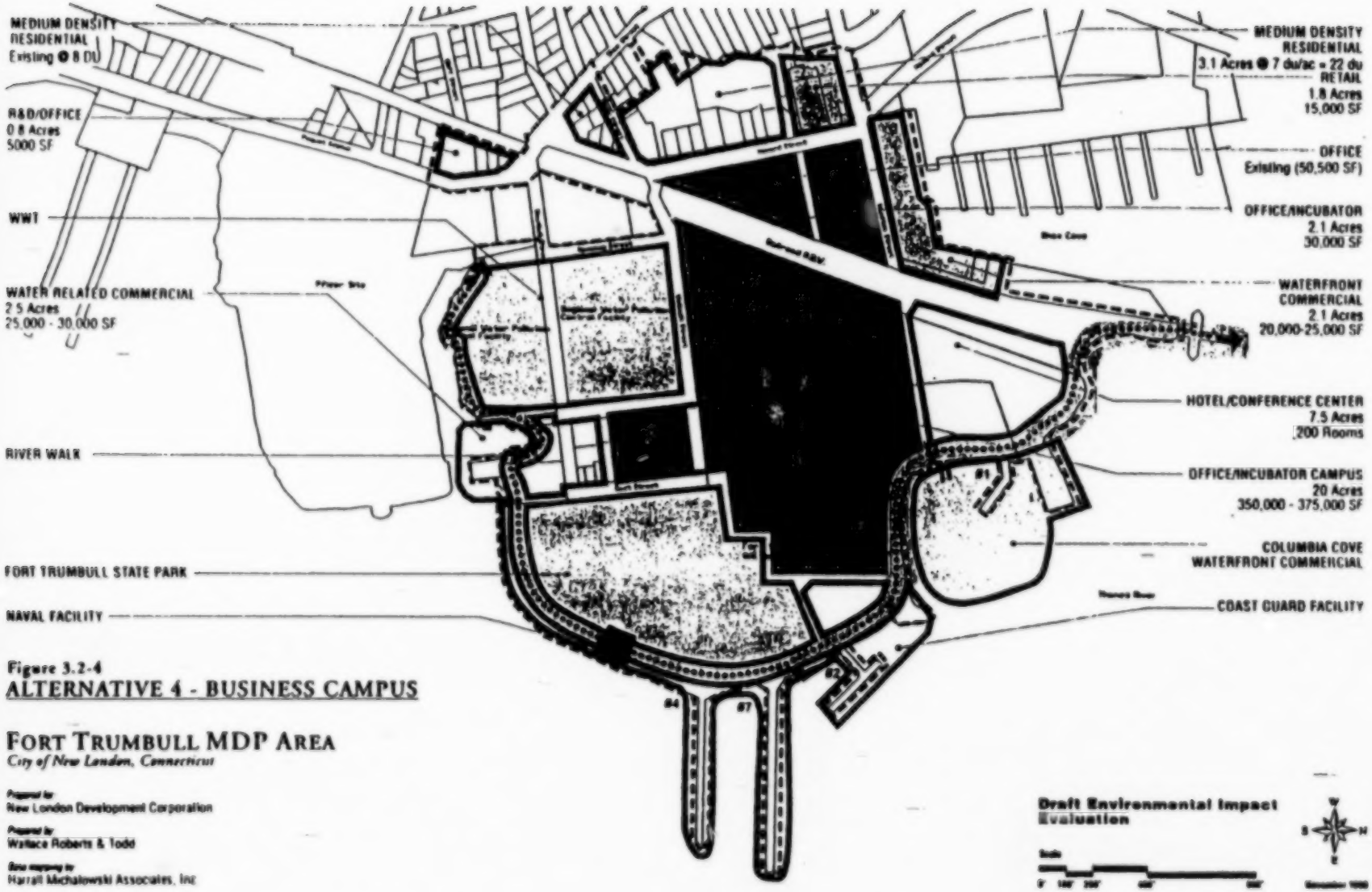


Figure 3.2-4
**ALTERNATIVE 4 - BUSINESS CAMPUS**

**FORT TRUMBULL MDP AREA**
*City of New London, Connecticut*

Prepared for
New London Development Corporation

Prepared by
Wallace Roberts & Todd

Base mapping by
Harrall Michalowski Associates, Inc

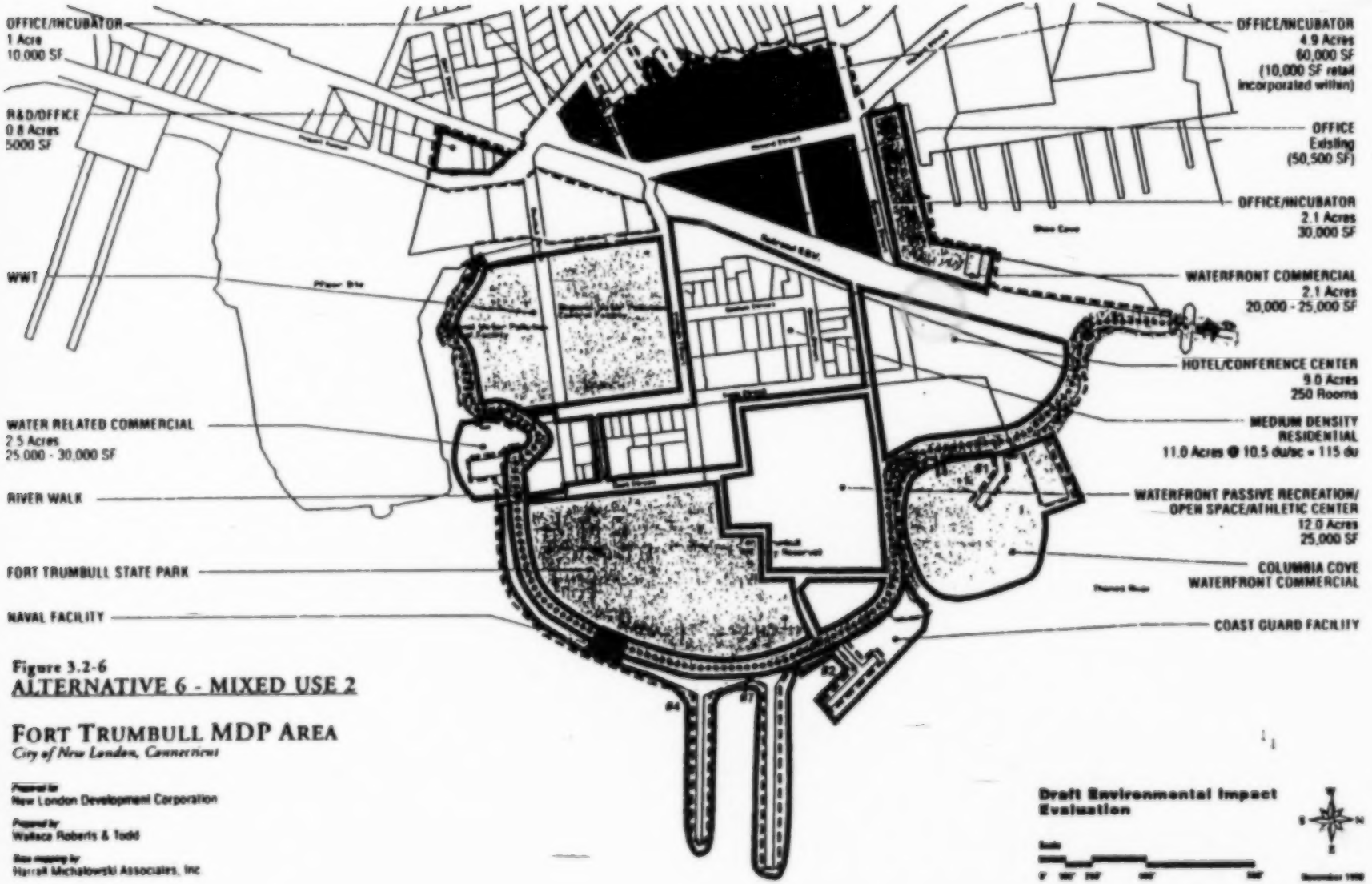


Figure 3.2-6
ALTERNATIVE 6 - MIXED USE 2

FORT TRUMBULL MDP AREA
*City of New London, Connecticut*

Prepared for
New London Development Corporation

Prepared by
Wallace Roberts & Todd

Base mapping by
Harrall Michalowski Associates, Inc

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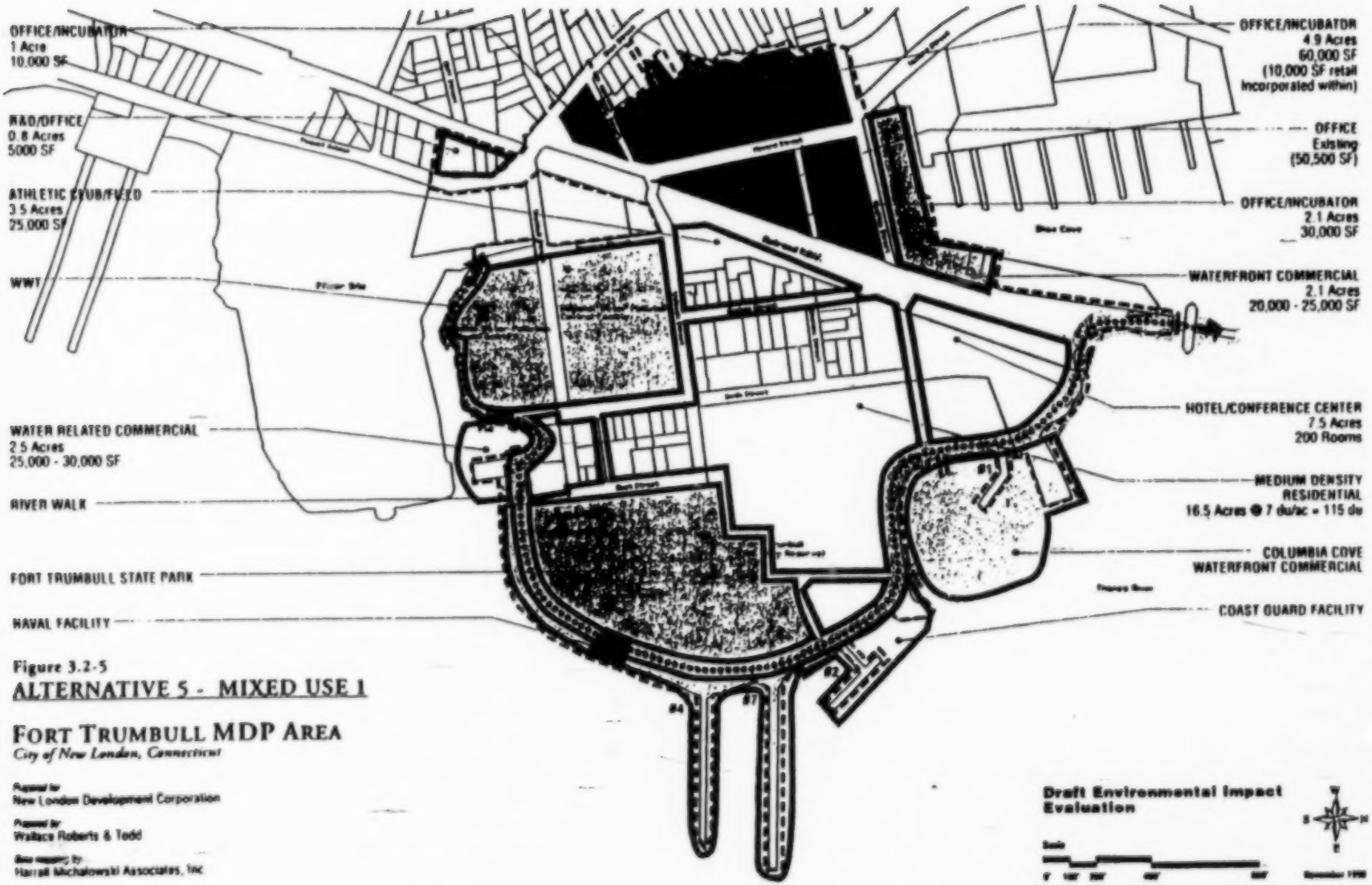


Figure 3.2-5
ALTERNATIVE 5 - MIXED USE 1

FORT TRUMBULL MDP AREA
*City of New London, Connecticut*

Prepared for
New London Development Corporation

Prepared by
Wallace Roberts & Todd

Base mapping by
Harrall Michalowski Associates, Inc

Based on information contained in the Draft Application to the Federal Lands to Parks Program from the Department of Environmental Protection, the park would provide a scenic overlook of the Thames River, passive open space, fishing, boating. picnicking, tours of historic Fort Trumbull, and interpretive programs of the military history of the site over the past 200 years.

Piers 4 and 7 are integral components in the plans for Fort Trumbull State Park. Both piers are located on the eastern boundary of the property, each extending approximately 150 feet. Pier 4 would serve the park as a public fishing pier. The lower Thames River is a rich and diverse fishery resource. The strategic location of Pier 4 would provide anglers, who do not own boats, the opportunity to fish the Thames River at a key access point. Pier 4 would also serve as a primary docking location for DEP's Marine Boating Law Enforcement Division, in monitoring boat traffic on the Thames River.

Pier 7 was historically used by the Navy to occasionally moor submarines, and by the U.S. Coast Guard to dock large patrol boats and the barque Eagle. Future planned use of this pier will be for dockage of public recreational boats and tour/excursion boats, providing visitors access to Fort Trumbull State Park by water. In the year 2000, "Operation Sail" will be visiting New London with 24 tall ships. The piers would afford dockage for several of these ships for public display and visitation.

***Coast Guard*** – The Coast Guard will retain use of an area of approximately 1.5 acres along the Thames River adjacent to Fort Trumbull State Park. This use area will include Buildings 45, 86 and 12 (15,000± square feet) and Piers 2 and 6.

***Navy*** – The Navy will retain use of one of its facilities (Building 109) along the river's edge and approximately 0.1 acre of land adjacent to it.

***Regional Water Pollution Control Facility*** – This facility is shown at its current location with no change in land requirements. This facility has been located along the Thames River since 1929. Feasibility studies are underway to upgrade the facility to improve the level of treatment and to implement odor control and aesthetic improvements. No land use or zoning changes are proposed.

### *3.2.2 Program Elements Common to Alternatives 2 Through 6*

The following elements are common to the five action alternatives. A description of each follows:

***Riverfront Walkway*** – A continuous, public walkway is proposed along the water's edge, extending from Bentley Creek to the Amtrak bridge over Shaw's Cove. This feature was adopted in all five action alternatives in an effort to incorporate a strong public access component in the project and to link the state park with the surrounding area. One of the critical features of the riverfront walkway is the linkage to downtown New London via a proposed pedestrian bridge at the Amtrak railroad crossing at the entrance to Shaw's Cove. If this linkage is determined to be infeasible, due to railroad operations or requirements, an alternative inland route would be developed to create this linkage.

Public access amenities along various portions of the walkway could include a small boat launch area. This component is further intended to implement and be consistent with the Connecticut Coastal Management Act (CCMA) policies and guidelines.



***Columbia Cove Waterfront Commercial Use*** – The land and water in this area are planned for waterfront commercial development and it is anticipated to be a mix of uses. This area is currently occupied in part by New London Seafood Distributors. Ongoing water-dependent uses are proposed under all alternatives, either as rehabilitated existing facilities or new water-dependent facilities. Among the potential new uses is a marina (80 to 100 slips) for docking recreational boats, with onshore support to be constructed in the immediate area. Parking would be provided nearby in dedicated and shared parking spaces. Other options include a smaller transient dockage area or a kayak launching area. The issue of water dependency under the CCMA would need to be addressed for the specific use or uses in this area.

***Water-Related Commercial Uses*** – The existing Fort Trumbull Marina and adjacent land are shown for reuse as water-related commercial to include up to 30,000 square feet. Similar to the Columbia Cove area, ongoing water-dependent uses are proposed for the Fort Trumbull Marina area under all alternatives, either as rehabilitated existing facilities or new water-dependent facilities. Potential new uses are expected to range from a marina training facility and marina (40 to 50 slips) to marine commercial/retail. A marina training facility could provide education and outreach opportunities in areas such as marina management and marine and coastal management which would integrate with Pfizer's preliminary plans for a nature/educational walk associated with the tidal wetland area near Bentley Creek. Commercial/retail uses are anticipated to be water dependent or incorporate water-dependent aspects. Water dependency and consistency with CCMA would need to be addressed for the specific use or uses in this area.

***Pequot Avenue Area*** – The area of land west of Pequot Avenue and south of Trumbull Street of approximately one acre in size is identified for R&D/ Office use it is expected to be used for expansion or support space for the new 800,000 square foot Pfizer facility to be constructed immediately east of Pequot Avenue. the site has an estimated development capacity of approximately 5,000 square feet of this type of use, assuming elevated structures and parking beneath for the maximum yield.

***Gateway Area*** – No changes are proposed to the existing office building located at 194 Howard Street. This is a three-story 50,500 square foot structure with 152 associated parking spaces. This building is elevated above the 100-year flood elevation. The parcel north of it (at the corner of Howard Street and Hamilton Street) is shown as office/incubator use. It is a 2.1-acre site with capacity for 30,000 square feet of space and 90 parking spaces. This building, and all others within the floodplain, will be designed and built to conform to State of Connecticut and FEMA standards.

***Shaw's Cove Area*** – The area west of the railroad tracks (2.1 acres) is currently occupied by the Miner and Alexander Marine Lumber Yard. This area is proposed as waterfront commercial uses, either as rehabilitated existing facilities or new water-dependent facilities similar to the types present. It is estimated that there could be a total of approximately 5,000 square feet accommodated in two to three businesses with 60 to 75 parking spaces, depending on the type of commercial use.

***Utility Improvements*** – Utility improvements will be necessary under all of the action alternatives. This work is anticipated to be conducted within existing or future roadway right-of-ways and not impact adjacent land uses. Under all land use alternatives, the existing



storm drainage system will need to be modified to accommodate new roadway alignments and, improvements and to correct deficiencies in the existing system. The storm drainage systems will incorporate stormwater quality renovation elements such as inlet chambers *(Vortechnics* or *Stormceptors)* and/or infiltration systems to meet the stormwater general permit requirements. Maintenance of these systems treating roadway runoff would be carried out by the city, whereas systems treating private development would be maintained by the owner.

***Roadway and Traffic Improvements*** – Traffic and roadway improvements will be necessary under all of the action alternatives, Various concepts have been evaluated and are presented in Section 3.2.3 of this document.

### *3.2.3 Roadway Improvement Alternatives*

Adequate and safe vehicular access to the sites that comprise the Fort Trumbull MDP area is a principal consideration for a successful municipal development program. Traffic improvements will be necessary to increase the capacity of local streets to accommodate projected traffic volumes that will be generated by the land use alternatives.

Of particular concern is the ability to improve vehicular access to the peninsula (i.e. coastal areas of the MDP that lie east of the Amtrak rail corridor) where existing access points are limited and deficient. Specifically, the two existing underpasses that carry traffic beneath the Amtrak rail lines at Walbach Street and Pequot Avenue are (1) quite old and in need of maintenance, if not replacement; (2) have road beds that lie below the flood elevations; (3) have inadequate vertical clearances that prohibit the passage of

certain trucks and buses; and (4) have limited horizontal clearances that restrict the width and number of travel lanes, reduce the line of sight, and limit the ability to provide bike lanes or sidewalks at both sides of the street.

Roadway improvement objectives are as follows:

1. to create an attractive "gateway" that will provide a commanding entrance to Pfizer's new campus, the proposed Fort Trumbull State Park, and the municipal development area.

2. to improve existing and projected traffic flows from the proposed Pfizer facility, the proposed State Park at Fort Trumbull, the proposed reuse of the remainder of the NUWC site, potential commercial, industrial, and/or residential development in the Fort Trumbull MDP area, and current and future through-traffic serving other city neighborhoods;

3. to improve public safety by correcting or mitigating existing flooding problems at the underpasses in order to maintain access to the peninsula during minor storms events (to be accomplished with increased storm sewer capacity and/or pump stations); and

4. to improve the ability to provide efficient and safe evacuation of the peninsula in the event of a major storm event.

Accordingly, a preliminary study was conducted to determine how best to achieve the aforementioned goals considering economic, physical, and operational feasibility issues. This task is complicated by the need to maintain vehicular access to the area during construction, the need to maintain uninterrupted rail service on Amtrak's Northeast Corridor line, the



restricted ability to change the vertical and horizontal alignment of the Amtrak rail lines, and the shallow location of major sanitary sewer trunk lines that lead to the region's wastewater treatment facility on Trumbull Street.

Three possible roadway improvement alternatives have been evaluated for the MDP area (Options A, B, and C). Option A is a modification of existing bridges. This option does not require the construction of new bridge structures; rather it would utilize the existing bridge structures and improve their ability to carry more traffic by adding lanes within the current horizontal confines and increase vertical clearances by excavating the roadbeds below the bridges.

Under Option B, a new roadway would be constructed over the railroad line. This option calls for the construction of a "fly-over" bridge to replace the Walbach Street underpass. The Pequot Avenue underpass would be improved as in Option A.

New railroad underpasses would be constructed under Option C to replace existing bridges. This would require that the Amtrak railroad tracks be elevated slightly to increase vertical clearances and shifted slightly to the east to allow for maintenance of rail traffic during construction.

Each of the roadway improvement options has advantages and disadvantages. These "pros and cons," along with a discussion of potential impacts of each access option, are presented in more detail in Table 3.2-1 and are shown graphically in Figures 3.2-7, 3.2-8, and 3.2-9. It is anticipated that roadway improvements will be refined during the MDP process and during final design.

In addition to increasing traffic capacity at the railroad underpasses, there is a need to widen and

realign roads in the vicinity of the railroad in order to increase traffic capacity, improve sight lines, and provide for better and safer roadway geometry. The three options depict these changes as well. The commonalties among the three options as they relate to road improvements are:

1. realign Howard Street to the west and discontinue Harris Street in order to improve sight lines and provide safer roadway geometry;

2. provide full traffic signals at the four intersections that lead to the railroad underpasses (or overpass) (i.e. Howard and Walbach; Walbach and Pequot Avenue Extension; Pequot Avenue and Trumbull; and Shaw Street, Willetts Avenue and Howard Street) and at the intersection of Howard and Hamilton Streets;

3. widen Howard Street between Hamilton and Shaw Street to four lanes minimum;

4. discontinue Nameaug Street and shift traffic patterns onto a proposed extension of Pequot Avenue that will extend north to connect with Walbach Street. This will serve to distribute traffic more efficiently between the two bridges and reduce the potential for traffic delays; it will also allow for safer and more efficient access to the proposed Pfizer site by creating a "four-way" intersection at Pequot and Trumbull and the Pfizer's northerly access road; and

5. widen Pequot Avenue between the southern end of the proposed Pfizer site and Trumbull Street to a minimum of three lanes.

TABLE 3.2-1
Access to Fort Trumbull MDP Area
Comparison of Access Options

| | | Option A | Option B | Option C |
|---|---|---|---|---|
| 1. | Description | Minimal improvements to existing underpasses. | Construct "fly-over bridge (overpass) to replace Walbach St. underpass; minimal improvements to Pequot Ave. underpass. | Construct two new under-passes/elevate Amtrak RR tracks |
| 2. | Relative Cost | Least expensive of 3 options. | Potentially most expensive of 3 options. | Nearly as expensive as Option B |
| 3. | Projected intersection LOS under Land Use Alternatives 4 & 5 (for year 2010) | LOS "C" or better, except LOS "D" in p.m. hours at Bank Street/ Howard Street intersection (under Land Use Alternate 4). | LOS "C" or better, except LOS "D" in p.m. hours at Bank Street/Howard Street intersection (under Land Use Alternate 4) and LOS "D" in a.m. peak hour at Howard Street/New Bridge Road (under Land Use Alternate 4). | LOS "C" or better, except LOS "D" in p.m. hours at Bank Street/ Howard Street intersection (under Land Use Alternate 4). |
| 4. | Provides for the re-placement of Walbach St. RR underpass | Does not result in the replacement of the Pequot Ave. underpass. | Does not result in the replacement of the Pequot Ave. underpass. | Pequot Ave. bridge to be replaces with new underpass. |
| 5. | Provides for the re-placement of Pequot Ave. RR underpass | Does not result in the replacement of the Pequot Ave. underpass. | Does not result in the replacement of the Pequot Ave. underpass. | Pequot Ave. bridge to be replaces with new underpass. |
| 6. | Alleviate current flood problems | Requires lowering road bed beneath each overpass; flooding problem to be mitigated by construction of storm chambers and high-volume pumps to discharge water at times of storms. This solution will improve current situation but will still not meet flood regulations and will be subject to flooding during extreme coastal storms. | Flooding problem at Walbach Street would be eliminated by virtue of the "flyover" bridge; flooding problem at Pequot Ave. to be mitigated (see note for Option A). | Flooding problem at Walbach St. under-pass to be mitigated by combination of elevating the railroad bed (as feasible) at new track location and lowering roadbed to create clearance of approx. 14'-6". A storm water pumping station may still be required. Flooding problem at Pequot Ave. underpass to be mitigated by combination of elevating the railroad be at new track location and lowering road bed to create clearance of approx. 14'-0". |
| 7. | Provides adequate vertical clearance for trucks/buses (current clearances are 10'-0" at Walbach underpass and 12'-8" at Pequot under-pass) | Requires lowering road bed beneath each overpass; even then, optional vertical clearance of 14'-6" cannot be achieved. | Walbach St. will have unlimited vertical clearance since road will be over tracks; Pequot Ave. underpass will have a clearance of approx. 13'-6" through lowering of roadbed. | Walbach St. underpass will have a clearance of approx. 14'-6" through combination of elevating rail tracks and lowering of roadbed. Pequot Ave. under-pass will have a clearance of approx. 14'-0". through combination of elevating rail tracks and lowering of road bed. |

| | | | | |
|---|---|---|---|---|
| 8. | Ability to facilitate evacuation of peninsula in major storms | Peninsula will be nearly as susceptible to flooding as it is currently during extreme coastal storm events although construction of storm pumps will provide a longer period of time for vehicles to exit peninsula . . . evacuation of vehicles may also be prone to disruption by accidents since lane widths of 11 feet at the underpasses is less than desirable by current standards. | Evacuation of the peninsula is best facilitated by this option since the "flyover" bridge will not be subject to flooding and has adequate capacity. | Evacuation routes will still be below flood elevations under this options but since vertical and horizontal clearances at the bridges (underpasses) will be greatly improved and storm water pumps will be constructed, evacuation will be better facilitated than under Option A. |
| 9. | Corporate image/ Attraction of investment dollars | Utilization of existing undersized and old RR underpasses may not present an image consistent with a progressive, world-class development. | Construction of a new "flyover" bridge would create a dramatic entrance to the Fort Trumbull area and offer distant views of the Thames River. Utilization of existing undersized and old RR underpass at Pequot Ave. may not present an image consistent with a progressive, world-class development. | Construction of new underpasses provides the opportunity to create a more impressive corporate/business image with wide and well-aligned traffic lanes, road shoulders, full sidewalks, etc. |
| 10. | Impact to Amtrak rail lines | No impact, to existing Amtrak rail line or operations . . . may require underpinning of existing abutments of underpass(es) while maintaining train use above. | No impact to existing Amtrak rail line or operations . . . may require underpinning of existing abutments of Pequot Ave. underpass while maintaining train use above. Construction of steel girders of new overpass will need to be closely coordinated with Amtrak schedules to ensure safety of trains and passengers. | Significant impact to Amtrak rail line since it will need to be reconstructed for a distance of approximately 2,600 feet to increase its elevation and to relocate both tracks on new bridges approx. 30 feet east of current alignment. Work of changing over to new alignment can be phased and coordinated with Amtrak schedule to avoid disruption of service. |
| 11. | Impact to existing U.G utilities | Impact to sanitary sewer trunk line (may have to be lowered) at Walbach St. underpass; Possible impacts to other utilities at Pequot Ave. underpass. | No impact to utilities at Walbach St. underpass. Possible impacts to utilities at the Pequot Ave. underpass. | Impact to sanitary sewer trunk line (may have to be lowered) at Walbach St. underpass; Possible impacts to other utilities at Pequot Ave. underpass. |
| 12. | Potential for traffic disruption during construction | Minimal disruption at each underpass. | Minimal disruption at Pequot underpass; no disruption at Walbach St. underpass. | Potential for disruption at both underpasses during construction of new bridges . . . traffic will have to be rerouted (possibly alternating between Walbach and Pequot) during construction. |

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| 13. | Degree to which option detracts from land developability | Relocation of Howard Avenue approximately 100 feet to west will reduce developability of "Gateway parcels. | Proposed "fly-over" bridge and its approaches with embankments will utilize developable land. Relocation of Howard Avenue approximately 180 feet to west will reduce developability of "Gateway parcels. | Relocation of Howard Avenue approximately 100 feet to west will reduce developability of "Gateway parcels. |
| 14. | Sidewalks under bridges | Walbach St. currently has sidewalks at each side of underpass, one of the walks will be eliminated to provide space for an additional vehicular travel lane under the underpass; Pequot Ave. currently has one sidewalk along the south side of the underpass, this walk will be maintained or reconstructed. | New overpass which will replace the Walbach St. underpass could have walks on each side of road; Walbach St. underpass will be abandoned and could be utilized as a pedestrian/ bikeway corridor between the "Gateway" and the peninsula; Pequot Ave. currently has one sidewalk along the south side of the underpass, this walk will be maintained or reconstructed. | The construction of new, wider underpasses at both Walbach and Pequot will present the opportunity to construct new sidewalks on both sides of the road at each location. |
| 15. | Bike lane under bridges | No bike lanes currently exist at either Walbach or Pequot. The reduction of lane width at both locations will not provide any opportunity for bike lanes or road shoulders. Biking within the travelways under the underpasses at Walbach and Pequot will be hazardous. | New overpass which will replace the Walbach St. underpass could have wide shoulders and/or bike lanes on each side of road, however, the benefit of providing bike lanes will have to be weighed against the added costs to construct a wider bridge. The reduction of lane width at the Pequot Ave. underpass will not provide any opportunity for bike lanes or road shoulders. Biking within the travelway under the underpass at Pequot will be hazardous. | The construction of new, wider underpasses at both Walbach and Pequot will present the opportunity to construct wide road shoulders and/or bike lanes on both sides of the road at each location. |
| 16. | Facilitates access to proposed Pfizer facility | All three options facilitate access to Pfizer by virtue of adding lanes on Howard between Hamilton and Pequot and eliminating turning movements from Pequot Ave. at the RR underpass to the Pfizer site. | All three options facilitate access to Pfizer by virtue of adding lanes on Howard between Hamilton and Pequot and eliminating turning movements from Pequot Ave. at the RR underpass to the Pfizer site. | All three options facilitate access to Pfizer by virtue of adding lanes on Howard between Hamilton and Pequot and eliminating turning movements from Pequot Ave. at the RR underpass to the Pfizer site. |

| | | | | |
|---|---|---|---|---|
| 17. | Potential to inconvenience existing through traffic or local traffic patterns or travel times | Requires the closing of Trumbull St. between Pequot Avenue and the WWTP site and the closing of Harris Street. New signals and added turning movements from Pequot northbound to Shaw/Howard Ave. will increase through travel time from current level. Nameaug St. to be closed and traffic pattern shifted to new extension of Pequot Ave. | Possible termination of Shaw St. in a cul-de-sac near its intersection with Howard Ave. and the closing of Harris St. (to avoid traffic conflicts . . . current volumes of traffic from Shaw St. to are minimal compared to traffic on Howard or Willets St.). New signals and added turning movements from Pequot northbound to Shaw/Howard Ave. will increase through travel time from current level existing access road north of Hamilton Ave. that serves the east side of Shaw's Cove will have to be rerouted under the new overpass at Hamilton St., then turn west to intersect directly with Howard Ave. Walbach St. to be closed between Nameaug St and Howard Ave. and traffic patterns shifted to new bridge over Amtrak line at Hamilton Ave. Nameaug St. to be closed and traffic pattern shifted to new extension of Pequot Ave. | Requires the closing of Trumbull St. between Pequot Avenue and the WWTP site and the closing of Harris St. New signals and added turning movements from Pequot northbound to Shaw/Howard Ave. will increase through travel time from current level. Nameaug St. to be closed and traffic pattern shifted to new extension of Pequot Ave. |
| 18. | Regulatory Issues | Inadequate vertical clearances and flooding issues at both underpasses. | Inadequate vertical clearance at Pequot Ave. underpass; Flooding issues at Pequot Ave. underpass | Possible inadequate vertical clearances and flooding issues at both underpasses. |
| 19. | Potential visual impact | No visual impacts associated with access (other than increased pavement areas and the introduction of traffic signals) are anticipated. | The "flyover" bridge will rise to approx. elevation 46 feet including bridge parapets. This has the potential to block views of the Thames River from surrounding MDP sites and nearby residential properties. | Minimal visual impacts associated with the construction of new underpasses and relocated rail tracks (e.g. railroad embankment will be extended) |

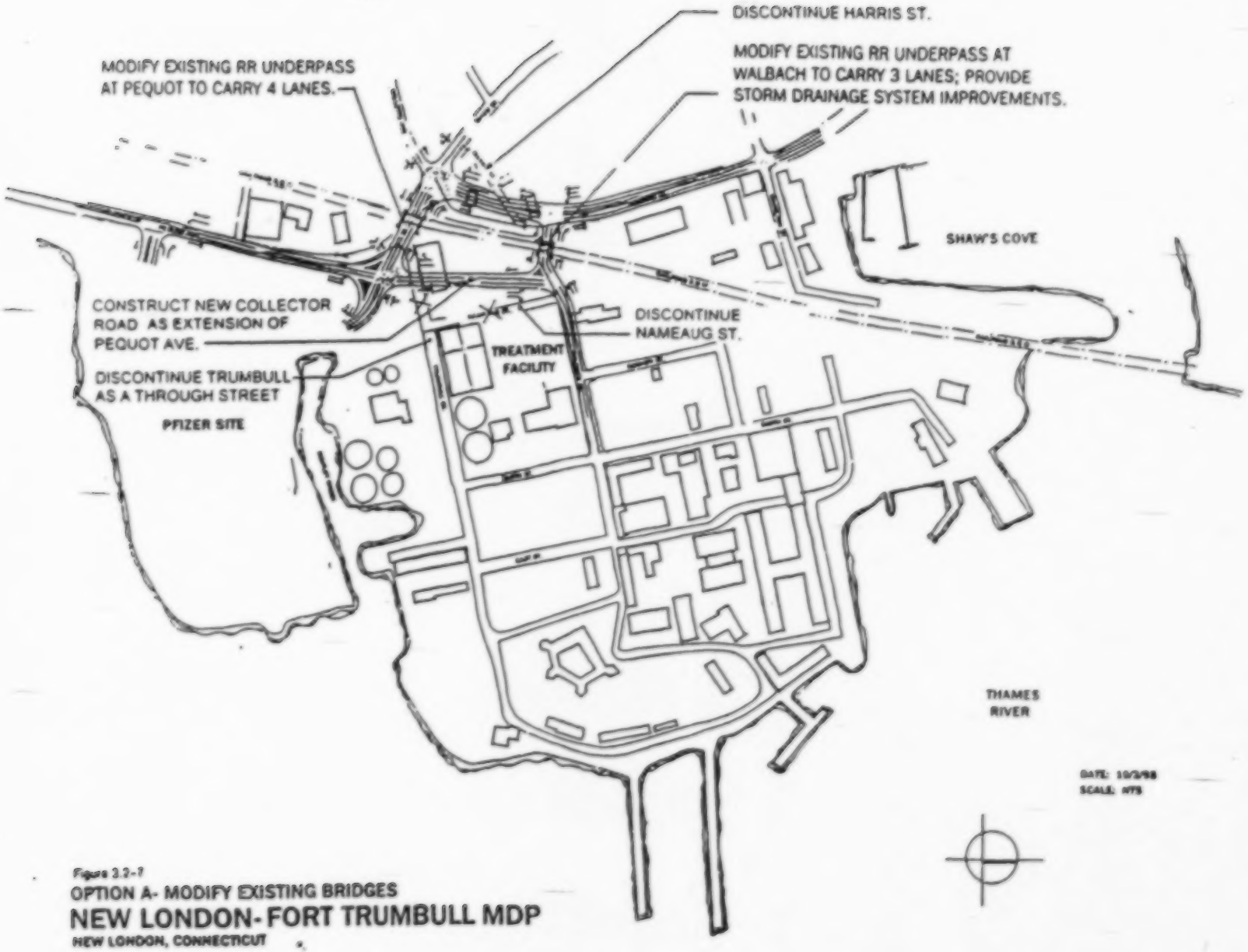


Figure 3.2-7
OPTION A- MODIFY EXISTING BRIDGES
**NEW LONDON- FORT TRUMBULL MDP**
NEW LONDON, CONNECTICUT

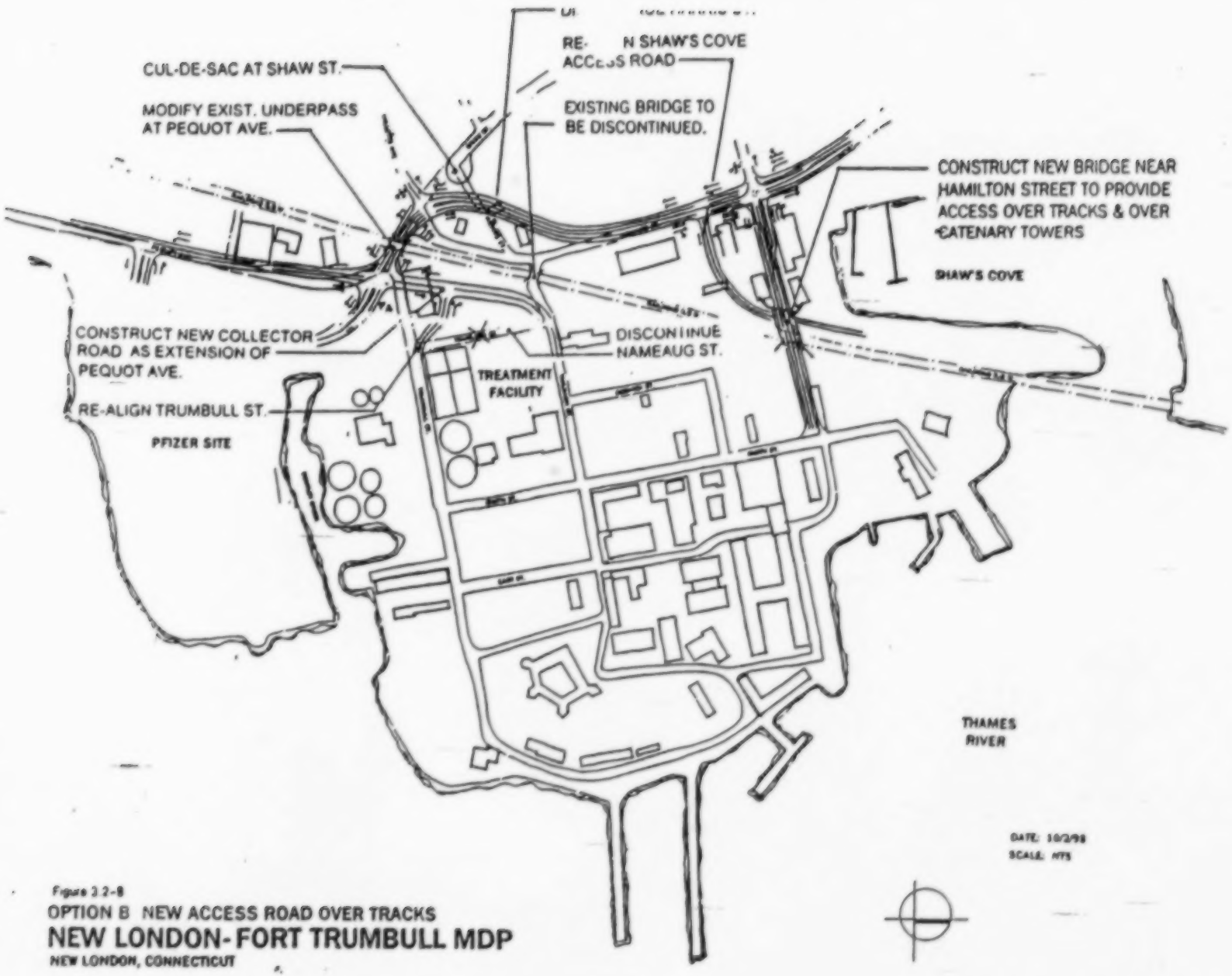


Figure 3.2-8
OPTION B NEW ACCESS ROAD OVER TRACKS
**NEW LONDON- FORT TRUMBULL MDP**
NEW LONDON, CONNECTICUT

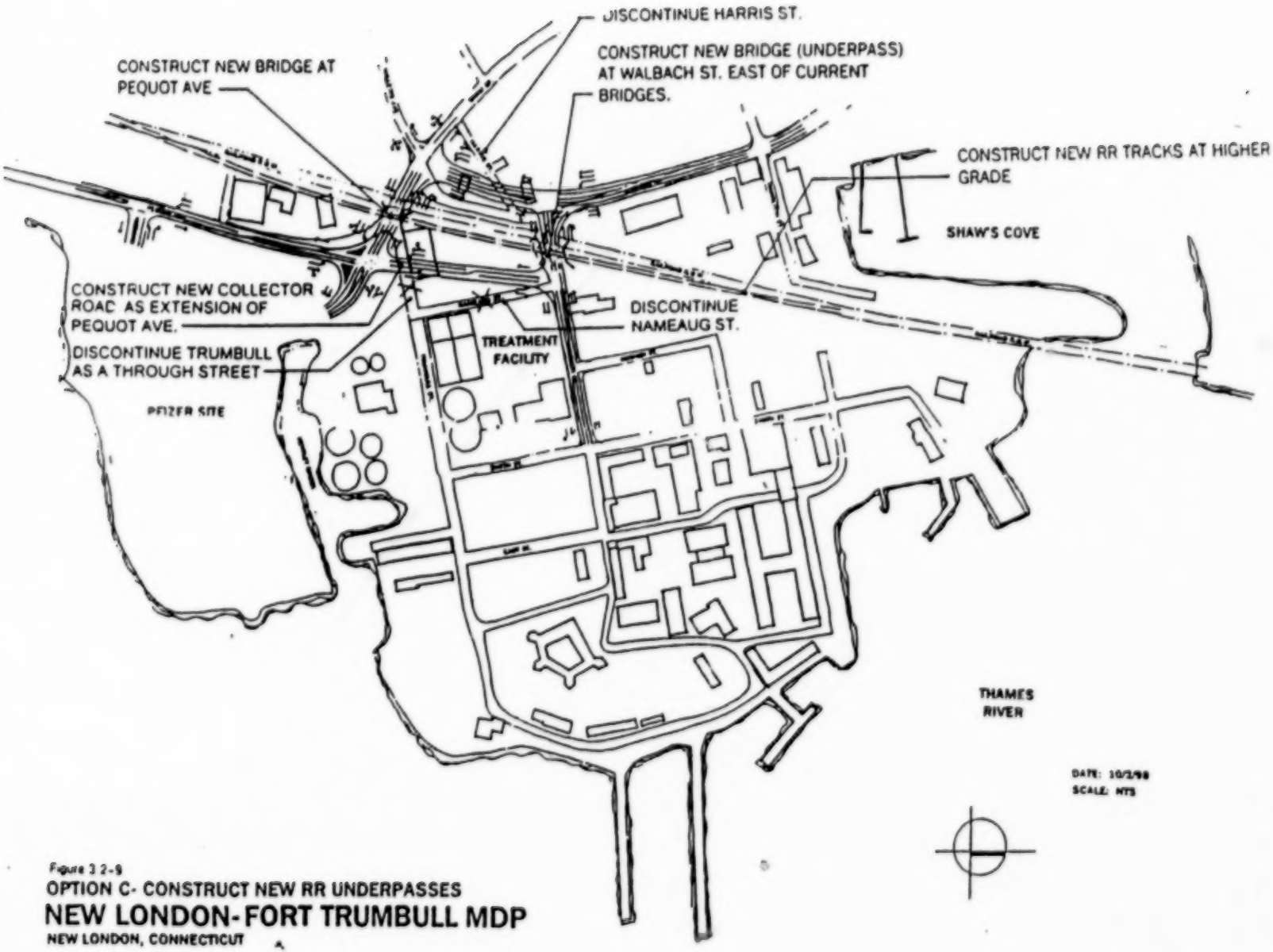


Figure 3.2-9
OPTION C- CONSTRUCT NEW RR UNDERPASSES
**NEW LONDON- FORT TRUMBULL MDP**
NEW LONDON, CONNECTICUT

In addition to roadway improvements, future traffic improvements should be made as follows:

- providing a westbound double left turn lane and a northbound double right turn lane at the intersection of Bank Street/Howard Street/Reed Street;
- upgrading traffic signal installation with new timing, phasing, and sequencing at the Bank Street/Howard Street/Reed Street intersection;
- revising timing of the existing traffic signal at Bank Street/Shaw Street/Trumbull Street; and
- installing new traffic signals (from STOP sign control) at the following intersections:
  - Howard Street at Hamilton Street;
  - Howard Street at Relocated Hamilton Street (Roadway Improvement Option B only);
  - Howard Street at Walbach Street;
  - Howard Street at Shaw Street/Willetts Avenue/Pequot Avenue; and
  - Pequot Avenue at Trumbull Street/Pfizer Drive.

In addition, on-street parking on Howard Street between Shaw Street and Hamilton Street is proposed to be prohibited to maintain four lanes of traffic.

### *3.2.4 Alternative No. 1 – No Action*

The No Action alternative is shown graphically in Figure 3.2-1. This alternative assumes that the MDP process does not proceed. Under this scenario, it is likely that the Navy would proceed with disposition of the NUWC property as planned prior to the introduction of the MDP process. Sixteen acres of this site

would accordingly become state park, to be operated and maintained by the Department of Environmental Protection. The remaining land area would likely be disposed of or publicly sold for future development.

It is noted that use of 16 acres of NUWC land for a state park would reduce the amount of land identified in the LRA's reuse plan for future development, including an area which was identified for a hotel/ conference center. The hotel facility was estimated at 82,500 square feet, with associated parking (264 to 417 parking spaces). The LRA also identified the Columbia Cove area to be used for ferry service. Given the recent commitment to providing ferry service in downtown New London as part of the multi-modal transportation terminal. it is unlikely that ferry service would be provided from the Columbia Cove site as described in the reuse plan.

The following components of the No Action alternative reflect the LRA's preferred plan as amended for the expanded state park. These uses are confined to the NUWC portion of the MDP area. The remainder of the project area would remain in the context of the existing land use patterns, with possible redevelopment of the area taking place on a parcel-by-parcel basis.

It should be noted that the features and recommendations of the preferred LRA plan may not evolve in the public sale portion of the NUWC property. Individual future owners would either inhabit individual buildings "as is," conduct renovations (ranging from relatively minor to major), or demolish the existing buildings and construct new ones. The LRA preferred plan features are assumed for the purposes of this analysis.



***State Park*** – The proposed 16-acre Fort Trumbull State Park is described above as common to all alternatives. Detailed programming and planning for the park are currently underway by the Connecticut Department of Environmental Protection. The LRA plan anticipated restoration and reuse of Buildings 13, 14, 27, 32, and 42 for office and as attractions. The plan also identified the use of Piers 4 and 7 for recreational uses (fishing, boat mooring) and possibly R&D support in the case of Pier 7. The plan projected parking potential of 10 to 115 parking spaces.

***Research & Development/Incubator*** – The central portion of the NUWC property is identified for reuse as research & development. incubator space, and incubator training space. The plan contemplates the reuse of five NUWC buildings (Buildings 2, 80, 96, 99, and 101) for a total of 377,900 square feet. The reuse plan also identified parking for 980 to 1,060 vehicles.

***Water-Related Use*** – The third major use area is the land located at the north end of the NUWC property and identified for a public benefit conveyance area for water-related uses. Such uses could include ferry terminal, boat launch, or marina. Support facilities would be accommodated on-site to include terminal and storage buildings (6,600 square feet), landings, parking (160 to 204 parking spaces), and a small clubhouse (3,000 square feet).

***Open Space*** – In addition to the state park, the reuse plan identified an area of open space along the north shore of Columbia Cove located between the R&D/ Incubator area and the Water-Related Use area. Specific uses are not identified.

### 3.2.5 *Alternative No. 2 – Recreation/Tourism*

The Recreation/Tourism alternative is shown graphically in Figure 3.2-2. This alternative capitalizes on the state's commitment to the Fort Trumbull State Park by focusing the majority of uses east of the Amtrak line as recreational or tourism related. It also maximizes public access to the waterfront as one of the project goals. The cultural, museum, and recreational uses would supplement the museum space that is anticipated to be provided within the state park. With this additional use, visitors would have the opportunity to experience several museums in the immediate vicinity with a day trip to the Fort Trumbull area. The proposed recreation center is compatible with the adjacent uses, including the railroad, open space, parking, and hotel.

The following specific land use concepts are proposed under this alternative:

***State Park*** – The state park is shown in this alternative as expanded from 16 acres to 30+ acres. In planning studies which took place prior to the initiation of the CEPA process, the state expressed an interest in an expanded park beyond that which was initially identified in the early land use plan alternatives. In this alternative, the park has been enlarged to include all of the NUWC land and an adjacent block bound by East, Walbach, and Smith Streets. This alternative (as well as Alternatives 3 through 6) assumes 100 paved parking spaces plus an additional 200 grass parking spaces for overflow parking (personal communication 10/2/98, Pamela Adams, DEP). It is assumed that none of the buildings in the expanded section would be reused. DEP representatives have indicated that funding is not currently in place for additional demolition and remediation that that would be required for an expanded state park.



***Cultural/Museum/Recreation*** – The area to the west and north of Walbach Street is approximately eight acres in size and has been identified for cultural/museum/active recreation uses. Museum space is estimated at 50,000 to 70,000 square feet, to be accommodated in one or more buildings. Parking would be provided by 200 to 240 parking spaces. Some outdoor recreation space associated with the recreation center immediately to the north is shown within this land use area. The recreation fields are placed next to the rail line, since these uses are considered to be compatible.

***Recreation Center*** – The recreation center is shown on an area of approximately 1.5 acres and would accommodate a building of 25,000 square feet. It would provide indoor recreation and exercise facilities adjacent to the playfields and the hotel to the north. It is assumed that the state park could not provide these types of facilities that are customarily provided by municipalities or private interests.

***Hotel*** – At approximately 3.2 acres, the hotel use area is located on the waterfront, oriented to views of the Thames River, downtown, and a proposed waterfront commercial or marina use. The public riverwalk would pass through the parcel along the waterfront. The hotel area has the capacity to accommodate an 80-room facility, with associated parking of 120 spaces. This site was selected to be more distant from the flooding and wave action hazard zone found further east. The use area also provides a higher base ground elevation. The hotel site would be designed so as to ensure that development proceeds in a manner that is consistent with the CCMA.

***Office/incubator*** – Most of the Gateway Area west of the rail line is shown as office or office/incubator use. Besides the office/incubator uses common to all action

alternatives, the area west of Howard Street is approximately 4.3 acres (2.9 acres usable due to environmental constraints) and can accommodate 50,000 square feet of office/incubator space and 150 parking spaces. Its location capitalizes on similar uses across Howard Street which include an existing office building and proposed office/incubator noted above as common to all alternatives. These uses are located to be close to and along the travel route to the Pfizer facility, thereby capitalizing on a synergy between them. This location isolates these uses from the state park and the other recreational and tourism uses that are consolidated east of the railroad in this alternative.

***Retail*** – The retail area is shown at the corner of Howard Street and Harris Street on approximately three acres. The area can provide approximately 20,000 square feet of retail space and is expected to be convenience shopping and specialty shops for the neighborhood residents and employees from Pfizer and other businesses in the redevelopment area. Parking is anticipated at 80 parking spaces due to high turnover associated with convenience shopping. Given the number of existing residents and employees, combined with an anticipated increase, there will be a growing need for this type of retail use.

### *3.2.6 Alternative No. 3 – Residential/Commercial*

A strong sentiment was voiced at numerous monthly neighborhood meetings (beginning in April 1998) to pursue at least one alternative which embraced a residential component. Accordingly, these uses were evaluated in several alternatives. Alternative 3 maximizes this type of use and incorporates both new development and rehabilitation of existing residential uses.



The Residential/Commercial alternative is shown graphically in Figure 3.2-3. This alternative is focused on providing housing to meet the needs of the existing community and future residents. The use areas would permit a variety of housing types and capitalizes on the amenities of the state park, the Thames River, water-related facilities, and proximity to downtown New London. The following specific land use concepts are proposed under this alternative:

***State Park*** – Fort Trumbull State Park is maintained at 16 acres within the NUWC property as noted for all alternatives (except Alternative 2).

***Mid-Density Residential*** – The area west and immediately adjacent to the state park is approximately 16 acres and could provide for 115 dwellings of varying sizes. The density (7 du/acre) is similar to the existing neighborhood, allowing for single-family detached and single-family attached units such as duplexes. Parking would be available for a minimum of 270 vehicles. This residential pattern would allow portions of the existing neighborhood to be retained and supplemented or redeveloped with new homes at similar density to current conditions. A major amenity of this area for housing is its proximity to the proposed state park and the waterfront.

A second area of mid-density residential is shown in the MDP Gateway Area west of Howard Street. It would be built or redeveloped as an extension of the existing neighborhood to the west and south. The parcel is known to have some environmental constraints, but with clustered development is expected to yield approximately 20 dwellings, including attached and detached dwelling units.

***High-Density Residential*** – The area along the northern edge of the peninsula is identified for a

high-density residential use. It is approximately 6.5 acres in size and could accommodate 160 dwelling units in a high-density development (25 du/acre). Dwelling units would be a mixture of apartments and/or townhouse units. This use area is located to take advantage of the high amenity elements, including views of downtown and the river, as well as the proximity to the proposed waterfront commercial/marina in Columbia Cove, the new state park, and the public riverwalk. Parking would be provided and would include additional parking spaces to be used by marina users who are not residents, and for other waterfront commercial uses in the Columbia Cove area.

***Open Space*** – The area along Goshen Street abutting the railroad line is to be used for open space under this alternative to meet community recreation needs and to serve as a buffer to the railroad. It is approximately 3.5 acres and would provide opportunity for both passive and active recreation for the nearby community. The use area would include some multipurpose fields and recreation facilities.

***Office/Incubator*** – Within the gateway portion of the MDP area, the parcels east of Howard Street are identified for office/incubator use. This would be the existing office building and new space at the intersection of Howard Street and Hamilton Street identified as common to Alternatives 2 through 6.

***Retail*** – A retail area is proposed at the corner of Howard and Harris Streets on approximately three acres. The area can provide approximately 20,000 square feet of retail space and is expected to develop as convenience shopping and specialty shops for the neighborhood residents and employees from Pfizer and other businesses in the redevelopment area. The use would provide 80 parking spaces to serve customers at a high rate of turnover due to the type of retail.



Given the number of existing residents and employees, coupled with an anticipated increase, there will be a greater need for this type of use.

### *3.2.7 Alternative No. 4 – Business Campus*

The Business Campus alternative focuses on the economic potential of the area by maximizing office/incubator uses and job creation. This alternative is shown graphically in Figure 3.2-4. The focus of this alternative is to provide the maximum amount of office/incubator space in close proximity to the adjacent Pfizer development. The largest amount of land area within the MDP area is located east of the railroad line. A portion of this land was previously used by the Navy as office and research. Numerous large and small buildings remain with the potential for reuse of some of them. The following specific land use concepts are proposed under this alternative:

***Office/Incubator*** – The majority of the Fort Trumbull area adjacent to the proposed state park, the regional wastewater treatment facility, and the railroad is depicted as office/incubator space in this alternative. It includes approximately 20 acres and could support 350,000 to 375,000 square feet of space, including necessary parking, plus some additional parking and shared parking for the adjacent waterfront development. The major attributes to this location are proximity to the Pfizer site and existing office/research facilities on a large portion of this land use area. The other area shown for office/incubator on this alternative would be along Howard Street and Hamilton Street as depicted for Alternatives 2 through 6.

***Hotel/Conference*** – The land use area that is shown for hotel/conference center is located along the northern edge of the peninsula. It includes approximately

7.5 acres and is oriented to take advantage of the views of the river, downtown, and the waterfront development at Columbia Cove. The site is a short distance from downtown and the Pfizer site. This use area would accommodate a 200-room hotel with support space (20,000 square feet) for meeting and dining, plus parking (400 to 550 spaces). The structure would be elevated due to the flooding risk and would allow for parking beneath a portion of the facility. Some of the parking would be shared by the adjacent waterfront commercial uses. An elevated structure would provide an opportunity for excellent long views. The site would be served by the public riverwalk leading through the state park to the south and to downtown to the north.

***Mid-Density Residential*** – This use area is shown west of Howard Street at its intersection with Harris Street. It includes an area of approximately four acres (3.1 usable acres) and would provide for approximately 22 dwelling units, including attached and detached units. The adjacent parcel at Harris Street and Shaw Street would remain in residential use. The eight homes present today may remain or be redeveloped. Residential use in these areas would continue the adjacent residential pattern and provide additional housing to meet part of the future demand.

***Retail*** – The retail area in this alternative is shown at the corner of Howard Street and Hamilton Street. It is approximately 1.8 acres and could provide for approximately 15,000 square feet of convenience shopping and parking (60 parking spaces) for residents and employees of the area.



### *3.2.8 Alternative No. 5 – Mixed Use 1*

This Mixed Use alternative is shown graphically in Figure 3.2-5. This alternative is a hybrid of several of the alternatives discussed above and attempts to pull in attractive features from each. The following specific land use concepts are proposed under this alternative:

***Mid-Density Residential*** – This use area is approximately 17 acres and is located nearly in the center of the Fort Trumbull MDP area adjacent to the state park, regional wastewater treatment facility, and Columbia Cove. It could provide approximately 115 dwellings of varying size and type and parking for a minimum of 230 vehicles. This development could be accomplished by either retaining a portion of the existing neighborhood, with rehabilitation and infill development, or by completely redeveloping the existing neighborhood and the adjacent area. The density would be similar to existing density, on average, with higher density closer to the amenities such as the water's edge, state park, and new marina or other waterfront use.

***Athletic Club*** – An area of approximately 3.5 acres is identified for an athletic club with indoor and outdoor facilities. The indoor use would be 25,000 square feet to include court space and multi-purpose rooms for fitness and training. Outdoor space would include some play areas and courts. Parking would be available for 85 cars. It would be located just north of the Howard Street/Walbach Street intersection to be convenient for users from the community. Pfizer employees, and the hotel/conference center. It would also provide a suitable use as a buffer along the rail line.

***Hotel/Conference*** – The land use area that is shown for hotel/conference center is located along

the northern edge of the peninsula. It includes approximately 7.5 acres and is oriented to take advantage of the views of the river, downtown, the athletic club, and the new waterfront commercial/marina area. The site is a short distance from downtown and the Pfizer site. It would accommodate a 200-room hotel with support space (20,000 square feet) for meeting and dining, plus parking (400 to 550 parking spaces). Additional parking would he provided for the marina and other waterfront commercial development in that use area. The structure would be elevated due to the flooding risk and would allow for parking below a portion of the facility. An elevated structure would provide an opportunity for excellent long views. The site would be served by the public riverwalk leading to the state park and downtown.

***Office/Incubator*** – All of the Gateway Area west of the rail tine (except adjacent to Shaw's Cove) is shown as office or office/incubator use. In addition to the uses common to all alternatives, the area west of Howard Street is approximately five acres in size and can accommodate 70,000 square feet of office/incubator. Its location capitalizes on the similar use across Howard Street. The total amount of office/incubator use is approximately 150,500 square feet and is located to be close to and along the travel route to the new Pfizer facility, thereby capitalizing on a synergy between them. This location isolates these uses from the state park and the other uses (residential, hotel, state park) located east of the rail line.

***Retail*** – The retail (10,000 square feet) would be incorporated into the office/incubator use area and is expected to be convenience shopping and specialty shops for the neighborhood residents as well as employees from Pfizer and other businesses in the area. The use area would provide 40 parking spaces for shoppers. Given the number of existing residents and



employees coupled with anticipated increases, there will be a growing need for this type of retail use.

### *3.2.9 Alternative No. 6 – Mixed Use 2*

This Mixed Use alternative is similar to Alternative 5, with several modifications to improve recognized deficiencies in that alternative, most notably the concentration of residential uses in the floodplain. This alternative is shown graphically in Figure 3.2-6. The following specific land use concepts are proposed under this alternative:

***Mid-Density Residential*** – The mid-density residential use described in Alternative 5 would be reconfigured as a clustered mid-density residential use in Alternative 6. This use area is approximately 11 acres and is located in the higher ground of the Fort Area. It could provide approximately 115 dwellings at 10.5 dwelling units per acre and parking for a minimum of 230 vehicles. Parking would be accommodated in the rear of the dwelling units, closer to the railroad line. Suitable buffering would be necessary in addition to the parking area to shield residential uses from the rail operations. Under this alternative, complete redevelopment of the existing neighborhood and the adjacent area would occur, with no retention of the existing residential dwellings. The principal reason for the shift in configuration of the residential use from Alternative 5 to Alternative 6 is to pull the intensity of development out of the flood prone area adjacent to the Thames River and to open up views and access to the waterfront.

***Athletic Club/Open Space*** – An area of approximately 12 acres is identified for a combination of open space and athletic club with indoor and outdoor facilities. This locates a relatively low intensity use in the

floodplain. The indoor use would be 25,000 square feet to include court space and multi-purpose rooms for fitness and training. Outdoor space would include some play areas and courts. It would be located just east of the residential use and south of the hotel/conference center. Parking would be available for 85 cars.

***Hotel/Conference*** – The land use area that is shown for hotel/conference center is located along the northern edge of the peninsula as in Alternative 5 but it is expanded to the south to encompass approximately nine acres. As in Alternative 5, the hotel/conference center is oriented to take advantage of the views of the river, downtown, and the new waterfront commercial/marina area It would accommodate a 250-room hotel with support space for meeting and dining, plus parking. As in Alternative 5, additional parking would be provided for the marina and other waterfront commercial development in that use area. The structure would either be elevated to allow for parking below a portion of the facility or it would be situated on the higher elevations of the site, out of the floodplain. An elevated structure would provide an opportunity for excellent long views. The site would be served by the public riverwalk leading to the state park and downtown.

***Office/Incubator*** – The office/incubator use in Alternative 6 would be identical to that described for Alternative 5.

***Retail*** – The retail use in Alternative 6 would also be identical to that described for Alternative 5.

(38)

No. 04-108

Supreme Court, U.S.
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

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## Volume III, Pages 488 to 735

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# 4.0 IMPACT EVALUATION

## 4.1 Overview of Impacts

Potential impacts associated with each identified resource are evaluated for the six land use concept alternatives presented in Section 3.0 of this document. This impact evaluation has been organizationally structured to be compatible with the existing conditions inventory presented in Section 2.0 of this document.

Major issues evaluated include (1) consistency with state and local land use policies for the Fort Trumbull area; (2) consistency with the Connecticut Coastal Management Act with respect to water dependency of waterfront uses; (3) consistency with the project goals of world class development, economic stimulation, waterfront public access, and the revitalization of downtown New London; (4) consistency with flood management policies; (5) neighborhood relocation impacts; (6) traffic and parking impacts; and (7) other identified issues particular to each alternative.

A brief summary of significant positive and negative impacts of each alternative is presented in Tables 4.1-1 through 4.1-6. These are described in greater detail in Sections 4.2 through 4.18 of this document.

A summary that rates the alternatives' consistency with project goals and objectives and related impacts is presented in Table 4.1-7. Designations have been assigned for general consistency and impact, without regard to the weight of each area or the degree to which a particular alternative is: consistent, neutral, or inconsistent. These designations are based upon the collective opinion of the project consultant team based on available data and information, as well as input from NLDC, state agencies, and various other reviewers. To assign numerical values to these attributes would be overly subjective and was therefore not done.

The following project goals merit further description:

***Complement Pfizer*** – Consistency of alternatives with the planned Pfizer facility to the south (and outside) of the MDP area is based on whether or not the land uses would complement the planned development. The only alternative which was considered to be inconsistent was the no action alternative, since it would result in segmented and disconnected projects, with no improvements proposed between the two. The recreation/tourism and residential/commercial alternatives were considered neutral in that they would not be anticipated to detract from the Pfizer facility, but would not necessarily complement it either. The business campus and mixed use alternatives were determined to be compatible with and complement the planned Pfizer facility.

***Economic and Financial Considerations*** – Consistency of alternatives with economic stimulation, job creation, generation of tax revenues, and creation of spin-off activity was based on the socioeconomic analysis presented in Section 4.3 of this document.

***Downtown Revitalization*** – New London is currently undergoing analysis and evaluation of its downtown community. Most of these planning projects are underway and finalized details are not yet available. The determination of consistency (or lack thereof) of the alternatives for the Fort Trumbull area with downtown revitalization is based upon whether proposed uses would complement or detract from downtown uses. For instance, a large retail component or ferry services would likely duplicate services which are currently or will soon be provided in the downtown area, whereas uses in the Fort Trumbull area that would draw upon or rely on downtown amenities were considered to be consistent. Residential uses would be considered neutral or marginally



consistent with downtown revitalization in that they would not likely detract or complement the revitalization efforts in downtown New London.

The Fort Trumbull area benefits from its proximity to downtown New London, which is a major transportation hub. It is situated near Interstates 95 and 395, with numerous multi-modal transportation amenities in the immediate vicinity. Amtrak and Shoreline East provide daily train service to downtown New London. Amtrak expects its electrified track to be operational by the year 2000. Cross Sound Ferry Services, Inc. provides water transportation to Long Island, Block Island, and Fisher's Island. The city has recently invested in a large parking facility located in central downtown near the ferry and railroad terminals. Additionally the Groton/New London Airport is located across the Thames River in Groton, providing service to Philadelphia and New York City. South East Area Transit (SEAT) provides bus service to the southeast region. Other land uses in downtown New London include municipal offices, places of worship, business offices, industrial operations, retail, and residential uses.

Common to Alternatives 2 through 6 is a physical linkage to downtown New London through the proposed waterfront riverwalk which will ideally make use of the Amtrak bridge at the entrance to Shaw's Cove. Alternately, this linear walkway could take an inland route, connecting the Fort Trumbull area with downtown New London.

***Resource Impacts*** – Impacts on resources, regulations, and characteristic features within the MDP area are also summarized in Table 4.1-7. These are based upon the analysis presented in Sections 4.2 through 4.16 of this document.

**TABLE 4.1-1**
**Advantages and Disadvantages of Alternative No. 1 – No Action**

| Advantages | Disadvantages |
|---|---|
| • Proposed uses at the NUWC site are consistent with state and local land use policies for the area.<br>• Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Implementation would result in economic gains, and no cost would be incurred by the city or NLDC.<br>• No neighborhood relocation would be involved. | • The land uses off NUWC would continue to be in disparity with local zoning and state planning documents.<br>• Would not meet the project goals, objectives, or vision for the Fort Trumbull area in total.<br>• Would not complement Pfizer due to the discontinuity of sites.<br>• Would not have a strong positive impact on downtown revitalization.<br>• Public access to the waterfront would not be maximized.<br>• Would not receive the benefit of positive roadway and utility improvements proposed in the MDP process.<br>• Would not provide aesthetic improvements to the Fort and Gateway Areas.<br>• Flood hazards would not be reduced.<br>• Traffic and parking impacts would not be mitigated.<br>• The existing building stock would continue to age. |



**TABLE 4.1-2**
**Advantages and Disadvantages of Alternative No. 2 – Recreation/Tourism**

| Advantages | Disadvantages |
|---|---|
| • Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Waterfront access would be provided by the proposed riverwalk.<br>• Would maximize recreational uses and provide educational benefits as a result of museum uses.<br>• Would be compatible with flood management policies.<br>• Aesthetic and visual improvements would result. | • Proposed uses are not consistent with state and local land use policies for the area.<br>• Would create fewer number of jobs and lower tax revenues as compared to other alternatives.<br>• Would result in less spin-off economic activity as compared to other alternatives.<br>• Would not have a strong positive impact on downtown revitalization.<br>• May not have a strong funding source.<br>• 100% neighborhood relocation would result from implementation of this alternative (but could be mitigated).<br>• Traffic and parking impacts would result (but could be mitigated). |

**TABLE 4.1-3**
**Advantages and Disadvantages of**
**Alternative No. 3 – Residential/Commercial**

| Advantages | Disadvantages |
|---|---|
| • Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Waterfront access would be provided by the proposed riverwalk.<br>• Will encourage private investment.<br>• Minimal neighborhood relocation would be necessary.<br>• Aesthetic and visual improvements would result. | • Proposed uses are not consistent with state and local land use policies for the area.<br>• Would create fewer number of jobs and tax revenues as compared with other alternatives.<br>• Would result in less spin-off economic activity as compared to other alternatives.<br>• May not have a strong public funding source.<br>• Would not have a strong positive impact on downtown revitalization.<br>• Would locate residential uses in a flood hazard zone (but could be mitigated).<br>• Traffic and parking impacts would result (but could be mitigated). |



**TABLE 4.1-4**
**Advantages and Disadvantages of**
**Alternative No. 4 – Business Campus**

| Advantages | Disadvantages |
|---|---|
| • Proposed uses are consistent with state and local land use policies for the area.<br>• Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Waterfront access would be provided by the proposed riverwalk.<br>• Would maximize number of jobs in close proximity to Pfizer.<br>• Would create highest number of jobs and tax revenues as compared to other alternatives.<br>• Would result in greatest spin-off economic activity as compared to other alternatives.<br>• Aesthetic and visual improvements would result.<br>• Would be consistent with and complement downtown revitalization. | • Would locate residential uses in a flood hazard zone (but could be mitigated).<br>• Traffic and parking impacts would result (but could be mitigated).<br>• 100% neighborhood relocation would result from implementation of this alternative (but could be mitigated). |

**TABLE 4.1-5**
**Advantages and Disadvantages of**
**Alternative No. 5 – Mixed Use 1**

| Advantages | Disadvantages |
|---|---|
| • Proposed uses are consistent with state and local land use policies for the area.<br>• Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Waterfront access would be provided by the proposed riverwalk.<br>• Would provide a balanced mix of land uses.<br>• Will encourage private investment.<br>• Would create jobs and tax revenues consistent with project goals.<br>• Would result in spin-off economic activity consistent with project goals.<br>• Aesthetic and visual improvements would result.<br>• Would be consistent with and complement downtown revitalization. | • Would locate residential uses in a flood hazard zone (but could be mitigated).<br>• Traffic and parking impacts would result (but could be mitigated).<br>• Neighborhood relocation would result (but could be mitigated). |



**TABLE 4.1-6**
**Advantages and Disadvantages of**
**Alternative No. 6 – Mixed Use 2**

| Advantages | Disadvantages |
|---|---|
| • Proposed uses are consistent with state and local land use policies for the area.<br>• Would provide a balanced mix of land uses.<br>• Proposed waterfront uses are water dependent and are consistent with the CCMA.<br>• Waterfront access would be provided by the proposed riverwalk.<br>• Would create jobs and tax revenues consistent with project goals.<br>• Would result in spin-off economic activity consistent with project goals.<br>• Will encourage private investment.<br>• Would be comparible with flood management policies.<br>• Aesthetic and visual improvements would result.<br>• Would be consistent with and complement downtown revitalization. | • 100% neighborhood relocation would result from implementation of this alternative (but could be mitigated).<br>• Traffic and parking impacts would result (but could be mitigated). |

**TABLE 4.1-7**
**Fort Trumbull MDP Area Alternatives Impact Summary**

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| LAND USE CONCEPT ALTERNATIVE | GOALS & OBJECTIVES | | | | | | | | IMPACTS | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | COMPLEMENT PFIZER | ECONOMIC STIMULATION | JOB CREATION | GENERATE TAX REVENUE | CREATE SPIN-OFF ACTIVITY | WATERFRONT ACCESS | WATER DEPENDENT USES | DOWNTOWN REVITILIZATION | LAND USE AND ZONING | SOCIOECONOMICS | NEIGHBORHOOD RELOCATION | COMMUNITY FACILITIES/SERVICES | AESTHETIC/VISUAL RESOURCES | PUBLIC UTILITIES AND SERVICES | CULTURAL RESOURCES | TRAFFIC AND PARKING | WATER RESOURCES | FLOOD HAZARD POTENTIAL | BIOLOGICAL ENVIRONMENT | PHYSICAL ENVIRONMENT | AIR QUALITY | NOISE | HAZARDOUS MATERIALS |
| Alternative 1 - No Action | ● | + | + | + | + | O | + | O | + | + | + | O | O | O | O | ● | O | ● | O | O | O | O | O |
| Alternative 2 - Recreation/Tourism | O | O | O | O | O | + | + | O | ● | O | ● | O | + | O | O | ● | O | + | O | O | O | O | O |
| Alternative 3 - Residential/Commercial | O | O | O | O | O | + | + | O | ● | O | + | O | + | O | O | ● | O | ● | O | O | O | O | O |
| Alternative 4 - Business Campus | + | + | + | + | + | + | + | + | + | + | ● | O | + | O | O | ● | O | O | O | O | O | O | O |
| Alternative 5 - Mixed Use 1 | + | + | + | + | + | + | + | + | O | + | ● | O | + | O | O | ● | O | ● | O | O | O | O | O |
| Alternative 6 - Mixed Use 2 | + | + | + | + | + | + | + | + | + | + | ● | O | + | O | O | ● | O | + | O | O | O | O | O |

+ Consistent/Positive Impact  O Marginally Consistent/Minimal Impact (Positive or Negative)  ● Inconsistent/Negative Impact

## 4.2 Land Use and Zoning Impacts

### *4.2.1 Consistency With Relevant Policies and Programs*

Detailed discussions of statewide land use policies, municipal zoning regulations, and coastal management policies are presented in Section 2.1 of this document. Brief summaries are presented below.

#### *Statewide Land Use Policies*

The majority of the Fort Trumbull MDP area has been designated in the *Conservation and Development Policies Plan for Connecticut* as an Urban Area Regional Center. Regional Centers encompass land areas containing traditional core commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance.

State policy seeks to concentrate economic development to the extent possible in major urban centers, promoting infill development and intensification where appropriate. It is also intended to promote stability of urban communities and to support staged, orderly growth of urban development. The goals and objectives of the statewide plan are used to assess the consistency of proposed actions with state policy. State actions (including projects which are funded in whole or in part with state money) that influence the form and location of development or conservation because of investments in infrastructure, real property, physical facilities, and human services should conform to this strategy.

Pertinent goals of regional centers include revitalization of the economic base, revitalization of the quality of life for urban area residents, and economic development assistance emphasizing site cleanup, land

assembly, structural rehabilitation, and the location of labor-intensive businesses to revitalize the economic base. Priority should be given to. infrastructure proposals, new product development and facilities for start-up firms, location of appropriate state facilities within urban areas, promotion of recreational uses of urban rivers, and development of heritage parks.

### *Regional Land Use Goals and Objectives*

In 1997, the Southeastern Connecticut Council of Governments (COG) published their *Regional Conservation and Development Policy Guide for Southeastern Connecticut.* The following major land use goals and objectives have been identified for the region.

Minimizing the risks of high unemployment and overdependence on a single industry has been identified by the COG as a major issue of concern. Their goal is a restructuring the regional economy in order to provide a balanced and diversified economic base through the creation of development opportunities. Improved coordination between the various entities having primary responsibilities with respect to economic development has been cited as the major objective in achieving this goal.

Developing a transportation system that provides access to regional resources for both residents, regionally employed, and visitors is also a key issue to the Southeastern Connecticut COG's planning efforts. The intent is to balance needs via several objectives outlined in the regional plan, including:

- coordination of policies among key transportation stakeholders;
- protection of natural and cultural resources during new system development;



- recognition of fiscal constraint;
- expansion of intermodal links; and,
- development of alternative modes of transportation, including mini-buses, ferries, bicycle and pedestrian paths, and light trails.

Additionally, provision of a public utility infrastructure system that balances the needs and protection of the region's population and resources is also a high priority. It is intended that development and expansion be focused within the region's core. Objectives identified for meeting this goal include the following:

- maintenance and improvement of public facilities such as water, sewer, and solid waste facilities;
- improved coordination between various utilities and authorities; and,
- encouragement of high density development in areas suitable to service.

### *Municipal Zoning Regulations*

There is currently a disparity between land use and zoning in the Fort Trumbull MDP area. Three municipal zones occur within the project area. These are Waterfront Commercial/Industrial (WC-I), Waterfront Development District (WD), and General Commercial District (C-I). As would be expected, the majority of waterfront property is zoned WC-I and WD, with the interior parcels zoned C-1. There are no residential zones within the MDP boundary.

Municipal zoning can be modified as part of the MDP process. However, the Fort Trumbull area has been targeted for renewal and revitalization for many

years and the current zoning reflects the historic planning philosophy of the city.

### *Consistency of Program Elements with the Connecticut Coastal Management Act Policies*

Coastal management policies, statutes, and regulations give highest priority and preference to uses and facilities which are dependent upon proximity to the water or the shorelands immediately adjacent to marine and tidal waters. Water-dependent uses are defined by the CCMA to be those uses which:

> require direct access to, or location in, marine or tidal waters and which therefore, cannot be located inland, including but not limited to: marinas, recreational and commercial fishing and boating facilities, finfish and shellfish processing plants, waterfront dock and port facilities, shipyards and boat building facilities, water-based recreational uses, navigation aides, basins and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site and uses which provide general public access to marine or tidal waters [C.G.S. Section 22a-93(16)].

Numerous proposed waterfront uses have been reviewed for consistency with the CCMA with respect to water dependency, since these uses are common to numerous alternatives. Other aspects of CCMA consistency are addressed under their individual topics in this section of the document (i.e., flood control. biological resources, etc.). Moving from south to north along the perimeter of the peninsula, the following waterfront uses are proposed:



***Riverwalk*** – A proposed riverwalk would follow the perimeter of the peninsula. This feature is intended to encourage public access to a water resource that has been unavailable to the general public for many decades. The riverwalk is proposed to be located primarily in state designated preservation areas, consistent with policies which are intended to discourage intensive development in these areas. Other uses, such as the proposed hotel site, residential, and office uses that are proposed in the various alternatives would occur landward of the riverwalk, thus providing public access directly adjacent to the waterfront. This philosophy is consistent with the CCMA and with recent Department of Environmental Protection approvals.

***Regional Water Pollution Control Facility*** – Sewage treatment disposal is water dependent because of the need for a receiving waterbody for the large volume of treated wastewater effluent. The regional WPCF has been located along the Thames River in New London since 1929. The only anticipated modifications are related to improvements to odor control and aesthetics. No land use or zoning changes are proposed.

***State Park*** – The CCMA encourages public access to the waters of Long Island Sound by expansion, development, and effective utilization of state-owned recreational facilities within the coastal area that are consistent with sound resource conservation procedures and constitutionally protected rights of private property owners. The development of the proposed Fort Trumbull State Park is therefore consistent with CCMA policy.

***Navy/Coast Guard Facilities*** – These are existing operations which are located on the NUWC property waterfront. These would remain unchanged in their

nature. Water dependency is integral to these two organizations.

***Waterfront Related Commercial/Columbia Cove Area*** – Two areas along the peninsula perimeter have been designated as water related or waterfront commercial. These are currently occupied in part by the Fort Trumbull Marina and the New London Seafood Distributors. Ongoing water-dependent uses are proposed under all alternatives, either as rehabilitated existing facilities or new water-dependent facilities.

### *4.2.2 Alternative No. 1 – No Action*

Alternative 1 assumes change only to the NUWC property. This area is currently zoned as a Waterfront Commercial/Industrial District. Current land use is a vacant naval base facility, with limited activities. Land uses and zoning off the NUWC property would reflect current conditions.

The majority of the NUWC property is designated as a regional center in the *Conservation and Development Policies Plan for Connecticut*. The fringes of this land mass are classified as either *Conservation* or *Preservation* areas, presumably due to their flood prone nature immediately adjacent to the Thames River.

The proposed land uses at the NUWC site under this alternative include a 16-acre state park, an area identified as municipal maritime conveyance, and public sale for business office uses. These are consistent with local zoning classifications as well as regional and statewide planning documents.

The coastal management regulations and guidelines give high priority and preference to uses and facilities which are dependent upon proximity to the water or



the shorelands immediately adjacent to marine and tidal waters. A state park and ferry terminal would likely be viewed by the Department of Environmental Protection as water-dependent land uses. The proposed business/office use is located inland from the waterfront.

### *4.2.3 Alternative No. 2 – Recreation/Tourism*

The Recreation/tourism alternative includes an expanded state park and other recreational amenities in the Fort and NUWC portions of the MDP area, along with several water-related and waterfront commercial uses. Office and retail uses are concentrated in the Gateway Area, west of the Amtrak rail line and away from the Thames River waterfront.

Although recreational facilities offer positive benefits with respect to public use and public access to the waterfront, they do not promote the overall goals and objectives of local, regional, or statewide planning policies and philosophies. This issue alone may not preclude development as proposed under this alternative. However, it is a significant factor in evaluating its consistency with pertinent land use planning policies. Office and retail uses, proposed in the interior Gateway Area, are consistent with local, regional, and statewide policies.

### *4.2.4 Alternative No. 3 – Residential/Commercial*

The proposed uses under this alternative, particularly those east of the Amtrak railroad, are less intensive than existing land uses or that which is allowed under current zoning regulations. A predominantly residential use does not promote local, regional, or statewide planning policies and philosophies and does not meet the identified objectives and goals which are

used to assess consistency of a proposed action in urban regional centers. Likewise, zoning in the project area has not been specifically designated for residential uses. However, similar to Alternative 2, this issue alone may not preclude development as proposed under this alternative.

The proposed marina/waterfront commercial and water-related commercial uses east of the railroad line are in keeping with state land use planning policies and local zoning regulations. Similarly, commercial and retail uses in the Gateway Area are consistent with the same.

#### *4.2.5 Alternative No. 4 – Business Campus*

The majority of land uses associated with the business campus scenario are consistent with statewide planning policies and with local zoning regulations. The Gateway Area provides a mix of office and retail uses, with a small amount of residential uses on the west side of Howard Street.

#### *4.2.6 Alternative No. 5 – Mixed Use 1*

This alternative provides a more balanced mix of uses in the MDP area. Although residential uses are not explicitly encouraged in regional centers, the area of residential use in the Fort and NUWC areas is offset by the concentrated office/incubator uses in the Gateway Area. The business office. retail, and hotel/conference center uses are consistent with statewide policies and local zoning regulations.



#### *4.2.7 Alternative No. 6 – Mixed Use 2*

This alternative is similar to Alternative 5 in that it provides a balanced mix of uses without a disproportionate amount of residential land uses. The Gateway Area supports a strong office/incubator use to offset the residential use in the Fort Area. The expanded Hotel/Conference Center is better suited to meet economic goals. These latter uses are consistent with statewide policies and local zoning regulations.

### 4.3 Socioeconomic Impacts

Key socioeconomic impacts have been estimated for each of the six alternatives. Included in the impact analysis is a review of the potential for job creation, including direct jobs, indirect jobs, and construction employment. An estimate of the net property tax gain is also presented for each alternative, which includes the projected decline in valuation associated with demolition of existing structures, as well as the projected increase in valuation associated with the construction of new facilities. A discussion of the economic costs and benefits is also presented for each alternative.

#### *4.3.1 Methodology*

In order to estimate the tax impacts associated with each of the alternative land use plans, several sources of information were utilized. The estimated current value of facilities in the study area is based on individual building assessments, as provided by the New London assessor's office. The level of new construction activity for each alternative is as presented in Section 3.0 of this document. Construction costs for each type of facility were developed based on construction cost data provided by the Marshall & Swift Valuation

Service, a well known construction cost estimating guide. These construction cost estimates serve as the basis for estimating property tax revenues for the development alternatives.

The baseline estimates for jobs within the MDP area (as well as housing units and occupancy) are based on windshield surveys of the area and on information gathered through a review of property tax cards provided by the New London assessor's office. The study area was toured on several occasions to determine occupancy and to compare field observations with information provided by the assessor's office.

Estimates of potential direct employment are based on multipliers provided by the Urban Land Institute (ULI). ULI tracks development trends throughout the United States and has estimated ranges of the square footage required for each employee by industry. Some of the key components of this information are included in Table 4.3-1.

**TABLE 4.3-1**
**Square Footage Per Employee by Industry**

| Industry | Low SF Per Employee | High SF Per Employee |
|---|---|---|
| Office | 200 | 400 |
| Retail | 250 | 650 |
| Parks & Outdoor Recreation | 108,900 | 174,240 |
| Recreation & Athletic Facilities | 500 | 2,000 |
| Hotels[1] | 2.9 rooms per employee | 2.0 rooms per employee |

Source: Urban Land Institute

[1]Although ULI does not track hotels as a separate category, information for New London has been developed based on data obtained from the U.S. Bureau of the Census.



These figures have been used to create a range of direct employment for each alternative, based on the build-out estimates presented in Section 3.0. In order to estimate the indirect or induced employment for each industry, the findings of the U.S. Department of Commerce's Regional Input-Output Modeling System, known as RIMS II, were utilized. The RIMS II model calculates induced employment by industry for each state. Indirect or induced employment is created as workers (direct jobs) spend their earnings in the regional economy for food, clothing, housing, automobiles, etc. As these earnings are "recycled" through the economy, additional jobs are created at food stores, clothing stores, and the like. The key Connecticut multipliers used in this analysis are summarized in Table 4.3-2.

**TABLE 4.3-2**
**RIMS II Multipliers by Land Use Category**

| Land Use Category | RIMS II Multiplier |
|---|---|
| State Park | 0.5392 |
| Columbia Cove Area | 0.5392 |
| Water-Related Commercial | 0.4992 |
| Hotel | 0.5392 |
| Recreation Center | 0.5392 |
| Outdoor Recreation Area | 0.5392 |
| Museum(s) | 0.5392 |
| Hotel/Conference Center | 0.5392 |
| Residential Mid-Range | 0.0000 |
| Residential High-End | 0.0000 |
| Athletic Club | 0.5392 |
| Office (Existing) | 0.7433 |
| Office/Incubator | 0.7433 |
| Retail | 0.4992 |
| R&D/Office | 0.7433 |
| Waterfront Commercial | 0.4992 |

Source: U.S. Department of Commerce

As illustrated in Table 4.3-2, every direct job created in the retail sector creates an additional 0.4992 jobs elsewhere in the economy. The higher multipliers associated with new office development are related to the nature of the development associated with Pfizer and the generally higher multiples of R&D and manufacturing operations.

Estimates of construction jobs associated with new development in the study area are based on the projected construction costs for each facility, as determined through the Marshall & Swift Valuation Service. Based on the total construction cost for each land use alternative, total construction wages have been estimated at 45% of construction costs. Using the average construction wages for southeastern Connecticut of $38,388, as provided by the Connecticut Department of Labor, the number of person-years of construction employment associated with each land use alternative can be estimated. For example, if construction wages are estimated to be $5,000,000, a total of 130.25 person-years of construction employment would be created at an average wage of $38,388.

It is important to note that all financial information contained in this document is stated in 1998 dollars. No allowance has been made for inflation or the timing of revenues and/or expenses.

### *4.3.2 Alternative No. 1 - No Action*

Alternative 1 is referred to as the No Action alternative. However, this name is somewhat misleading, since the implementation of this alternative includes creation of a state park on a portion of the former U.S. Navy Undersea Warfare Center (NUWC) site as well as private development of approximately 380,000 square feet of non-residential facilities at NUWC.



#### *Job Creation*

The implementation of this alternative is anticipated to create between 1,080 and 1,779 direct jobs. The majority of these jobs (950 to 1,520) are related to the reuse of the former NUWC facilities by private sector entities. The occupancy of an existing under-utilized office building accounts for an additional 126 to 253 jobs. The remaining jobs are associated with the creation of the state park. No existing jobs are expected to be lost under this alternative, with the exception of the NUWC caretaker staff, estimated to be between 10 and 15. Additional indirect jobs are estimated to be between 802 and 1,321. This brings the total number of net new direct and indirect jobs associated with this alternative to between 1,872 and 3,085.

#### *Tax Revenue Created/Lost*

The implementation of this alternative will add new property to the city's tax base in the form of the former NUWC property, which was tax-exempt due to federal government ownership. Based on an analysis of properties within the study area, the average property assessment is estimated to be $26.00 per square foot of building area. Using the estimated 380,000 square feet of facilities at NUWC which would be developed, the city's tax base would increase by $9.88 million. Using the tax rate of $27.30 per $1,000 of valuation, property tax revenue for the City of New London would increase by approximately $270,000.

### *4.3.3 Alternative No. 2 - Recreation/Tourism*

The development program of Alternative 2 is summarized in the Table 4.3-3.

**TABLE 4.3-3**
**Development Program – Alternative 2 – Recreation/Tourism**

| Land Use | Programmed Development |
|---|---|
| State Park | 30 Acres |
| Columbia Cove Area | 80 – 100 Slips |
| Water-Related Commercial | 25,000 – 30,000 SF |
| Hotel | 80 Rooms |
| Recreation Center | 25,000 SF |
| Museum(s) | 55,000 – 70,000 SF |
| Office (Existing) | 50,500 SF |
| Office/Incubator | 80,000 SF |
| Retail | 20,000 SF |
| R&D/Office | 5,000 SF |
| Waterfront Commercial | 25,000 SF |

Based on the identified development program, the projected job creation associated with this alternative has been estimated. Direct job creation is projected to be between 506 and 1,019. Due to the density of employment, office uses contribute the largest number of jobs, accounting for 339 jobs under the low estimate and 598 under the high estimate. Table 4.3-4 provides the estimated job creation by land use category.



**TABLE 4.3-4**
**Estimated Range of Direct Employment – Alternative 2 – Recreation/Tourism**

| Direct Employment | Low Estimate Employees | High Estimate Employees |
|---|---|---|
| State Park | 8 | 12 |
| Columbia Cove Area | 1 | 5 |
| Water-Related Commercial | 46 | 120 |
| Hotel | 27 | 40 |
| Recreation Center | 13 | 50 |
| Museum(s) | 4 | 14 |
| Office (Existing) | 126 | 253 |
| Office/Incubator | 200 | 320 |
| Retail | 31 | 80 |
| R&D Office | 13 | 25 |
| Waterfront Commercial | 38 | 180 |
| Total | 506 | 1,019 |

Source: Urban Land Institute and RKG Associates, Inc.

As an offset to the jobs created under this alternative, it is necessary to subtract the existing jobs in the study area. It is estimated that 148 to 222 people currently work within the MDP area. Eliminating these jobs brings the net gain from this alternative to between 358 and 797 jobs.

Additional indirect jobs will also be created in the regional economy, based on the recirculation of wages and purchases through the economy. It is estimated that between 337 and 659 indirect jobs will be created, as detailed in Table 4.3-5.

**TABLE 4.3-5**
**Estimated Range of Indirect Employment –**
**Alternative 2 – Recreation/Tourism**

| Land Use Category | Low Estimate | High Estimate |
|---|---|---|
| State Park | 4 | 6 |
| Columbia Cove Area | 1 | 3 |
| Water-Related Commercial | 23 | 60 |
| Hotel | 15 | 22 |
| Recreation Center | 7 | 27 |
| Museum(s) | 2 | 8 |
| Office (Existing) | 94 | 188 |
| Office/Incubator | 149 | 238 |
| Retail | 15 | 40 |
| R&D Office | 9 | 19 |
| Waterfront Commercial | 19 | 50 |
| Total | 337 | 659 |

The construction of new facilities in the study area will also generate additional employment in the form of short-term construction jobs. Implementation of this alternative is expected to result. in between $28.2 and $58.1 million in new construction within the area. Assuming that 45% of this cost is for wages, between $12.7 million and $26.1 million in construction wages will be paid out. Using the average construction wage of $38,388 for the region, 331 to 681 person-years of construction employment will be created.

***Tax Revenue Created/Lost***

The implementation of this alternative is expected to generate between $28.2 and $58.1 million in new construction activity. The projected construction costs are detailed in the Table 4.3-6.



**TABLE 4.3-6**
**Estimated Construction Costs –**
**Alternative 2 – Recreation/Tourism**

| Land Use Category | Low Estimate | High Estimate |
|---|---|---|
| State Park | $6,000,000 | $22,500,000 |
| Columbia Cove Area | $450,000 | $750,000 |
| Water-Related Commercial | $1,855,500 | $2,941,800 |
| Hotel | $3,676,800 | $4,459,680 |
| Recreation Center | $1,591,000 | $2,299,000 |
| Museum(s) | $6,471,500 | $9,201,500 |
| Office/Incubator | $5,085,600 | $10,855,200 |
| Retail | $1,237,000 | $1,961,200 |
| R&D Office | $317,850 | $678,450 |
| Waterfront Commercial | $1,546,250 | $2,451,500 |
| Total | $28,231,500 | $58,098,330 |

Source: Marshall & Swift Valuation Service and RKG Associates, Inc.

Assuming that these facilities are assessed at an average of 70% of their construction cost, the New London tax base would expand by between $19.8 million and $40.7 million. However, the demolition of existing structures in this area must also be accounted for. Approximately $6 million in existing tax base will be eliminated to implement this plan, making the net increase in the tax base between $13.8 million and $34.7 million. This translates into a net increase in property tax revenues of between $375,000 and $950,000.

### *4.3.4 Alternative No. 3 – Residential/Commercial*

The development program of Alternative 3 is summarized in the Table 4.3-7.

**TABLE 4.3-7 Development Program – Alternative 3 – Residential/Commercial**

| Land Use | Development |
|---|---|
| State Park | 16 Acres |
| Columbia Cove Area | 80-100 Slips |
| Water-Related Commercial | 25,000-30,000 SF |
| Outdoor Recreation Area | 3.5 Acres |
| Residential Mid-Range | 135 Units |
| Residential High-End | 160 Units |
| Office (Existing) | 50,500 SF |
| Office/Incubator | 30,000 SF |
| Retail | 20,000 SF |
| R&D/Office | 5,000 SF |
| Waterfront Commercial | 25,000 SF |

***Job Creation***

Based on the identified development program, the projected job creation associated with this alternative has been estimated. Direct job creation is projected to be between 335 and 710. Office uses contribute the largest number of jobs. accounting for 376 jobs under the low estimate and 398 under the high estimate. Table 4.3-8 provides the estimated job creation by land use category.



**TABLE 4.3-8 Estimated Range of Direct Employment – Alternative 3 – Residential/Commercial**

| | Direct Employment | |
|---|---|---|
| Land Use Category | Low Estimate | High Estimate |
| State Park | 4 | 6 |
| Columbia Cove Area | 1 | 5 |
| Water-Related Commercial | 46 | 120 |
| Outdoor Recreation Area | 1 | 1 |
| Office (Existing) | 126 | 253 |
| Office/Incubator | 75 | 120 |
| Retail | 31 | 80 |
| R&D Office | 13 | 25 |
| Waterfront Commercial | 38 | 100 |
| Total | 335 | 710 |

Source: Urban Land Institute and RKG Associates, Inc.

As an offset to the jobs created under this alternative, it is necessary to subtract the existing jobs in the study area. It is estimated that 148 to 222 people currently work within the study area. Eliminating these jobs brings the net gain from this alternative to between 187 and 488 jobs.

Additional indirect jobs will also be created in the regional economy, based on the recirculation of wages and purchases through the economy. It is estimated that between 220 and 452 indirect jobs will be created, as detailed in Table 4.3-9.

**TABLE 4.3-9**
**Estimated Range of Indirect Employment –**
**Alternative 3 – Residential/Commercial**

| Land Use Category | Indirect Employment | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | 2 | 3 |
| Columbia Cove Area | 1 | 3 |
| Water-Related Commercial | 23 | 60 |
| Outdoor Recreation Area | 0 | 1 |
| Office (Existing) | 94 | 188 |
| Office/Incubator | 56 | 89 |
| Retail | 15 | 40 |
| R&D Office | 9 | 19 |
| Waterfront Commercial | 19 | 50 |
| Total | 220 | 452 |

Source: U.S. Department of Commerce and RKG Associates, Inc.

The construction of new facilities in the MDP area will also generate additional employment in the form of short-term construction jobs. Implementation of this alternative is expected to result in between $40.1 and $64.2 million in new construction within the study area. Assuming that 45% of this cost is for wages. between $18.1 million and $28.9 million in construction wages will be paid out. Using the average construction wage of $38,388 for the region, 470 to 753. person-years of construction employment will be created.

***Tax Revenue Created/Lost***

The implementation of this alternative is expected to generate between $40.1 and $64.2 million in new construction activity. The projected construction costs are detailed in the Table 4.3-10.



**TABLE 4.3-10**
**Estimated Construction Costs –**
**Alternative 3 – Residential/Commercial**

| Land Use Category | Construction Costs | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | $3,200,000 | $12,000,000 |
| Columbia Cove Area | $450,000 | $750,000 |
| Water-Related Commercial | $1,855,500 | $2,941,800 |
| Outdoor Recreation Area | $105,000 | $393,750 |
| Residential Mid-Range | $8,049,780 | $13,130,100 |
| Residential High-End | $21,463,200 | $25,872,000 |
| Office/Incubator | $1,907,100 | $4,070,700 |
| Retail | $1,237,000 | $1,961,200 |
| R&D/Office | $317,850 | $678,450 |
| Waterfront Commercial | $1,546,250 | $2,451,500 |
| Total | $40,131,680 | $64,249,500 |

Source: Marshall Valuation Service and RKG Associates, Inc.

Assuming that these facilities are assessed at an average of 70% of their construction cost, the New London tax base would expand by between $28.1 million and $45.0 million. However, the demolition of existing structures in this area must also be accounted for. Approximately $6 million in existing tax base will be eliminated to implement this plan, making the net increase in the tax base between $22.1 million and $39.0 million. This translates into a net increase in property tax revenues of between $600,000 and $1.1 million.

### *4.3.5 Alternative No. 4 – Business Campus*

Alternative 4 focuses on development of the study area as a business campus. The development program for this alternative is summarized in the Table 4.3-11.

**TABLE 4.3-11 Development Program – Alternative 4 – Business Campus**

| Land Use | Proposed Development |
|---|---|
| State Park | 16 Acres |
| Columbia Cove Area | 80-100 Slips |
| Water-Related Commercial | 25,000-30,000 SF |
| Hotel/Conference Center | 200 Rooms |
| Residential Mid-Range | 30 Units |
| Office (Existing) | 50,500 SF |
| Office/Incubator | 380,000-405,000 SF |
| Retail | 15,000 SF |
| R&D/Office | 5,000 SF |
| Waterfront Commercial | 20,000-25,000 SF |

***Job Creation***

Based on the identified development program, the job creation associated with this alternative has been estimated. Direct job creation is projected to be between 1,332 and 2,289. Office positions account for a large percentage of total job creation, with 1,150 to 1,700 jobs. Table 4.3-12 provides the estimated job creation by land use category.

**TABLE 4.3-12 Estimated Range of Direct Employment – Alternative 4 – Business Campus**

| | Direct Employment | |
|---|---|---|
| Land Use Category | Low Estimate | High Estimate |
| State Park | 4 | 6 |
| Columbia Cove Area | 1 | 5 |
| Water-Related Commercial | 46 | 120 |
| Hotel/Conference Center | 68 | 100 |
| Office (Existing) | 126 | 253 |
| Office/Incubator | 1,013 | 1,620 |
| Retail | 23 | 60 |
| R&D/Office | 13 | 25 |
| Waterfront Commercial | 38 | 100 |
| Total | 1,332 | 2,289 |

Source: Urban Land Institute and RKG Associates, Inc.



As an offset to the jobs created under this alternative, it is necessary to subtract the existing jobs in the study area. It is estimated that 148 to 222 people currently work within the study area. Eliminating these jobs brings the net gain from this alternative to between 1,184 and 2,067 jobs. Additional indirect jobs will also be created in the regional economy, based on the recirculation of wages and purchases through the economy. It is estimated that between 949 and 1,610 indirect jobs will be created, as detailed in Table 4.3-13.

**TABLE 4.3-13 Estimated Range of Indirect Employment – Alternative 4 – Business Campus**

| | Indirect Employment | |
|---|---|---|
| Land Use Category | Low Estimate | High Estimate |
| State Park | 2 | 3 |
| Columbia Cove Area | 1 | 3 |
| Water-Related Commercial | 23 | 60 |
| Hotel/Conference Center | 37 | 54 |
| Office (Existing) | 94 | 188 |
| Office/Incubator | 753 | 1,204 |
| Retail | 12 | 30 |
| R&D/Office | 9 | 19 |
| Waterfront Commercial | 19 | 50 |
| Total | 949 | 1,610 |

Source: U.S. Department of Commerce and RKG Associates, Inc.

The construction of new facilities in the study area will also generate additional employment, in the form of short-term construction jobs. Implementation of this alternative is expected to result in between $56.8 and $104.2 million in new construction within the MDP area. Assuming that 45% of this cost is for wages, between $25.5 million and $46.9 million in construction wages will be paid out. Using the average construction

wage of $38,388 for the region, 665 to 1,222 person-years of construction employment will be created.

***Tax Revenue Created/Lost***

The implementation of this alternative is expected to generate between $60.9 and $104.2 million in new construction activity. The projected construction costs are detailed in the Table 4.3-14.

**TABLE 4.3-14**
**Estimated Construction Costs –**
**Alternative 4 - Business Campus**

| Land Use Category | Construction Costs | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | $3,200,000 | $12,000,000 |
| Columbia Cove Area | $450,000 | $750,000 |
| Water-Related Commercial | $1,855,500 | $2,941,800 |
| Hotel/Conference Center | $20,920,000 | $26,038,000 |
| Residential Mid-Range | $1,788,840 | $2,917,800 |
| Office/Incubator | $25,745,850 | $54,954,450 |
| Retail | $927,750 | $1,470,900 |
| R&D/Office | $317,850 | $678,450 |
| Waterfront Commercial | $1,546,250 | $2,451,500 |
| Total | $56,752,040 | $104,202,900 |

Source: Marshall Valuation Service and RKG Associates, Inc.

Assuming that these facilities are assessed at an avenge of 70% of their construction cost, the New London tax base would expand by between $39.7 million and $72.9 million. However, the demolition of existing structures in this area must also be accounted for. Approximately $5.6 million in existing tax base will be eliminated to implement this plan, making the net increase in the tax base between $34.10 million and $67.3 million. This translates into a net increase



in property tax revenues of between $930,000 and $1.8 million at full build-out.

### *4.3.6 Alternative No. 5 – Mixed Use 1*

Alternative 5 focuses on mixed use development of the study area. The development program is summarized in the Table 4.3-15.

**TABLE 4.3-15**
**Development Program –**
**Alternative 5 – Mixed Use 1**

| Land Use | Proposed Development |
|---|---|
| State Park | 16 Acres |
| Columbia Cove Area | 80-100 Slips |
| Water-Related Commercial | 25,000-30,000 SF |
| Hotel/Conference Center | 200 Rooms |
| Residential Mid-Range | 115 Units |
| Athletic Club | 25,000 SF |
| Office (Existing) | 50,500 SF |
| Office/Incubator | 100,000 SF |
| Retail | 10,000 SF |
| R&D/Office | 5,000 SF |
| Waterfront Commercial | 20,000-25,000 SF |

***Job Creation***

Based on the identified development program, the job creation associated with this alternative has been estimated. Direct job creation is projected to be between 574 and 1,099. Due to the density of employment, office uses contribute the largest number of jobs, accounting for 389 jobs under the low estimate and 678 under the high estimate. Table 4.3-16 provides the estimated job creation by land use category.

**TABLE 4.3-16**
**Estimated Range of Direct Employment – Alternative 5 – Mixed Use 1**

| Land Use Category | Direct Employment | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | 4 | 6 |
| Columbia Cove Area | 1 | 5 |
| Water-Related Commercial | 46 | 120 |
| Hotel/Conference Center | 68 | 100 |
| Athletic Club | 13 | 50 |
| Office (Existing) | 126 | 253 |
| Office/Incubator | 250 | 400 |
| Retail | 15 | 40 |
| R&D/Office | 13 | 25 |
| Waterfront Commercial | 38 | 100 |
| Total | 574 | 1,099 |

Source: Urban Land Institute and RKG Associates, Inc.

As an offset to the jobs created under this alternative, it is necessary to subtract the existing jobs in the study area. It is estimated that 148 to 222 people currently work within the study area. Eliminating these jobs brings the net gain from this alternative to between 426 and 877 jobs.

Additional indirect jobs will also be created in the regional economy, based on the recirculation of wages and purchases through the economy. It is estimated that between 385 and 720 indirect jobs will be created, as detailed in Table 4.3-17.



**TABLE 4.3-17**
**Estimated Range of Indirect Employment – Alternative 5 – Mixed Use 1**

| Land Use Category | Indirect Employment | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | 2 | 3 |
| Columbia Cove Area | 1 | 3 |
| Water-Related Commercial | 23 | 60 |
| Hotel/Conference Center | 37 | 54 |
| Athletic Club | 7 | 27 |
| Office (Existing) | 94 | 188 |
| Office/Incubator | 186 | 297 |
| Retail | 8 | 20 |
| R&D/Office | 9 | 19 |
| Waterfront Commercial | 19 | 50 |
| Total | 385 | 720 |

Source: U.S. Department of Commerce and RKG Associates, Inc.

The construction of new facilities in the study area will also generate additional employment in the form of short-term construction jobs. Implementation of this alternative is expected to result in between $43.7 and $72.9 million in new construction within the study area. Assuming that 45% of this cost is for wages, between $19.7 million and $32.8 million in construction wages will be paid out. Using the average construction wage of $38,388 for the region, 512 to 854 person-years of construction employment will be created.

***Tax Revenue Created/Lost***

The implementation of this alternative is expected to generate between $47.8 and $72.9 million in new construction activity. The projected construction costs are detailed in Table 4.3-18.

**TABLE 4.3-18**
**Estimated Construction Costs –**
**Alternative 5 – Mixed Use 1**

| Land Use Category | Construction Costs | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | $3,200,000 | $12,000,000 |
| Columbia Cove Area | $450,000 | $750,000 |
| Water-Related Commercial | $1,855,500 | $2,941,800 |
| Hotel/Conference Center | $20,920,000 | $26,038,000 |
| Residential Mid-Range | $6,857,220 | $11,184,900 |
| Athletic Club | $1,591,000 | $2,299,000 |
| Office/Incubator | $6,357,000 | $13,569,000 |
| Retail | $618,500 | $980,600 |
| R&D/Office | $317,850 | $678,450 |
| Waterfront Commercial | $1,546,250 | $2,451,500 |
| Total | $43,713,320 | $72,893,250 |

Source: Marshall Valuation Service and RKG Associates, Inc.

Assuming that these facilities are assessed at an average of 70% of their construction cost, the New London tax base would expand by between $30.6 million and $51.0 million. However, the demolition of existing structures in this area must also be accounted for. Approximately $6 million in existing tax base will be demolished to implement this plan, making the net increase in the tax base between $24.6 million and $45.0 million. This translates into a net increase in property tax revenues of between $670,000 and $1.2 million.

### *4.3.7 Alternative No. 6 – Mixed Use 2*

Alternative 6 focuses on mixed use development of the study area. The development program is summarized in the Table 4.3-19.



**TABLE 4.3-19**
**Development Program –**
**Alternative 6 – Mixed Use 2**

| Land Use | Proposed Development |
|---|---|
| State Park | 16 Acres |
| Columbia Cove Area | 80-100 Slips |
| Water-Related Commercial | 25,000-30,000 SF |
| Hotel/Conference Center | 250 Rooms |
| Residential Mid-Range | 115 Units |
| Athletic Club | 25,000 SF |
| Office (Existing) | 50,500 SF |
| Office/Incubator | 100,000 SF |
| Retail | 10,000 SF |
| R&D/Office | 5,000 SF |
| Waterfront Commercial | 20,000-25,000 SF |

***Job Creation***

Based on the identified development program, the job creation associated with this alternative has been estimated. Direct job creation is projected to be between 591 and 1,124. Due to the density of employment, office uses contribute the largest number of jobs, accounting for 389 jobs under the low estimate and 678 under the high estimate. Table 4.3-20 provides the estimated job creation by land use category.

**TABLE 4.3-20**
**Estimated Range of Direct Employment –**
**Alternative 6 – Mixed Use 2**

| Land Use Category | Direct Employment | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | 4 | 6 |
| Columbia Cove Area | 1 | 5 |
| Water Related Commercial | 46 | 120 |
| Hotel/Conference Center | 85 | 125 |
| Athletic Club | 13 | 50 |
| Office (Existing) | 126 | 253 |
| Office/Incubator | 250 | 400 |
| Retail | 15 | 40 |
| R&D/Office | 13 | 25 |
| Waterfront Commercial | 38 | 100 |
| Total | 591 | 1,124 |

Source: Urban Land Institute and RKG Associates, Inc.

As an offset to the jobs created under this alternative. it is necessary to subtract the existing jobs in the study area. It is estimated that 148 to 222 people currently work within the study area. Eliminating these jobs brings the net gain from this alternative to between 443 and 902 jobs.

Additional indirect jobs will also be created in the regional economy, based on the recirculation of wages and purchases through the economy. It is estimated that between 394 and 734 indirect jobs will be created, as detailed in Table 4.3-21.

The construction of new facilities in the study area will also generate additional employment in the form of short-term construction jobs. Implementation of this alternative is expected to result in between $48.9 and $79.4 million in new construction within the study area. Assuming that 45% of this cost is for wages, between $22.0 million and $35.7 million in



construction wages will be paid out. Using the average construction wage of $38,388 for the region, 574 to 931 person-years of construction employment will be created.

**TABLE 4.3-21**
**Estimated Range of Indirect Employment –**
**Alternative 6 – Mixed Use 2**

| Land Use Category | Indirect Employment | |
|---|---|---|
| | Low Estimate | High Estimate |
| State Park | 2 | 3 |
| Columbia Cove Area | 1 | 3 |
| Water-Related Commercial | 23 | 60 |
| Hotel/Conference Center | 46 | 67 |
| Athletic Club | 7 | 27 |
| Office (Existing) | 94 | 188 |
| Office/Incubator | 186 | 297 |
| Retail | 8 | 20 |
| R&D/Office | 9 | 19 |
| Waterfront Commercial | 19 | 50 |
| Total | 394 | 734 |

Source: U.S. Department of Commerce and RKG Associates, Inc.

***Tax Revenue Created/Lost***

The implementation of this alternative is expected to generate between $48.9 and $79.4 million in new construction activity. The projected construction costs are detailed in Table 4.3-22.

**TABLE 4.3-22**
**Estimated Construction Costs –**
**Alternative 6 – Mixed Use 2**

| | Construction Costs | |
|---|---|---|
| **Land Use Category** | **Low Estimate** | **High Estimate** |
| State Park | $3,200,000 | $12,000,000 |
| Columbia Cove Area | $450,000 | $750,000 |
| Water-Related Commercial | $1,855,500 | $2,941,800 |
| Hotel/Conference Center | $26,150,000 | $32,547,500 |
| Residential Mid-Range | $6,857,220 | $11,184,900 |
| Athletic Club | $1,591,000 | $2,299,000 |
| Office/Incubator | $6,357,000 | $13,569,000 |
| Retail | $618,500 | $980,600 |
| R&D/Office | $317,850 | $678,450 |
| Waterfront Commercial | $1,546,250 | $2,451,500 |
| Total | $48,943,320 | $79,402,750 |

Source: Marshall Valuation Service and RKG Associates, Inc.

Assuming that these facilities are assessed at an average of 70% of their construction cost, the New London tax base would expand by between $34.2 million and $55.6 million. However, the demolition of existing structures in this area must also be accounted for. Approximately $6 million in existing tax base will be demolished to implement this plan, making the net increase in the tax base between $28.2 million and $49.6 million. This translates into a net increase in property tax revenues of between $770,000 and $1.4 million.

### *4.3.8 Summary*

The six land use alternatives for the study area have impacts that are widely varied. Table 4.3-23 provides an indication of the range of direct employment associated with each of the six land use alternatives



proposed for the study area. Implementation of any of the six alternatives (including the no action alternative) would result in a net increase in jobs and property tax revenues.

Alternative 4 (Business Campus) is the highest generator of jobs, followed by Alternatives 1, 6, 5, 2, and 3. It is interesting to note that Alternative 1 (No Action) generates the second highest number of jobs (1,779), behind only the Business Campus Alternative (#4). This is because the No Action Alternative anticipates the reuse of approximately 380,000 square feet of existing facilities at the Naval Undersea Warfare Center (NUWC). The reuse of this space accounts for more than 1,500 of the 1,779 jobs to be created under this alternative.

In addition to these direct jobs, the six alternatives are also expected to result in the creation of additional employment opportunities. These indirect jobs are expected to be created as direct employees on the site spend their wages in the regional economy for food, clothing, etc. Table 4.3-24 provides an estimate of the projected number of indirect jobs expected to be created in the study area for each of the six land use alternatives.

The land use alternatives for the study area also have varied projected construction impacts. Total construction costs range from as low as $3.2 million to as high as $113.0 million. Estimates of construction wages range from as low as $1.4 million to as high as $51 million. Between 37 and 1,304 person-years of construction are expected to be created through these projects, as shown in Table 4.3-25.

New tax revenues are projected to range from a modest $57,000 to as much as $2.0 million as presented in Table 4.3-26.

**TABLE 4.3-23**
**Range of Employment Estimates by Land Use Alternative**

**(Direct Employment – Low Estimate)**

| Land Use Category | Alt. 1 No Action | Alt. 2 Recreation/ Tourism | Alt. 3 Residential/ Commercial | Alt. 4 Business Campus | Alt. 5 Mixed Use 1 | Alt 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| State Park | 4 | 8 | 4 | 4 | 4 | 4 |
| Columbia Cove Area | - | 1 | 1 | 1 | 1 | 1 |
| Water-Related Commercial | - | 46 | 46 | 46 | 46 | 46 |
| Hotel | - | 27 | - | - | 0 | - |
| Recreation Center | - | 13 | - | - | 0 | - |
| Outdoor Recreation Area | - | - | 1 | - | 0 | - |
| Museum(s) | - | 4 | - | - | 0 | - |
| Hotel/Conference Center | - | - | - | 68 | 68 | 85 |
| Residential Mid-Range | - | - | - | - | - | - |
| Residential High-End | - | - | - | - | - | - |
| Athletic Club | - | - | - | - | 13 | 13 |
| Office (Existing) | 126 | 126 | 126 | 126 | 126 | 126 |
| Office/Incubator | 950 | 200 | 75 | 1,013 | 250 | 250 |
| Retail | - | 31 | 31 | 23 | 15 | 15 |
| R&D/Office | - | 13 | 13 | 13 | 13 | 13 |
| Waterfront Commercial | - | 38 | 38 | 38 | 38 | 38 |
| **Total** | **1,080** | **506** | **335** | **1,332** | **574** | **591** |

**(Direct Employment – High Estimate)**

| Land Use Category | Alt. 1 No Action | Alt. 2 Recreation/ Tourism | Alt. 3 Residential/ Commercial | Alt. 4 Business Campus | Alt. 5 Mixed Use 1 | Alt 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| State Park | 6 | 12 | 6 | 6 | 6 | 6 |
| Columbia Cove Area | - | 5 | 5 | 5 | 5 | 5 |
| Water-Related Commercial | - | 120 | 120 | 120 | 120 | 120 |
| Hotel | - | 40 | - | - | - | - |
| Recreation Center | - | 50 | - | - | - | - |
| Outdoor Recreation Area | - | - | 1 | - | - | - |
| Museum(s) | - | 14 | - | - | - | - |
| Hotel/Conference Center | - | - | - | 100 | 100 | 125 |
| Residential Mid-Range | - | - | - | - | - | - |
| Residential High-End | - | - | - | - | - | - |
| Athletic Club | - | - | - | - | 50 | 50 |
| Office (Existing) | 253 | 253 | 253 | 253 | 253 | 253 |
| Office/Incubator | 1,520 | 320 | 120 | 1,620 | 400 | 400 |
| Retail | - | 80 | 80 | 60 | 40 | 40 |
| R&D/Office | - | 25 | 25 | 25 | 25 | 25 |
| Waterfront Commercial | - | 100 | 100 | 100 | 100 | 100 |
| **Total** | **1,779** | **1,019** | **710** | **2,289** | **1,099** | **1,124** |

**TABLE 4.3-24**
**Range of Indirect Job Creation by Land Use Alternative**

| | Alternative 1 No Action | Alternative Recreation/ Tourism 2 | Alternative 3 Residential/ Commercial | Alternative 4 Business Campus | Alternative 5 Mixed Use 1 | Alternative 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| Low Estimate | 802 | 337 | 220 | 949 | 385 | 394 |
| High Estimate | 1,321 | 659 | 452 | 1,610 | 720 | 734 |

Source: U.S. Department of Commerce and RKG Associates, Inc.

**TABLE 4.3-25**
**Summary of Construction Impacts by Land Use Alternative**

| | Alt. 1 No Action | Alt. 2 Recreation/ Tourism 2 | Alt. 3 Residential/ Commercial | Alt. 4 Business Campus— | Alt. 5 Mixed Use 1 | Alt. 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| Construction Costs – Low | $3,200,000 | 28,321,500 | 40,131,680 | 56,752,040 | 43,713,320 | 48,943,320 |
| Construction Costs – High | $12,000,000 | 58,098,330 | 64,249,500 | 104,202,900 | 72,893,250 | 79,402,750 |
| Construction Wages – Low | $1,440,000 | 12,704,175 | 18,059,256 | 25,538,428 | 19,670,994 | 22,024,494 |
| Construction Wages – High | $5,400,000 | 26,144,249 | 28,912,275 | 46,891,305 | 32,801,963 | 35,731,238 |
| Construction Employment – Low | 38 | 331 | 470 | 665 | 512 | 574 |
| Construction Employment – High | 141 | 681 | 753 | 1,222 | 854 | 931 |

Source: Marshall Valuation Service and RKG Associates, Inc.

**TABLE 4.3-26**
**Summary of Tax Revenues Generated by Land Use Alternative**

| | Alt. 1 No Action | Alt. 2 Recreation/ Tourism 2 | Alt. 3 Residential/ Commercial | Alt. 4 Business Campus | Alt. 5 Mixed Use 1 | Alt. 6 Mixed Use 2 |
|---|---|---|---|---|---|---|
| Tax Revenues – Low | $61,152 | 375,704 | 603,116 | 931,651 | 671,562 | 771,507 |
| Tax Revenues – High | $229,320 | 946,459 | 1,064,008 | 1,838,437 | 1,229,190 | 1,353,587 |

Source: Marshall Valuation Service and RKG Associates, Inc.

## 4.4 Neighborhood/Housing Impacts

The overall character of the Fort Trumbull area will be enhanced by the disposition of a portion of the NUWC property (±16 acres) to the Department of Environmental Protection for the creation of a state-owned and operated park. This park will have a positive impact on the neighborhood, both physically and economically. An aesthetically pleasing park would beautify the area, significantly increase useable open space, provide public access to the waterfront, and, as a consequence of this $20 million public investment, increase surrounding land values to the benefit of the residents. These benefits will accrue to each of the alternatives to be discussed herein.

### *4.4.1 Alternative No. 1 – No Action*

The development of the NUWC property alone would not directly impact the area's housing stock since the No Action plan calls for only the creation of areas for open space, maritime conveyance, and public sale. There would be no project generated changes in the residential or commercial properties in the Fort Trumbull MDP area. However, private investment in the existing building stock would likely be stimulated by development of the State Park and, depending on the future use of the NUWC area to be sold, further investment in residential and commercial properties is possible.

### *4.4.2 Alternative No. 2 – Recreation/Tourism*

Both the Fort and Gateway Areas would be significantly impacted by a reuse option geared toward recreation and tourism. The state park at Fort Trumbull will serve to improve the appearance and waterfront accessibility of the area. The NUWC site has served

various military purposes since the American Revolution and has not been generally open to the public. Amenities such as a recreation center, museum, and the riverwalk would provide activities for New London residents to enjoy as well as tourist coming to this new destination. New opportunities for employment would be created through neighborhood and water-related retail activities, development of a hotel, and R&D, incubator, and office spaces. Neighborhood retail is proposed to service employees and visitors to the area, as well as adjoining residential areas.

In this alternative, the Gateway Area would become an extension of the adjoining Shaw's Cove Redevelopment Area that was redeveloped during the 1980's. The addition of office, incubator, and retail uses along Howard Street would complete a transition in use and function of this corridor, which began approximately 20 years ago. All alternatives that propose redevelopment of the Howard Street corridor would serve to implement City policy to renew this area.

The current neighborhood and its housing stock would cease to exist in its present configuration under this scenario. All of the 115 dwelling units in the area would be removed, of which 92 are currently occupied. (Fort Area: 81 dwelling units, 69 households. Gateway Area: 34 dwelling units, 23 households.) This would require the relocation of all the families in the area. In addition, 28 businesses may be displaced. All households and businesses displaced would receive assistance under the Connecticut Uniform Relocation Assistance Act and the Relocation Plan adopted as part of the MDP. Table 4.4-1 presents an estimate of displacement under this scenario.



### *4.4.3 Alternative No. 3 – Residential/Commercial*

This alternative proposal seeks to create a balance between the current character of the neighborhood with new opportunities for the future. The area would maintain a significant amount of land in residential uses (±25.8 acres) while adding the state park (±16 acres) along with new retail and commercial uses. The retail uses would be geared toward employees, the tourist coming to the area, as well as the neighborhood residents. The office component along Howard Street would serve to link the area with the existing commercial and industrial uses found in the Gateway Area. In addition to the public amenities such as the state park and riverwalk, an area of open space (±3.5 acres) would be preserved in the center of the Fort Area.

The housing stock would be beneficially changed by this land use alternative. Forty-five dwelling units in the Fort Trumbull area would be removed, of which 40 are occupied. The plan does allow 36 existing dwelling units, of which 29 are currently occupied, to remain. Also, 29 households in 34 dwelling units would be displaced from the Gateway Area.

In total, 79 of the 115 dwelling units would be displaced under this scenario. This would result in the relocation of 63 households. In addition, 28 business may be displaced. All households and businesses displaced would receive assistance under the Connecticut Uniform Relocation Assistance Act and the Relocation Plan adopted as part of this MDP. Table 4.4-2 presents an estimate of displacement under this scenario.

**TABLE 4.4-1**
**Estimate of Displacement –**
**Alternative 2 – Recreation/Tourism**

| Land Use Type | Current Property Use | Land Area (Ac.) | Total # of Dwelling Units | # of Dwelling Units to be Demolished | Total # of Households | # of Households to be Displaced | # of Businesses to be Displaced |
|---|---|---|---|---|---|---|---|
| State Park, Navy & Coast Guard Facilities | Fort Trumbull | 30.0 | 36 | 36 | 29 | 29 | 1 |
| Columbia Cove Marina | Fishing Docks | 0.0 | 0 | 0 | 0 | 0 | 0 |
| Hotel | RR | 3.2 | 0 | 0 | 0 | 0 | 0 |
| Recreation Center | RR | 1.5 | 0 | 0 | 0 | 0 | 1 |
| Museum | Res/Comm | 7.8 | 39 | 39 | 35 | 35 | 8 |
| Office (Existing) | Comm | 2.2 | 0 | 0 | 0 | 0 | 3 |
| Office/Incubator | Res/Comm | 5.0 | 17 | 17 | 8 | 8 | 7 |
| R&D/Office | Vacant/Industrial | 1.3 | 1 | 1 | 0 | 0 | 3 |
| Retail | Res/Comm | 3.0 | 17 | 17 | 15 | 15 | 2 |
| Water Related Commercial | Res/Comm | 2.5 | 5 | 5 | 5 | 5 | 2 |
| Waterfront Commercial | RR/Comm | 2.1 | 0 | 0 | 0 | 0 | 1 |
| WWTP | WWTP | 10.5 | 0 | 0 | 0 | 0 | 0 |
| | | **69.1** | **115** | **115** | **92** | **92** | **28** |

**TABLE 4.4-2**
**Estimate of Displacement –**
**Alternative 3 – Residential/Commercial**

| Land Use Type | Current Property Use | Land Area (Ac.) | Total # of Dwelling Units | # of Dwelling Units to be Demolished | Total # of Households | # of Households to be Displaced | # of Businesses to be Displaced |
|---|---|---|---|---|---|---|---|
| State Park, Navy & Coast Guard Facilities | Fort Trumbull | 16.0 | 0 | 0 | 0 | 0 | 0 |
| Columbia Cove Marina | Fishing Docks | 0.0 | 0 | 0 | 0 | 0 | 1 |
| Open Space | Res/Comm | 3.5 | 12 | 12 | 12 | 12 | 4 |
| Residential Mid-Range | Res/Comm | 16.5 | 63 | 27 | 52 | 23 | 5 |
| Residential High-End | Fort Trumbull | 6.4 | 0 | 0 | 0 | 0 | 0 |
| Office (Existing) | Comm | 2.2 | 4 | 4 | 0 | 0 | 3 |
| Office/Incubator | Res/Comm | 2.1 | 0 | 0 | 3 | 3 | 4 |
| R&D/Office | Vacant/Industrial | 1.3 | 1 | 1 | 0 | 0 | 3 |
| Retail | Res/Comm | 3.0 | 17 | 17 | 15 | 15 | 2 |
| Water Related Commercial | Res/Comm | 2.5 | 5 | 5 | 5 | 5 | 2 |
| Waterfront Commercial | RR/Comm | 4.3 | 0 | 0 | 0 | 0 | 1 |
| WWTP | WWTP | 10.5 | 0 | 0 | 0 | 0 | 0 |
| Residential | Res/Comm | 2.9 | 13 | 13 | 5 | 5 | 3 |
| | | **71.2** | **115** | **79** | **92** | **63** | **28** |

With this alternative, there would be new residential uses created in the Gateway Area. Twenty dwelling units would be built, resulting in a net loss of 14 dwelling units. Furthermore, there would be 115 mid-density dwelling units in the area (36 preserved plus 79 newly constructed) and 160 high-density dwelling units at the completion of the project. This would result in 275 units in the area compared to the 81 that currently exist.

### *4.4.4 Alternative No. 4 – Business Campus*

This alternative commits most of the developable area to office, incubator, and campus use. A hotel/conference center on 7.5 acres supports the office function. The Gateway Area along Howard Street would accommodate office/incubator use on the eastern side, much of which is an existing building, and residential and neighborhood retail use on the western side. This alternative brings residential use to Howard Street, which currently is predominately non-residential.

The current neighborhood and all of its housing stock except eight dwelling units would cease to exist in its current configuration under this scenario. Of the 115 dwelling units in the area, 107 would be removed, of which 86 are currently occupied. (Fort Area: 81 dwelling units removed, 69 households. Gateway Area: 26 dwelling units removed, 16 households.) This would require the relocation of 85 households from the area. There would be 22 new dwelling units created under this alternative for a net loss of 85 dwelling units. In addition, 28 businesses may be displaced. All households and businesses displaced would receive assistance under the Connecticut Uniform Relocation Assistance Act and the Relocation Plan adopted as

part of this MDP. Table 4.4-3 presents an estimate of displacement under this scenario.

### *4.4.5 Alternative No. 5 – Mixed Use 1*

The addition of a hotel/conference center, an athletic club/field, the Fort Trumbull State Park, and water-related commercial activities in this alternative seeks to expand and improve the current residential/commercial character of the neighborhood, creating a truly mixed land use environment. This is accomplished by expanding the office/incubator uses in the Gateway Area, changing the location of some of the residential uses, while keeping their number constant, and providing residents with opportunities for recreation. As with the other alternatives, the creation of the state park and riverwalk would serve to balance the built environment with open space and natural settings.

**TABLE 4.4-3**
**Estimate of Displacement –**
**Alternative 4 – Business Campus**

| Land Use Type | Current Property Use | Land Area (Ac.) | Total # of Dwelling Units | # of Dwelling Units to be Demolished | Total # of Households | # of Households to be Displaced | # of Businesses to be Displaced |
|---|---|---|---|---|---|---|---|
| State Park, Navy & Coast Guard Facilities | Fort Trumbull | 16.0 | 0 | 0 | 0 | 0 | 0 |
| Columbia Cove Marina | Fishing Docks | 0.0 | 0 | 0 | 0 | 0 | 1 |
| Hotel/Conference Center | Fort Trumbull/RR | 7.5 | 0 | 0 | 0 | 0 | 0 |
| Residential | Res/Comm | 3.1 | 14 | 14 | 11 | 11 | 3 |
| Office (Existing) | Res/Comm | 2.2 | 0 | 0 | 0 | 0 | 3 |
| Office/Incubator | Res/Comm | 22.1 | 79 | 79 | 67 | 67 | 13 |
| R&D/Office | Vacant/Industrial | 1.3 | 1 | 1 | 0 | 0 | 3 |
| Retail | Res/Comm | 1.8 | 8 | 8 | 2 | 2 | 1 |
| Water Related Commercial | Res/Comm | 2.5 | 5 | 5 | 5 | 5 | 2 |
| Waterfront Commercial | RR/Comm | 2.1 | 0 | 0 | 0 | 0 | 1 |
| WWTP | WWTP | 10.5 | 0 | 0 | 0 | 0 | 0 |
| Residential (Existing) | Residential | 0.8 | 8 | 0 | 7 | 0 | 1 |
| | | **69.9** | **115** | **107** | **92** | **85** | **28** |

The housing stock in the area would undergo no net change in number of dwelling units in this reuse option. The plan calls for 115 dwelling units, which is the same as the current number. Of these 115 dwelling units, 36 would be in existing structures, while the remaining 79 would be from new construction. This would mean the relocation of 63 households. (Fort Area: 45 dwelling units removed, 40 households. Gateway Area: 34 dwelling units removed, 23 households.) Additionally, there are 28 businesses in the area that may require relocation. All households and businesses displaced would receive assistance under the Connecticut Uniform Relocation Assistance Act and the Relocation Plan adopted as part of this MDP. Table 4.4-4 presents an estimate of displacement under this scenario.

### *4.4.6 Alternative No. 6 – Mixed Use 2*

The current neighborhood and its housing stock would cease to exist in its present configuration under this scenario. All of the 115 dwelling units in the area would be removed, of which 92 are currently occupied. (Fort Area: 81 dwelling units, 69 households. Gateway Area: 34 dwelling units, 23 households.) This would require the relocation of all the families in the area. In addition, 28 businesses may be displaced. All households and businesses displaced would receive assistance under the Connecticut Uniform Relocation Assistance Act and the Relocation Plan adopted as part of this MDP. The level of displacement under this alternative would the same as Alternative 2 as presented in Table 4.4-1.

**TABLE 4.4-4**
**Estimate of Displacement –**
**Alternative 5 – Mixed Use 1**

| Land Use Type | Current Property Use | Land Area (Ac.) | Total # of Dwelling Units | # of Dwelling Units to be Demolished | Total # of Households | # of Households to be Displaced | # of Businesses to be Displaced |
|---|---|---|---|---|---|---|---|
| State Park, Navy & Coast Guard Facilities | Fort Trumbull | 16.0 | 0 | 0 | 0 | 0 | 0 |
| Columbia Cove Marina | Fishing Dock | 0.0 | 0 | 0 | 0 | 0 | 0 |
| Hotel/Conference Center | Fort Trumbull/RR | 7.5 | 0 | 0 | 0 | 0 | 1 |
| Athletic Club/Field | Res/Comm | 3.5 | 12 | 12 | 12 | 12 | 4 |
| Residential Mid-Range | Res/Comm | 16.5 | 63 | 27 | 52 | 23 | 5 |
| Office (Existing) | Res/Comm | 2.2 | 0 | 0 | 0 | 0 | 3 |
| Office/Incubator | Res/Comm | 8.0 | 34 | 34 | 23 | 23 | 9 |
| R&D/Office | Vacant/Industrial | 1.3 | 1 | 1 | 0 | 0 | 3 |
| Water Related Commercial | RR/Comm | 2.5 | 5 | 5 | 5 | 5 | 2 |
| Waterfront Commercial | WWTP | 2.1 | 0 | 0 | 0 | 0 | 1 |
| WWTP | Residential | 10.5 | 0 | 0 | 0 | 0 | 0 |
| | | **70.1** | **115** | **79** | **92** | **63** | **28** |

## 4.5 Community Facilities and Services Impacts

### *4.5.1 Common Elements*

***Fire Protection*** – All of the land use alternatives are expected to have similar positive impacts on local fire and police services. The demolition of old, fire prone buildings is expected to reduce the potential for occurrence of an uncontrolled fire and enhance fire protection capabilities in the area. Construction of new buildings would be completed in accordance with current fire code and would employ sprinkler systems to provide additional fire protection capabilities. The improvement of public water service in the area will also allow for the installation of additional fire hydrants. Additionally, redevelopment activities can be designed to provide emergency vehicle access to the buildings, thus improving accessibility over existing conditions. Proposed roadway improvements would provide better emergency access to the area in the event of a fire. (Personal communication, 10/6/98, Chief Samuels). As part of the NUWC closure, the City of New London acquired a Navy fire truck, thus increasing its equipment inventory.

***Police Protection*** – Current land uses in the MDP area limits the volume of people, minimizing the need for police patrol. This is particularly evident at the NUWC property which is currently secured by Navy staff. All of the alternatives would result in increased use of the Fort Trumbull area, including NUWC, thus requiring more frequent police patrol of the area. Proposed alternatives which minimize open public access are viewed as most favorable for police protection. (Personal communication, 10/6/98, Deputy Chief Gavitt).

***Health Care*** – Health care facilities are not anticipated to be measurably affected by the implementation of any of the alternatives.

***Recreation*** – The disposition of a portion of the NUWC property (±16 acres) to the Department of Environmental Protection would result in a positive impact to parks and recreation. The state-owned and operated park would complement the local park network and provide additional waterfront access to the New London residents and to visitors from outside the New London area This new amenity would be afforded without any additional maintenance or staffing burden on the city, as these responsibilities would rest on the Department of Environmental Protection.

### *4.5.2 Alternative No. 1 – No Action*

Since development at the NUWC property associated with this alternative does not include a residential component, no impact on education or the need for additional educational facilities is anticipated. A positive impact on education is anticipated as a result of the Fort Trumbull State Park due to the educational aspect of the historic fort and associated park.

Emergency services (i.e., police, fire, ambulance, etc.) are not expected to be negatively impacted by this alternative. A far less intense land use would result in comparison to the fully operational NUWC facility at this site.

As indicated, the positive impacts of locating a state park in this area would be experienced under this alternative.

### *4.5.3 Alternative No. 2 – Recreation/Tourism*

A component of the Recreation/Tourism alternative includes cultural and museum recreation, with the potential for a 50,000 to 70,000 square foot museum facility. This, in combination with the educational



aspect of the proposed Fort Trumbull State Park, would have a positive impact on education in the community. No need for additional educational facilities or impact on New London's school system is anticipated in association with this alternative.

A positive benefit from the proposed Fort Trumbull State Park would be similar to that described in Alternative 1, except that the park would be expanded from 16 acres to approximately 30 acres. The construction of a proposed riverwalk along the waterfront would also complement existing and planned recreational facilities in New London.

Additional recreational amenities are offered in this alternative, including a cultural/museum active recreational use, a 25,000 square foot recreational center, a possible marina use, and an 80-room hotel with views of the waterfront. These features are expected to result in a positive impact to parks and recreation, since they would replace non-recreational land uses.

### *4.5.4 Alternative No. 3 – Residential/Commercial*

This alternative allocates approximately 23 acres of residential use east of the railroad in the Fort Area and at the NUWC property, as well as almost three acres of residential use in the Gateway Area. This would result in approximately 295 dwelling units in the area. Existing residential use in the project area occupies approximately 45.2 acres, with a resultant 126 dwelling units (as of August 1998). Therefore, the additional number of dwelling units under this alternative would be on the order of 169.

Table 4.5-1 illustrates the demographics of New London's school aged population under existing and proposed conditions in the MDP area under this alternative.

**TABLE 4.5-1**
**Demographics Concerning New London's School Aged Population**

| | 1990 Census Data | Estimated Existing MDP Area Conditions | Alternative No. 3 Projected Conditions | Anticipated Change from Existing to Proposed Conditions |
|---|---|---|---|---|
| Population | 28,540 | 335 | 785 | +450 |
| Number of Dwelling Units[1] | 10,712 | 126 | 295 | +169 |
| Population Density[2] | 2.66 | 2.66 | 2.66 | 0 |
| Population (% or number) Age 5 through 10 Years[3] | 6.5% | 22 | 51 | +29 |
| Population (% or number) Ages 11 through 13 Years[3] | 2.9% | 10 | 23 | +13 |
| Population (% or number) Ages 14 through 17 Years | 3.5% | 12 | 27 | +15 |

[1] Assumed one household per dwelling unit.
[2] MDP area population assumed to be the same as city-wide population density.
[3] Of the 594 10 and 11 year old students, one-half assumed to be age 10 and one-half assumed to be age 11.
Note: Information current as of August 1998

It is assumed that elementary school aged children are ages five through 10 years; middle school aged children are ages 11 through 13; and high school aged students are ages 14 through 17. As a result of the proposed conditions, there is the potential for an additional 57 children in the New London public school system (29 in elementary school, 13 in middle school, and 15 in high school). These estimates are somewhat conservative in that a fraction of school aged students attend non-public schools or require additional assistance through a special education program offered at the Little Red Schoolhouse. Additionally, it is possible that some of the residential population would be relocating from within the city and would, therefore, simply be a redistribution of school aged children.



At the present time, most of the New London schools operate at enrollment levels below the rated capacity of the buildings. The majority of the MDP area lies within the Harbor School elementary education district. This facility currently (1998/99 school year) has an excess capacity of about 100 students. The Bennie Dover Jackson middle school has additional capacity for approximately 50 students, and New London High School has capacity for an additional 75 students.

Based on the current enrollment and maximum capacities of educational institutions in New London, there will be no negative impact on these facilities if this alternative is implemented.

The positive benefits from the proposed Fort Trumbull State Park and riverwalk would be the same as described in previous alternatives. Additionally, 3.5 acres of open space are proposed under this alternative in the Fort Area. One function of this open space is expected to be passive recreation. This feature is expected to result in a positive impact to parks and recreation, since it would replace non-recreational land uses.

### *4.5.5 Alternative No. 4 – Business Campus*

This alternative allocates approximately 4.1 acres of residential use west of the railroad in the Gateway Area. This would result in approximately 30 dwelling units in the area. Existing residential use in the project area occupies approximately 45.2 acres, with a resultant 126 dwelling units (as of August 1998). Therefore, there would be an overall decrease in residential use, with an associated decrease in school aged children in the MDP area. Therefore, no negative impacts are anticipated with respect to educational facility needs under this alternative.

The positive benefits from the proposed Fort Trumbull State Park and riverwalk would be the same as described in previous alternatives. Additional recreational amenities are also offered in this alternative, including a possible marina use and a 200-room hotel/conference center with views of the waterfront. These features are expected to result in a positive impact to parks and recreation since they would replace non-recreational land uses.

### *4.5.6 Alternative No. 5 – Mixed Use 1*

This alternative allocates approximately 16.5 acres of residential use east of the railroad in the Fort Area and NUWC property with a resultant 115 dwelling units. Existing residential use in the project area occupies approximately 45.2 acres, with a resultant 126 dwelling units (August 1998). Therefore, there would be an overall decrease in residential use, with an associated decrease in school aged children in the MDP area. Therefore, no negative impacts are anticipated with respect to educational facility needs under this alternative.



The positive benefits from the proposed Fort Trumbull State Park and riverwalk would be the same as described in previous alternatives. Additional recreational amenities are also offered in this alternative, including a 25,000 athletic club/field, possible marina use, and a 200-room hotel/conference center with views of the waterfront. These features are expected to result in a positive impact to parks and recreation since they would replace non-recreational land uses.

### *4.5.7 Alternative No. 6 – Mixed Use 2*

The impacts of Alternative 6 are identical to that of Alternative 5, except that additional open/recreational space and opportunities are provided in Alternative 6.

## 4.6 Aesthetic/Visual Resource Impacts

The proposed municipal development of the Fort Trumbull area will alter the appearance of the neighborhood when viewed from both interior and exterior locations. The primary viewsheds that look out over this area include observers viewing south over Shaw's Cove, observers viewing the site from or across the Thames River (including small craft and ferry boats), the view from Pequot Avenue and the adjacent Pfizer site, and limited views from the Gateway Area. The railroad embankment limits external views of the Fort Area from the west.

The aesthetic quality of a landscape is somewhat subjective, depending upon the judgment and experiences of the viewer. Typical elements include mass, texture, color, height and width proportions, and the presence of natural versus common or unusual cultural features.

### *4.6.1 Alternative No. 1 – No Action*

The visual appearance of the site would have moderate change, even if no action were to be taken under the MDP process. The private sale of NUWC buildings could lead to alteration of that site, and the state park would still proceed to clear older wood frame structures from the southern half of the NUWC property. This would improve the view from the Fort Area.

There would be no significant changes anticipated in the Gateway and Fort Areas.

### *4.6.2 Alternative No. 2 – Recreation/Tourism*

The redevelopment of the Gateway and Lower Pequot Avenue Area would noticeably alter the appearance of these areas, with removal of existing buildings and construction of new ones. The exact composition of size, shape, and color has not been established at this time.

The Fort Area west of Smith Street would have a totally new look, intended to complement a new cultural center/museum and recreational center theme. This would likely involve new low-rise buildings with pedestrian walks, terraces, and parking lots. Many would consider this an improvement over existing conditions.

The proposed Columbia Cove area and adjacent hotel site would be designed to complement the waterfront and be visible across the river and Shaw's Cove. A well balanced waterfront design with public access would be attractive.

The focal point of Alternative 2 is an enlarged Fort Trumbull State Park, including removal of additional buildings in its northern area east of Smith Street. This would open up views of this congested site from



the river, and introduce natural elements into the viewshed.

### *4.6.3 Alternative No. 3 – Residential/Commercial*

New residential units would be constructed in the underutilized area along Howard Street and would need to complement the scale of the neighborhood. They would serve as a transition to office uses east of Howard Street. Generous front setbacks would be desirable between these separate uses. Similar colors and materials would also be desirable. However, it would be difficult to blend such diverse uses into a comfortable neighborhood. Medium and high density residential units, raised on fill or piers in flood prone areas, would be constructed in the Fort Area on both sides of the present Smith Street. They are visible from the river and Shaw's Cove and would detract from the waterfront vista. In contrast, the proposed Columbia Cove area is more likely to be of visual interest, as would be the state park.

The proposed open space between Goshen Street and the railroad is of internal interest and could be landscaped to form an attractive gateway beyond the Walbach Street bridge and buffer the residential area.

### *4.6.4 Alternative No. 4 – Business Campus*

The proposed Gateway Area mix of residential retail and office would be similar to Alternative 3, with minor spatial orientation changes. The core of this alternate is a large area of office and incubator business space in a campus type of layout. This offers the opportunity for an integrated visual design that could include courtyards, streetscape features, and mini parks. While not a distant viewshed attraction, it could complement the marina. Having a band of

green along the water and near the hotel would be a plus.

### *4.6.5 Alternative No. 5 – Mixed Use 1*

The proposed office and office/incubator areas in the Gateway Area has enough mass to create its own neighborhood character and needs only a suitable buffer or transition on the west side. The internal appearance and use would be self-defined.

The proposed hotel conference center and Columbia Cove area, as per previous alternatives, can be attractive waterfront features. The large residential area on both sides of Smith Street is a difficult backdrop to the marina and state park, particularly since flood management regulations would require higher elevations of these buildings. This could appear, from the water, as a cluttered hillside of little boxes.

### *4.6.6 Alternative No. 6 – Mixed Use 2*

This alternate is similar to Alternative 5, but with a reorientation of space in the Fort Area and in the northern portion of the NUWC property. A 12-acre passive recreation open space/athletic center would be provided along the river and the floodplain, with the Alternative 5 residential areas shifted west away from the water. This helps to hide the residential area into the hollow between Smith Street and the railroad embankment, and opens up the greenway along the river. It would complement the waterfront and hotel sites.



## 4.7 Public Utilities and Services Impacts

### *4.7.1 Common Elements*

Under the various land use alternatives, the MDP area would be partitioned into several different reuse parcels to be utilized by different tenants. There are various infrastructure improvements that are common to all of the land use alternatives. The common elements are summarized in the ensuing discussion. Elements that are specific to each alternative are described in subsequent sections.

Many of the utility systems that currently serve NUWC base, including electric, water, steam and sewage, are contiguous in nature. There will be a need to ensure that all parcels/buildings have use of all utilities during and following any site partitioning and construction.

#### *Water System*

The existing water distribution system east of the railroad right-of-way is currently in poor condition and is inadequate to provide the necessary fire flows for the proposed development uses. Fire flow tests performed to date have verified this. Computer simulations performed by the Navy have indicated that the flow capacity in the water mains is well below the normal capacity of the six-inch and eight-inch pipe sizes indicated on the record plans. This condition is probably due to advanced tuberculation of the pipe walls and inoperable gate valves.

It is anticipated that under Alternatives 2 through 6 the layout of the water distribution system infrastructure will be modified to accommodate a new street alignment and to meet needed fire flow demands for the development.

It is anticipated that the state park will be on a separate private water system which will be interconnected with the City of New London water system at several master meters at the perimeter of the park. The U.S. Coast Guard and the Naval facilities will be provided water from the New London system via easements across the state park or in a relocated street.

Water demands associated with all of the alternatives are anticipated to be less than historic demands when NUWC was fully operational. Water usage at the NUWC facility was estimated in March of 1987 by the Naval Facilities Engineering Command, Northern Division in a study entitled "Utilities Systems Assessment." At that time, all meters supplying water to the NUWC facility were found to be inoperative, as well as 23 of 26 individual building meters. Water demand was estimated based on population of the buildings multiplied by 30.75 gallons per capita per day usage. The daily flow was estimated at 43,671 gallons.

Existing water demands off the NUWC site but within the MDP area is estimated at 75,200 gpd. If the estimated NUWC use of 43,671 gpd is added to this, a rough estimate of the historic usage is 119,000.

### *Sanitary Sewer System*

There is currently adequate capacity in the existing sanitary sewer system to collect the existing and projected sewage flows (see specific program elements). It is anticipated that all discharges to the sewers will be domestic waste and that any industrial waste generated will be minimal in volume or be contained in a closed loop system and treated internally. Depending on the final configuration of the development, new



sanitary sewers may need to be constructed along any relocated road or driveway alignments.

### *Storm Drainage System*

Any significant introduction of constituents such as nutrients, toxics, heavy metals or pathogens, or significant alterations of the physical and chemical characteristics thereby degrading water quality would be considered an adverse impact to the estuarine waters of the Thames River. Hence, the use of advanced stormwater management associated development in the Fort Trumbull area will be necessary to protect coastal water quality and marine life.

If sufficient controls are not utilized, development and construction have the potential to alter stormwater quantities and quality. These alterations can be due to changes in vegetation, impervious cover (roads, parking lots, buildings), reduced infiltration, diversions, and modified channels or storm drains. Potential impacts include:

- higher peak flow rates;
- larger runoff volumes;
- increased flow velocities;
- soil erosion;
- water quality degradation; and
- sediment deposition.

The three fundamental storm drainage needs for this project are to (1) prevent nuisance flood problems in developed areas; (2) minimize downstream impacts; and (3) treat stormwater prior to discharge. Specific concepts are to control pollutants at their sources, plan for both frequent and rare storm events, avoid unnecessary impervious cover, and use multiple

treatment practices to reduce pollution loadings and concentrations.

It is anticipated that some existing storm drains may be cleaned and reused, while new drainage facilities will be required where new roads are constructed or older roads are rebuilt. Of special interest is providing adequate drainage of the low elevation points at railroad underpasses that tend to pond runoff during storm events which are coincident with high tides. All new storm drain discharge points will avoid existing or potential wetlands and have appropriate water quality controls.

Under all land use alternatives, the existing storm drainage system will need to be modified to accommodate any new roadway alignments and to correct deficiencies in the existing system. All of the storm drainage systems will incorporate stormwater quality renovation elements such as inlet chambers (Vortechnics, Stormsceptors, or similar equipment) and/or infiltration systems.

DEP general stormwater permits for construction activities in tidal areas specify post construction management requirements, including retention (i.e. infiltration) of the first inch of runoff from the site. If retention not possible, detention may be required. The general permit also requires 80% total suspended solids removal and velocity dissipation. These elements will be factored into the Municipal Development Planning process and project design.

Each of the alternatives will change the amount of impervious coverage due to the changes in land use. Table 4.7-1 presents the change in coverage for the six alternatives. The estimates are given in ranges since it is not possible to determine the exact amount until a more detailed design is developed.



**TABLE 4.7-1**
**Estimated Changes in Impervious Coverage**

| Alternative | Existing Impervious Coverage | Proposed Impervious Coverage | Change in Impervious Coverage |
|---|---|---|---|
| 1 – No Action | 45% | 40%-45% | 0%-5% Reduction |
| 2 – Recreation/ Tourism | 45% | 35%-40% | 5%-10% Reduction |
| 3 – Residential/ Commercial | 45% | 40%-45% | 0%-5% Reduction |
| 4 – Business Campus | 45% | 50%-60% | 5%-15% Increase |
| 5 – Mixed Use 1 | 45% | 45%-55% | 0%-10% Increase |
| 6 – Mixed Use 2 | 45% | 45%-55% | 0%-10% Increase |

Note: Numbers are approximate.

The changes range from a reduction of 5 to 10% under the Recreation/Tourism alternative to an increase of 5 to 15% under the Business Campus Alternative. The changes in the alternatives are largely due to the parking demand of each alternative. Conventional engineering design will be utilized to design the pipes for the storm sewer systems in each of the alternatives. The pipe sizes will be proportionally larger under the more intensive land uses.

***Gas***

Yankee Gas has adequate capacity to service the future development. Gas mains currently exist on most of the municipal streets in the vicinity of the project area. Some upgrading of the mains in the roadway may be required depending on the final configuration of development. Additional distribution facilities will need to be constructed on the land of the NUWC base, since a central steam plant previously heated it.

### *Energy Use and Conservation*

There is no known data readily available on historic energy use in the MDP area and guidelines have not been prepared for future energy use. In general, it is anticipated that new buildings will be more energy efficient than the older existing buildings, and will need to conform to or exceed current standards.

High electrical-demand uses are not proposed under any of the identified land use alternatives. However, it is anticipated that individual users will take advantage of energy-saving measures and available incentives. Additionally, future development projects will be designed in accordance with applicable state and local building codes with respect to electrical components, lighting, and HVAC.

### *Telephone and Cable*

The local telephone and cable utilities are required to extend capacity to serve developments if they are located on a public street. If it is desired to have facilities located underground in the roadway, the owner/developer is required to contribute to the cost. Extension of telephone service to private property would have to be completed by the owner/developer.

## *4.7.2 Alternative No. 1 – No Action*

Under the No Action alternative, there will be a net reduction in utility demand from the historical usage due to a reduction in the intensity of development.

### *Water Supply*

Potable water would continue to be obtained from the City of New London. Estimated water usage under



this alternative is 108,850 gallons per day (gpd). This is less than the estimated historic usage in the Fort Trumbull area. Flow meters that are currently installed to monitor water usage are inoperable and would have to be repaired or replaced in order to monitor the amount of water consumed by future tenants and uses. The State of Connecticut and other future occupants will need to upgrade the water distribution system to accommodate the needed fire flows. Table 4.7-2 presents estimates of domestic water demand for this alternative.

**TABLE 4.7-2**
**Estimated Domestic Water Usage –**
**Alternative 1 – No Action**

| Land Use/Type | Estimated Number of Employees | Estimated Domestic Water Usage (gpd/unit) | Estimated Sewage/ Domestic Water Usage (gpd) |
|---|---|---|---|
| Residential | 128 units * 3.5 persons/unit=448 | 75 gpd/person | 33,600 gpd |
| Commercial | 514,882 SF/250 SF/employee = 2060 employees | 20 gpd/person | 41,200 gpd |
| Industrial | Included in Commercial Usage | | |
| Business Park | 380,000 SF ÷ 250 SF/employee = 1520 | 20 gpd/employee | 20 gpd * 1520 employees = 30,400 gpd |
| WWTP | 20 estimated | 20 gpd/employee | 400 gpd |
| State Park | 50 | 20 gpd/employee 5 gpd/visitor | (20 gpd * 50 employee) + 450 visitors * 5 gpd) = 3,250 gpd |
| TOTAL | | | 108,850 gpd |

Note: Number of residential units and square footage as of August 1998.

***Sanitary Sewage***

Sewage discharge under this alternative would be below the historical rates at the NUWC facility and surrounding area. The existing sewer serving NUWC and would continue to serve the site and domestic sewage would continue to be treated at the regional WPCF. Meters would have to be installed at different discharge points of each parcel/building in order to monitor usage for billing purposes.

### *4.7.3 Alternative No. 2 – Recreation/Tourism*

***Water Supply***

Potable water would continue to be obtained from the City of New London. Per capita water usage is estimated to be 20 gallons per day per employee and five gallons per visitor. Estimated water usage is between 41,890 and 43,990 gallons per day. This is less than both historic and existing estimated demands in the Fort Trumbull area. Flow meters that are currently installed to monitor water usage are inoperable and would have to be repaired and/or replaced in order to monitor the amount of water consumed by future tenants and uses. Table 4.7-3 presents estimates of domestic water demand for this alternative.



**TABLE 4.7-3**
**Estimated Domestic Water Usage –**
**Alternative 2 – Recreation/Tourism**

| Land use/type | Estimated Employees | Estimated Domestic Water Usage (gallons per day/per unit) | Estimated Domestic Water Usage (gallons per day) |
|---|---|---|---|
| State Park | 100 | 20 gpd/employee 5 gpd/visitor | (20 gpd*100 employees) + 900 visitors * 5 gpd) = 6,500 gpd |
| Columbia Cove Waterfront Commercial | Assume 2000 SF office 2000 SF ÷ 250 SF/ employee = 8 | 20 gpd/slip | 1,600 - 2,000 gpd |
| Hotel | Assume 5,000 SF office 5,000 SF ÷ 250 SF/ employee = 20 | 20 gpd/employee 75 gpd/room | (20 gpd*20 employee) + 80 rooms *75 gpd) = 6,400 gpd |
| Recreation Center | 250 parking spaces x 2 visits/space/day | 15 gal/visit | 7,500 gpd |
| Museum | =10 estimated | 20 gpd/employee 5 gpd/visitor | (20 gpd * 10 employee) + 250-350 visitors * 5 gpd) = 1,450-1,950 gpd |
| Office (existing) | 50,500 ÷ 250 SF/employee = 202 | 20 gpd/employee | 4,040 gpd |
| Office/ Incubator | 250 SF/ employee = 320 | 20 gpd/employee | 6,400 gpd |
| R&D/Office | 250 SF/ employee = 20 | 20 gpd/employee | 400 gpd |

| | | | |
|---|---|---|---|
| Retail | 20,000 ÷ 650 SF/ employee = 30 | 0.10 gpd/sf of gross area | 2,000 gpd |
| Water-related Commercial | 250 SF/ employee = 100-120 | 20 gpd/employee | 2,000-2,400 gpd |
| Waterfront Commercial | 250 SF/employee = =160-200 | 20 gpd/employee | 3,200-4,000 gpd |
| WWTP | 20 estimated | 20 gpd/employee | 400 gpd |
| TOTAL | | | 41,890-43,990 gpd |

Note: Number of residential units and square footage as of August 1998.

### *Sanitary Sewage*

Sewage flow from the existing NUWC complex is not metered. Typically, sewage flow is equal to about 80% of the potable water used at most facilities.

The existing sanitary sewer serving NUWC would continue to serve the site and the sewage would continue to be treated at the regional WPCF. The daily sewage flow is estimated between 33,500 and 35,200 gallons. Therefore, no upgrading or rerouting of current sewer lines would be necessary. However, for future billing purposes, meters may have to be installed at different discharge points of each parcel/building in order to monitor usage.

### *Stormwater Systems*

The existing surface water drainage system at NUWC is controlled by a series of catch basins and underground piping. Over 20 buildings would be demolished to create the park and the new parking spaces



which would be required. Additions and relocations to the existing drainage system would be implemented to accommodate any new drainage changes that may result from the activity.

Stormwater associated with new development would be subject to the DEP permitting programs. Stormwater pollution prevention plans would need to be prepared prior to formal approval for permit coverage. The permit would need to include applicable components of the sediment and erosion and control site plan standards, site permits, and stormwater management site plans.

### *Steam*

High-pressure steam is currently generated in the steam plant (Building 99) and distributed throughout the site via a contiguous system. It is anticipated that Building 99 would no longer be used for steam generation.

### *Electrical*

Electrical service would continue to be provided by Connecticut Light and Power (CL&P). The maximum historical electrical demand at NUWC was 4243 kV or 4714 KVA. During this time period the incoming feeder was loaded to 88% of its rated capacity. Additionally, there is only one electrical feed that is metered for one owner. Assuming multiple users of electricity under this alternative, sub-metering of the current electrical system or the installation of additional electrical feeds would be required. Given the potential for different and varied electrical needs of future tenants, specific future amounts of electrical consumption cannot be predicted at this time. However, given comparable levels of usage between the

alternative build-out and the historical demand at NUWC, differences in electrical demand would not be significant.

### *4.7.4 Alternative No. 3 – Residential/Commercial Water Supply*

Potable water would continue to be obtained from the City of New London. Per capita water usage is estimated to be 75 gallons per day per resident. Estimated water usage under this alternative is between 105,230 and 106,830 gpd. This is less than historic usage in the Fort Trumbull area, and only slightly greater than existing estimated demands. Flow meters that are currently in place to monitor water usage are inoperable and would have to be repaired and or replaced in order to monitor the amount of water consumed by future tenants and uses. Table 4.7-4 presents estimates of domestic water demand for this alternative.



**TABLE 4.7-4**
**Estimated Domestic Water Usage –**
**Alternative 3 – Residential/Commercial**

| Land Use/Type | Estimated Employees | Estimated Domestic Water Usage (gpd/unit) | Estimated Domestic Water Usage (gpd) |
|---|---|---|---|
| State Park | 50 | 20 gpd/ employee 5 gpd/visitor | (20 gpd * 100 employee) + (900 visitors * 5 gpd) = 6,500 gpd |
| Columbia Cove Area | Assume 2000 SF office 20,000 SF ÷ 250 SF/ employee = 8 | 20 gpd | 1,600-2,000 gpd |
| Open Space | 0.09 employee/ acre x 3.5 ac = 0 | | |
| Residential Mid-Density | 135 SFA/SFD x 3.5 person/unit | 75 gpd/person | 35,440 gpd |
| Residential High-Density | 160 TH/APT x 3.5 person/unit | 75 gpd/person | 42,000 gpd |
| Office (existing) | 50,500 ÷ 250 SF/ employee = 202 | 20 gpd/ employee | 4,040 gpd |
| Office/Incubator | 250 SF/ employee = 120 | 20 gpd/ employee | 2,400 gpd |
| R&D/Office | 250 SF/ employee = 20 | 20 gpd/ employee | 400 gpd |
| Retail | 20,000 ÷ 650 SF/ employee = 31 | 0.10 gpd/sf of gross area | 2,000 gpd |
| Water-related Commercial | 250 SF/ employee = 100-120 | 20 gpd/ employee | 2,000-2,400 gpd |
| Waterfront Commercial | 250 SF/ employee = 80-100 | 20 gpd/ employee | 3,200-4000 gpd |
| WWTP | 20 estimated | 20 gpd/ employee | 400 gpd |

| | | | |
|---|---|---|---|
| Residential | 2.9 ac x 7 dwellings/ac x 3.5 persons/unit = 70 persons | 75 gpd/person | 5,250 gpd |
| TOTAL | | | 105,230-106,830 gpd |

Note: Number of residential units and square footage as of August 1998.

***Sanitary Sewage***

Sanitary sewage generation would be between 84,200 and 85,500 gallons per day. However, for future billing purposes, meters would have to be installed at different discharge points of each parcel/building in order to monitor usage.

***Stormwater Systems***

The existing surface water drainage system at NUWC is controlled by a series of catch basins and underground piping. As over 20 buildings would be demolished and new parking spaces would be provided, additions and relocations to the existing drainage system would be implemented to accommodate stormwater discharges. Any construction activities associated with the development of this alternative would be subject to DEP permitting programs.

***Steam***

It is anticipated that Building 99 would no longer be utilized for steam generation.



***Electricity***

Specific electrical demand cannot be estimated at this time. However, sub-metering of the current electrical system, or the installation of additional electrical feeds, would be required due to multiple users of electricity.

### *4.7.5 Alternative No. 4 – Business Campus Water Supply*

Potable water would continue to be obtained from the City of New London. Per capita water usage is estimated to be 20 gallons per day per employee. Estimated water usage is estimated between 67,565 and 71,665 gallons per day. This is less than historic and estimated current water usage in the Fort Trumbull area. Additionally, flow meters that are currently installed to monitor water usage are inoperable and would have to be repaired and/or replaced in order to monitor the amount of water consumed by future tenants and. uses. Table 4.7-5 presents estimates of domestic water demand for this alternative.

***Sanitary Sewage***

Sanitary sewage generation is estimated to be between 54,100 and 57,300 gallons per day. However, for future billing purposes, meters may have to be installed at different discharge points of each parcel/building in order to monitor usage.

**TABLE 4.7-5**
**Estimated Domestic Water Usage –**
**Alternative 4 – Business Campus**

| Land Use/Type | Estimated Employees | Estimated Domestic Water Usage (gallons per day/per unit) | Estimated Domestic Water Usage (gallons per day) |
|---|---|---|---|
| State Park | 50 | 20 gpd/employee 5 gpd/visitor | (20 gpd * 50 employee) + 450 visitors * 5 gpd) = 3,250 gpd |
| Columbia Cove Area | Assume 2,000 SF office 2,000 SF ÷ 250 S/F employee = 8 | 20 gpd/slip | 1,600-2,000 gpd |
| Hotel | 200 rooms | 50 gpd/unit | 10,000 gpd |
| Residential | 30 SFA/SFD x 3.5 persons/unit | 75 gpd/person | 7,875 gpd |
| Office (existing) | 50,500 SF/250 SF/ employee = 202 | 20 gpd/unit | 4,040 gpd |
| Office Incubator | 380,000-405,000/250 SF/employee = 1,520-1,620 employee | 20 gpd/ employee | 30,400-32,400 gpd |
| R&D/Office | 5,000/250 = 20 | 20 gpd/ employee | 400 gpd |
| Retail | 250 SF/ employee = 60 | 20 gpd/ employee | 1,200 gpd |
| Water-related Commercial | 25,000-30,000 ÷ 650 SF/ employee = 38-46 | .10 gpd/sf of gross area | 2,500-3,000 gpd |
| Water front Commercial | | 20 gpd/ employee | 1,600-2,000 gpd |



| | | | |
|---|---|---|---|
| WWTP | 160 dwellings/ac | 20 gpd/ employee | 3,200-4,000 gpd |
| Residential (existing) | 0.8 ac x 7 dwellings/ac x 3.5 persons/unit = 70 persons | 75 gpd/person | 1,500 gpd |
| TOTAL | | | 67,565-71,665 gpd |

Note: Number of residential units and square footage as of August 1998.

***Stormwater Systems***

Additions and relocations to the existing drainage system would be implemented to accommodate any new drainage changes that may result from the activity. As is the case with the Residential/Commercial alternative, any construction activities associated with the development of the Business alternative would be subject to the NPDES permit program.

***Steam***

Building 99 would be located within the Office/Incubator component of this reuse alternative. It is anticipated that Building 99 could provide steam to other non-military-retained buildings. However, submetering at points of use would have to be implemented in order to monitor usage.

***Electricity***

Specific electrical demand cannot be estimated at this time. However, sub-metering of the current electrical system, or the installation of additional electrical feeds, would be required due to multiple users of electricity.

### *4.7.6 Alternative No. 5 – Mixed Use 1*

#### *Water Supply*

Potable water would continue to be obtained from the City of New London. Estimated water usage under this alternative would be between 70,660 and 71,860 gallons per day. This is less than historic usage in the Fort Trumbull area and approximately equal to existing estimated usage in the area. Table 4.7-6 presents estimates of domestic water demand for this alternative.

#### *Sanitary Sewage*

Sanitary sewage generation is estimated to be between 56,500 and 57,500 gallons per day. However, for future billing purposes, meters would have to be installed at different discharge points of each parcel/building in order to monitor usage.

#### *Steam*

It is anticipated that Building 99 would no longer be used for steam generation.

#### *Electricity*

As is the case with the other alternatives, specific electrical demand cannot be estimated at this time. However, sub-metering of the current system or the installation of additional electrical feeds would be required because multiple users of electricity are also anticipated.



**TABLE 4.7-6**
**Estimated Domestic Water Usage –**
**Alternative 5 – Mixed Use 1**

| Land Use/Type | Estimated Employees or Units | Estimated Domestic Water Usage (gallons per day/per unit) | Estimated Domestic Water Usage (gallons per day) |
|---|---|---|---|
| State Park | 50 | 20 gpd/ employee 5 gpd/visitor | (20 gpd * 50 employee) + 450 visitors * 5 gpd = 3,250 gpd |
| Columbia Cove Area | Assume 2,000 SF office 2,000 SF ÷ 250 SF/ employee = 8 | 20 gpd/slip | 1,600-2,000 gpd |
| Hotel | Assume 10,000 SF office 10,000 SF ÷ 250 SF/ employee = 40 | 20 gpd/ employee 75 gpd/room | (20) gpd * 40 employee) + 200 rooms * 75 GPD) = 15,800 gpd |
| Athletic Club/Field | 25,000 SF x 6 visitors/day/ 1,000 SF | 15 gal/visitor | 2,250 gpd |
| Residential Mid-Range | 16.5 ac x 7 du/ac x 3.5 person/unit | 75 gpd/person | 30,320 gpd |
| Office (existing) | 50,500 ÷ 250 SF/ employee = 202 | 20 gpd/ employee | 4,040 gpd |
| R&D/Office | 5,000SF/250SF/ employee = 20 | 20 gpd/ employee | 400 gpd |
| Retail | 10,000 SF/650 SF/employee = 15 | 0.10 gpd/SF of gross area | 1,000 gpd |
| Water-related Commercial | 250 SF/employee = 100-120 | 20 gpd/ employee | 2,000-2,400 gpd |
| Waterfront Commercial | 250 SF/employee = 80-100 | 20 gpd/ employee | 1,600-2,000 gpd |

| | | | |
|---|---|---|---|
| WWTP | 40 estimated | 20 gpd/ employee | 400 gpd |
| TOTAL | | | 70,660-71,860 gpd |

Note: Number of residential units and square footage as of August 1998.

### *4.7.7 Alternative No. 6 – Mixed Use 2 Water Supply*

Potable water would continue to be obtained from the City of New London. Estimated water usage under this alternative would be between 74,410 and 75,610 gallons per day. This is less than historic usage in the Fort Trumbull area and approximately equal to existing demands. Table 4.7-7 presents estimates of domestic water demand for this alternative.

**TABLE 4.7-7**
**Estimated Domestic Water Usage – Alternative 6 – Mixed Use 2**

| Land Use/Type | Estimated Employees or Units | Estimated Domestic Water Usage (gallons per day/per unit) | Estimated Domestic Water Usage (gallons per day) |
|---|---|---|---|
| State Park | 50 | 20 gpd/ employee 5 gpd/visitor | (20 gpd * 50 employee) + 450 visitors * 5 gpd = 3,250 gpd |
| Columbia Cove Area | Assume 2,000 SF office 2,000 SF ÷ 250 SF/ employee = 8 | 20 gpd/slip | 1,600-2,000 gpd |
| Hotel | Assume 10,000 SF office 10,000 SF ÷ 250 SF/ employee = 40 | 20 gpd/ employee 75 gpd/room | (20) gpd * 40 employee) + 250 rooms * 75 GPD) = 19,550 gpd |



| | | | |
|---|---|---|---|
| Athletic Club/Field | 25,000 SF x 6 visits/day/ 1,000 SF | 15 gal/visitor | 2,250 gpd |
| Residential Mid-Range | 16.5 ac x 7 du/ac x 3.5 person/ unit | 75 gpd/person | 30,320 gpd |
| Office (existing) | 50,500 ÷ 250 SF/employee = 202 | 20 gpd/ employee | 4,040 gpd |
| R&D/Office | 5,000SF/250SF/ employee = 20 | 20 gpd/ employee | 400 gpd |
| Retail | 10,000 SF/650 SF/employee = 15 | 0.10 gpd/SF of gross area | 1,000 gpd |
| Water-related Commercial | 250 SF/ employee = 100-120 | 20 gpd/ employee | 2,000-2,400 gpd |
| Waterfront Commercial | 250 SF/ employee = 80-100 | 20 gpd/ employee | 1,600-2,000 gpd |
| WWTP | 40 estimated | 20 gpd/ employee | 400 gpd |
| TOTAL | | | 74,410-75,610 gpd |

Note: Number of residential units and square footage as of August 1998.

***Sanitary Sewage***

Sanitary sewage generation is estimated to be between 59,500 and 60,500 gallons per day. However, for future billing purposes, meters would have to be installed at different discharge points of each parcel/building in order to monitor usage.

### *Steam and Electricity*

Impacts to steam generation and electricity for Alternative 6 are the same as those for Alternative 5.

## 4.8 Cultural Resources Impacts

Future development in the Fort Trumbull MDP area will include ground disturbances from machine access, demolition of some existing structures, construction of new buildings, utility installation, and land scaping activities that are potentially damaging to archaeological resources. Alternative development plans will have varying affects on different parts of the project area, and possibly associated archaeological sites. Archeological reconnaissance surveys (Phase 1b) are planned in all areas that have been identified in the archaeological assessment surveys (Reeve, Keegan and Keegan 1998; TAMS 1998) as moderately and highly sensitive for prehistoric or historic period archaeological sites when future ground disturbances are anticipated.

Archeological investigations should not prevent future development of the project area. Representatives of the Connecticut Historical Commission (CHC) have indicated that Phase Ib, and, if necessary, Phase 2 and Phase 3 level investigation, can proceed over the long term as development plans and construction schedules are adopted. CHC has further indicated a willingness to work closely with all parties to assure protection of significant historic resources and to assure the success of New London revitalization.

In any of the alternatives, structures on the NWUC property would be impacted, including those in and out of the state park portion of the site. Although demolition of currently registered buildings is not contemplated, it is likely that some or all of the other



structures on this property would be destroyed in the implementation of various alternatives. Based on the building inventory presented in Section 2.3.3, reuse and rehabilitation of most of these buildings would be cost prohibitive. Future covenant restrictions are likely for Building 34 (Bowditch Hall) and Building 14 within the public sale portion of NUWC. These are described in detail in Section 2.7.2 of this document.

Numerous mitigative measures have been proposed to offset impacts to cultural resources. These are described in Section 5.0 of this document.

### *4.8.1 Alternative No. 1 - No Action*

Hypothetically, any archeological resources off the NUWC property would be preserved under this alternative. Due to the potentially sensitive contexts of certain properties in this area, the City of New London could require archeological investigations prior to future demolition and construction related to changing land use on a parcel-by-parcel basis. However, there is no mandatory or programmatic requirement to do so. Therefore, with no firm commitment to conduct additional archeological survey, additional resources may be lost if the no action alternative were pursued as compared with the other alternatives.

The LRA's preferred reuse plan for NUWC contemplates the reuse of five buildings (Buildings 2, 80, 96, 99, and 101) in the public sale portion of the property, as well as restoration and reuse of Buildings 13, 14, 27, 32, and 42 for office and as attractions. Buildings 41, 44, 34, 28, and 94 (which have been identified as eligible structures) would be demolished.

### *4.8.2 Alternative No. 2 – Recreation/Tourism*

Moderately to highly sensitive archeological areas are crossed by the state park expansion, the riverfront walkway, and the Pequot Avenue R&D area. Specific areas are likely to be affected by hotel construction, cultural museum/active recreation, the recreation center, and office/incubator construction. Archeological investigations should provide substantial thematic contexts for museum programs, exhibits, and tourism in this alternative. Substantial areas containing archeological sites might be preserved in this plan. Most, if not all of the identified eligible structures in the future development area at NUWC would be demolished. This is also true for Alternatives 3 through 6.

### *4.8.3 Alternative No. 3 – Residential/Commercial*

Residential development may be able to incorporate preservation of identified archeological sites as open space. Existing neighborhood homes of architectural interest and/or archeological significance could be preserved. Archeological sites identified in the R&D, office/incubator, and retail areas are expected to have intensive ground modifications that may require data recovery of significant archeological sites, if found.

### *4.8.4 Alternative No. 4 – Business Campus*

As in other alternatives, the business campus development is expected to affect moderately to highly sensitive archeological areas, with few opportunities for open space preservation of identified archeological sites.



### *4.8.5 Alternative No. 5 – Mixed Use 1*

Similar to Alternative 3, residential and recreational development can be designed to incorporate archeological site preservation in the open space areas.

Office/incubator, R&D, and hotel/conference center development are less adaptable for archeological preservation.

### *4.8.6 Alternative No. 6 – Mixed Use 2*

Impacts associated with Alternative 6 would be similar to Alternative 5, except that the larger area of open space designated in the eastern portion of the MDP area would result in less ground disturbance and, therefore, be more adaptable for archeological preservation.

## 4.9 Traffic and Parking Impacts

### *4.9.1 Traffic Generation*

Analyses required to assess existing (1998) and future year (2010) anticipated traffic volumes (with and without site traffic) for the weekday A.M. and P.M. peak highway hours are based on manual turning movement counts conducted on Thursday, August 13, 1998, and on Fridays, August 14 and 21, 1998. The turning movement counts performed for the periods 7:00 A.M.-9:00 A.M. and 4:00 P.M.-6:00 P.M. determined that weekday peak commuter hours are from 8:00-9:00 A.M. and 4:15-5:15 P.M. Existing (1998) weekday A.M. and P.M. traffic volumes are presented in Appendix D (Figures 1 and 2, respectively). Based on existing traffic patterns and proposed development land uses, it is anticipated that the most intense traffic impacts will occur during the weekday A.M. and P.M. peak commuter hours.

Future year 2010 projected traffic volumes without Fort Trumbull MDP development consists of expansion of existing year 1998 traffic volumes by 1.0% per year compounded annually plus the addition of peak hour traffic generated by the Pfizer facility. Estimated 2010 traffic volumes for the A.M. and P.M. weekday peak commuter hours, without the Fort Trumbull MDP area development, are presented in Appendix D (Figures 3 and 4, respectively).

Anticipated future year traffic generated by the proposed Fort Trumbull MDP were developed for six development alternatives including:

- Alternative 1 – No Action Alternative;
- Alternative 2 – Recreation/Tourism Alternative;
- Alternative 3 – Residential/Commercial Alternative;
- Alternative 4 – Business Park Alternative;
- Alternative 5 – Mixed Use 1; and
- Alternative 6 – Mixed Use 2.

Estimates of anticipated traffic generated by these alternatives were developed for the various proposed land uses in the MDP area using the Institute of Transportation Engineers', "Trip Generation" publication, 6th Edition. Trips generated by existing office space (50,500 square feet) are based on General Office Building trip generation rates (ITE Land Use 710), whereas proposed office/incubator and Research & Development office spaces are based on ITE Land Use 760 for Research and Development Center Uses.

Projected traffic generation is summarized in Table 4.9-1.



**TABLE 4.9-1**
**Summary of Projected Traffic Counts**

| Condition | A.M. | | P.M. | |
|---|---|---|---|---|
| | Entering | Exiting | Entering | Exiting |
| Alternative 1 – No Action | 1,081 | 326 | 333 | 961 |
| Alternative 2 – Recreation/Tourism | 690 | 402 | 280 | 565 |
| Alternative 3 – Residential/ Commercial | 575 | 478 | 341 | 495 |
| Alternative 4 – Business Campus | 973 | 466 | 337 | 812 |
| Alternative 5 – Mixed Use 1 | 654 | 417 | 315 | 541 |
| Alternative 6 – Mixed Use 2 | 671 | 428 | 331 | 556 |

Development Alternatives 1, 4, and 6 represent high trip generations relative to the six development alternatives and are used for analysis in this report. Tables 4.9-2 and 4.9-3 present a breakdown of the anticipated site trips generated during the weekday A.M. and P.M. peak highway hours for Alternatives 4 and 6, respectively.

Site traffic is distributed over the study area roadway system based on existing traffic patterns and distribution patterns presented in previous traffic reports for developments in the area, including the traffic study for Pfizer's adjacent facility. The distribution pattern used for the MDP area is as follows:

- 77% of the site traffic is oriented to and from the north and east, by way of Howard Street and Bank Street through New London's Central Business District, to/from the I-95 interchange;

- 8% of the site traffic is oriented to and from the north and west by way of Bank Street using Howard Street and Shaw Street for access;
- 10% of the site traffic is oriented to and from the west by way of Willetts Avenue; and
- 5% of the site traffic is oriented to and from the south by way of Pequot Avenue.

Alternatives 4 and 6 include approximately 12 land use areas within each alternate. For purposes of traffic analyses, access to development area is grouped within each alternate by a common access via Hamilton Street via the intersection of Howard Street/ Walbach Street, via the intersection of Trumbull Street/Pequot Avenue, via Trumbull Street and via Walbach Street.

Site generated traffic in Alternatives 4 and 6 were superimposed on the future year base traffic volumes to create future year (2010) combined traffic volumes for the weekday A.M. and P.M. peak highway hours. Appended Figures 5, 6, 7 and 8 present the combined traffic volumes for each scenario (Appendix D).

Anticipated Site Generated Traffic
Alternate 4 – Business Campus Alternate
Fort Trumbull MDP, New London, Connecticut

| Land Use | Size | ITE Code | Weekday Trip Generation Rate | | | | | | Weekday Generated Vehicle Trips | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | AM | | PM | | Daily | | AM | | PM | | Daily | |
| | | | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit |
| PENINSULA AREA | | | | | | | | | | | | | | |
| State Park | 16.0 Acres | | | - | - | - | - | - | 45 | 5 | 10 | 40 | 100 | 100 |
| Columbia Cove Marina | 100 Slips | 420 | 0.03 | 0.05 | 0.11 | 0.08 | 1.48 | 1.48 | 3 | 5 | 11 | 8 | 148 | 148 |
| Hotel/Conference Center | 200 Rooms | 310 | 0.34 | 0.22 | 0.32 | 0.29 | 4.12 | 4.12 | 68 | 44 | 64 | 58 | 824 | 824 |
| Office/Incubator | 375,000 | 760 | 1.03 | 0.21 | 0.16 | 0.92 | 4.06 | 4.06 | 386 | 79 | 60 | 345 | 1,523 | 1,523 |
| Water Related Commercial | 30,000 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 93 | 100 | 34 | 45 | 610 | 610 |
| Waste Water Treatment Plant | 40 Employees | - | - | - | - | - | - | - | (30) (Assumes 3 shifts with 30 employees on first shift, 6 employees on second shift and 4 employees on third shift) | (4) | (6) | (30) | (60) | (60) |
| **Peninsula Area Sub Totals** | | | | | | | | | **625** | **237** | **185** | **526** | | |
| GATEWAY AREA | | | | | | | | | | | | | | |
| Residential | 30 Single Family attached/ detached units | 270 | 0.11 | 0.40 | 0.40 | 0.22 | 3.75 | 3.75 | 4 | 12 | 12 | 7 | 113 | 113 |
| Office (Existing) | 50,500 sq. ft. | 710 | 1.37 | 0.19 | 0.25 | 1.24 | 5.51 | 5.51 | 69 | 10 | 13 | 63 | 278 | 278 |
| Retail/ | 3,750 sq. ft. | 852 | 15.51 | 15.51 | 16.94 | 17.63 | - | - | 58 | 58 | 64 | 66 | - | - |
| Specialty Retail | 11,250 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 35 | 38 | 13 | 17 | 229 | 229 |
| R & D Office | 70,000 sq. ft. | 760 | 1.03 | 0.21 | 0.16 | 0.92 | 4.06 | 4.06 | 72 | 15 | 12 | 65 | 305 | 305 |
| Waterfront Commercial | 25,000 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 77 | 84 | 28 | 37 | 509 | 509 |
| Residential (existing) | 8 dwelling units (existing) | 210 | 0.19 | 0.56 | 0.65 | 0.36 | 4.79 | 4.79 | 2 | 5 | 5 | 3 | 38 | 38 |
| Office/Incubator | 30,000 sq. ft. | 760 | 1.03 | 0.21 | 0.16 | .92 | 4.06 | 4.06 | 31 | 7 | 5 | 28 | 122 | 122 |
| **Gateway Area Sub Totals** | | | | | | | | | **348** | **229** | **152** | **286** | | |
| **TOTALS** | | | | | | | | | **973** | **466** | **337** | **812** | | |

(xx) Estimated

## ANTICIPATED SITE GENERATED TRAFFIC
### Alternate 6 – Mixed Use Alternate #2
### Fort Trumbull MDP, New London, Connecticut

| Land Use | Size | ITE Code | Weekday Trip Generation Rate | | | | | | Weekday Generated Vehicle Trips | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | AM | | PM | | Daily | | AM | | PM | | Daily | |
| | | | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit | Enter | Exit |
| PENINSULA AREA | | | | | | | | | | | | | | |
| State Park | 16 Acres | (Note 1) | - | - | - | - | - | - | 45 | 5 | 10 | 40 | 100 | 100 |
| Columbia Cove Marina | 100 Slips | 420 | 0.03 | 0.05 | 0.11 | 0.08 | 1.48 | 1.48 | 3 | 5 | 11 | 8 | 148 | 148 |
| Hotel/Conf Center | 250 Rooms | 310 | 0.34 | 0.22 | 0.32 | 0.29 | 4.12 | 4.12 | 85 | 55 | 80 | 73 | 1030 | 1030 |
| Athletic Club/Field | 25,000 sq. ft. | 492 | 0.73 | 0.73 | 0.92 | 0.92 | 8.57 | 8.57 | 19 | 19 | 23 | 23 | 215 | 215 |
| | | | (Assumes 50% in, 50 percent out) | | | | | | | | | | | |
| Residential Mid-Range | 115 Units (Single family attached and deatched units) | 270 | 0.11 | 0.40 | 0.40 | 0.22 | 3.75 | 3.75 | 13 | 46 | 46 | 25 | 432 | 432 |
| Water Related Commercial | 30,000 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 93 | 100 | 34 | 45 | 610 | 610 |
| Waste Water Treatment Plant | 40 Employ Plant | - | - | - | - | - | - | - | (30) | (4) | (6) | (30) | (60) | (60) |
| | | | | | | | | | (Assumes 3 shifts with 30 employees on first shift, 6 employees on second shift and 4 employees on third shift) | | | | | |
| | | | | | | | **Peninsula Area Sub Totals** | | **288** | **234** | **210** | **244** | | |
| GATEWAY AREA | – | | | | | | | | | | | | | |
| Office (Existing) | 50,500 sq. ft. | 710 | 1.37 | 0.19 | 0.25 | 1.24 | 5.51 | 5.51 | 69 | 10 | 13 | 63 | 278 | 278 |
| Office/Incubator | 100,000 sq. ft. | 760 | 1.03 | 0.21 | 0.16 | .92 | 4.06 | 4.06 | 103 | 21 | 16 | 92 | 406 | 406 |
| Retail/ | 2,500 sq. ft. | 852 | 15.51 | 15.51 | 16.94 | 17.63 | - | - | 39 | 39 | 43 | 44 | - | - |
| Specialty | 7,500 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 23 | 25 | 9 | 11 | 153 | 153 |
| R & D Office | 70,000 sq. ft. | 760 | 1.03 | 0.21 | 0.16 | 0.92 | 4.06 | 4.06 | 72 | 15 | 12 | 65 | 305 | 305 |
| Waterfront Commercial | 25,000 sq. ft. | 814 | 3.08 | 3.33 | 1.11 | 1.48 | 20.34 | 20.34 | 77 | 84 | 28 | 37 | 509 | 509 |
| | | | | | | | **Gateway Area Sub Totals** | | **383** | **194** | **121** | **312** | | |
| | | | | | | | **TOTALS** | | **671** | **428** | **331** | **556** | | |

(xx) Estimated

Notes: 1. DEIS – Disposal and Reuse of Naval Underwater Warfare Center, New London, Connecticut; January 23, 1998, prepared by TAMS, page 4.4-2 and Table 4.4-1.

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Anticipated future year 2010 combined traffic volumes are sufficient to require roadway and intersection improvements within and external to the MDP area. Vertical and horizontal clearances at existing railroad underpasses on Pequot Avenue and on Walbach Street were examined and three roadway improvement options (A, B, and C) were developed. These improvement plans, described in Section 3.0 of this document, were evaluated for the A.M. and P.M. peak commuter hours in alternate development scenarios 4 and 6.

Future year 2010 combined traffic volumes, as presented in Appendix D (Figures 5, 6, 7 and 8), are consistent with roadway improvement Options A and C. Roadway Option B introduces three improvement strategies concepts which alter existing traffic patterns; namely, Shaw Street is proposed to be a cul-de-sac south of Harris Street; Hamilton Street (east of Howard Street) will cross the rail line and provide new access to the site on the east side of the railroad; and Walbach Street would cease to be a vehicular access under the railroad. Accordingly, revised traffic patterns are presented for the weekday A.M. and P.M. peak highway hours for Alternatives 4 and 6 in Appendix D (Figures 9, 10, 11 and 12).

### *4.9.2 Intersection Capacity Analysis*

Capacity analyses and levels of service determinations were computed to determine the adequacy of study area intersections in existing year 1998, future year 2010 without site traffic, and future year 2010 with site traffic. Future year 2010 analyses with site traffic were performed under roadway improvement Options A, B, and C for Alternatives 4 and 6. Capacity analyses were performed at the following intersections:

- Bank Street at Shaw Street/Truman Street;
- Bank Street at Howard Street/Reed Street;
- Howard Street at Hamilton Street;
- Hamilton Street at Shaw Street;
- Howard Street at Walbach Street;
- Howard Street at Shaw Street/Pequot Avenue/ Willetts Avenue;
- Pequot Avenue at Trumbull Street/Pfizer Drive; and
- Howard Street at Relocated Hamilton Street (Applicable to Roadway Option B only).

Intersection capacities were performed in accordance with analyses techniques described in the 1994 Highway Capacity Manual, *Special Report 209*, published by the Transportation Research Board, National Research Council, Washington, D.C. Capacity analysis software is Highway Capacity Software – 1994 version 2.4g (signalized intersections) and version 2.1g (unsignalized intersections).

### *4.9.3 Evaluation Methodology*

The adequacy of the study area intersections were analyzed to determine operating characteristics and the need for proposed improvements. Level of Service analyses were computed for existing and future year operations using these analyses.

A study of capacity is important in determining the ability of a specific roadway or intersection to accommodate traffic under various levels of service. Level of service (LOS) is a qualitative measure describing driver satisfaction with a number of factors that influence the degree of traffic congestion. These factors include speed and travel time, traffic interruption, freedom of maneuverability, safety, driving comfort and convenience, and delay.



There are six levels of service describing flow conditions. The highest, Level of Service A, describes a condition of free flow, with low volumes and high speeds. There is little or no restriction in maneuverability due to the presence of other vehicles, and drivers can maintain speeds with little or no delay. This occurs when vehicle progression is extremely favorable, and most vehicles arrive during the green phase of a traffic signal.

Level of Service B represents a stable traffic flow with operating speeds beginning to be restricted somewhat by traffic conditions. Drivers still have reasonable freedom to select their speed and lane operations.

Level of Service C, which is normally utilized for design purposes, describes a stable condition of traffic operation. It entails moderately restricted movements due to higher traffic volumes, but traffic conditions are not objectionable to motorists.

Level of Service D, acceptable for traffic operation in urban environments and during peak hours of traffic flow, reflects a condition of more restrictive movement for motorists. Queues and delays may occur during short peaks, but lower demands occur often enough to permit clearance of developing queues, thus preventing excessive backup. At Level of Service D, the influence of congestion becomes more noticeable and longer delays may result from unfavorable vehicle progression.

Level of Service E is defined as the actual capacity of the roadway or intersection, and involves delay to all motorists due to congestion. This is considered to be the limit of acceptable delay. These high delay values generally indicate poor vehicle progression.

The lowest, Level of Service F, is described as forced flow and is characterized by volumes greater than the

theoretical roadway capacity. Complete congestion occurs and, in extreme cases, the volume passing a given point drops to zero. This is generally considered unacceptable traffic operations.

Levels of service criteria for signalized intersections is quantified in terms of delay, which may be used as a measure of driver discomfort, excess fuel consumption, and lost travel time. Specifically, level of service criteria, stated in terms of the average "stopped" delay per vehicle, are presented in Table 4.9-4.

**TABLE 4.9-4**
**Levels of Service for Signalized Intersections**

| Level of Service | Stopped Delay per Vehicle (seconds) |
|---|---|
| A | 5.0 or less |
| B | 5.1 to 15.0 |
| C | 15.1 to 25.0 |
| D | 25.1 to 40.0 |
| E | 40.1 to 60 |
| F | greater than 60 |

Level of service criteria for unsignalized intersections is given in terms of reserve or unused capacity of the approach lane in question under STOP control. These are presented in Table 4.9-5.

**TABLE 4.9-5**
**Levels of Service for Unsignalized Intersections**

| Level of Service | Reserve Capacity (vehicles per hour) |
|---|---|
| A | 400 or more |
| B | 300 to 399 |
| C | 200 to 299 |
| D | 100 to 199 |
| E | 0 to 99 |
| F | Demand exceeds lane capacity. |



These levels of service are defined by the 1994 *Highway Capacity Manual, Special Report 209*, published by the Transportation Research Board, National Academy of Sciences.

Table 4.9-6 summarizes anticipated levels of service for the study area intersections. Table 4.9-7 presents critical volume/capacity ratios. The analyses assume that future improvements would be made to mitigate anticipated traffic flows including:

**TABLE 4.9-6**

**ANTICIPATED LEVELS OF SERVICE**
**Fort Trumbull MDP Area**
**New London, CT**

| | | | | | Year 2010 – Development Alternative 4 | | | | | | Year 2010 – Development Alternative 6 | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1998 Existing | | 2010 w/o site[1] | | Road Alt A | | Road Alt B | | Road Alt C | | Road Alt A | | Road Alt B | | Road Alt C | |
| Intersection | AM | PM | AM | PM | AM | PM | AM | PM | AM | PM | AM | PM | AM | PM | AM | PM |
| Bank Street & Reed St./Howard Street | B | B | C | D | C | D | C | D | C | D | C | C | C | C | C | C |
| Bank Street & Truman St./Shaw Street | B | B | B | B | B | B | B | B | B | B | B | B | B | B | B | B |
| Hamilton Street/Shaw St. & Commercial Drive | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] | A[2] |
| Howard Street & Hamilton Street | A[3] | A[3] | A[3] | A[3] | A | A | n/a | n/a | A | A | A | A | n/a | n/a | A | A |
| Howard Street & Relocated Hamilton Street | n/a | n/a | n/a | n/a | n/a | n/a | B | B | n/a | n/a | n/a | n/a | B | B | n/a | n/a |
| Howard Street & New Bridge Road | n/a | n/a | n/a | n/a | n/a | n/a | D | C | n/a | n/a | n/a | n/a | B | B | n/a | n/a |
| Howard Street & Walbach Street | A[3] | A[3] | A[3] | A[3] | B | B | n/a | n/a | B | B | B | B | n/a | n/a | B | B |
| Howard St./Shaw St./Willetts Ave./Pequot Avenue | A[3] | A[3] | C[3] | F[3] | C | C | B | B | C | C | B | C | B | B | B | C |
| Pequot Ave. & Trumbull St/Pfizer Drive | A[3] | A[3] | F[3] | F[3] | B | B | B | B | B | B | B | B | B | B | B | B |

n/a – not applicable, intersection does not exist.
Notes: All intersections are signalized except as noted
(1) Includes Pfizer Global Development Facility
(2) All Way Stop Sign Controlled
(3) Two Way Stop Sign Controlled

**TABLE 4.9-7**
**Anticipated Critical Volume/Capacity Ratios**
**For Trumbull MDP Area**

| Intersection | 1998 Existing | | 2010 w/o site[1] | | Year 2010 – Development Alternative 4 | | | | | | Year 2010 – Development Alternative 6 | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Road Alt A | | Road Alt B | | Road Alt C | | Road Alt A | | Road Alt B | | Road Alt C | |
| | A.M. | P.M. | | | A.M. | P.M. | A.M. | P.M. | A.M. | P.M. | A.M. | P.M. | A.M. | P.M. | A.M. | P.M. |
| Bank & Reed St./Howard. | 0.40 | 0.60 | 0.88 | 0.97 | 0.91 | 0.95 | 0.91 | 0.95 | 0.91 | 0.95 | 0.81 | 0.86 | 0.81 | 0.86 | 0.81 | 0.86 |
| Bank & Truman/Shaw | 0.61 | 0.83 | 0.71 | 0.87 | 0.61 | 0.78 | 0.61 | 0.78 | 0.61 | 0.78 | 0.61 | 0.78 | 0.61 | 0.78 | 0.61 | 0.78 |
| Hamilton/Shaw & Commercial Dr.[2] | 0.08[2] | 0.14[2] | 0.09[2] | 0.26[2] | 0.12[2] | 0.27[2] | 0.14[2] | 0.38[2] | 0.12[2] | 0.27[2] | 0.11[2] | 0.26[2] | 0.14[2] | 0.43[2] | 0.11[2] | 0.26[3] |
| Howard & Hamilton | 0.06[3] | 0.15[3] | 0.22[3] | 0.47[3] | 0.63 | 0.70 | n/a | n/a | 0.63 | 0.70 | 0.52 | 0.66 | n/a | n/a | 0.52 | 0.66 |
| Howard & Relocated Hamilton St. | n/a | n/a | n/a | n/a | n/a | n/a | 0.63 | 0.61 | n/a | n/a | n/a | n/a | 0.61 | 0.53 | n/a | n/a |
| Howard & New Bridge Rd. | n/a | n/a | n/a | n/a | n/a | n/a | 0.89 | 0.87 | n/a | n/a | n/a | n/a | 0.73 | 0.80 | n/a | n/a |
| Howard & Walbach St. | 0.07[3] | 0.09[3] | 0.18[3] | 0.27 | 0.80 | 0.81 | n/a | n/a | 0.80 | 0.81 | 0.56 | 0.73 | n/a | n/a | 0.56 | 0.72 |
| Howard/Shaw/Willetts/Pequot | 0.36[3] | 0.57[3] | 0.99[3] | 1.74[3] | 0.83 | 0.95 | 0.73 | 0.80 | 0.83 | 0.95 | 0.80 | 0.89 | 0.68 | 0.75 | 0.80 | 0.89 |
| Pequot & Trumbull/Pfizer Dr. | 0.04[3] | 0.03[3] | 0.81[3] | 1.08[3] | 0.79 | 0.76 | 0.76 | 0.73 | 0.72 | 0.76 | 0.76 | 0.71 | 0.73 | 0.71 | 0.72 | 0.71 |

n/a – not applicable, intersection does not exist.
Please note all intersections are signalized except as noted.
(1) Includes Pfizer Global Development Facility
(2) All-way Stop Sign Controlled
(3) Two-way Stop Sign Controlled

- Implementation of Roadway Improvement Options A, B, or C as appropriate;
- Providing a westbound double left turn lane and a northbound double right turn lane at the intersection of Bank Street/Howard Street/Reed Street.
- An upgraded traffic signal installation with new timing, phasing and sequencing at the Bank Street/Howard Street/Reed Street intersection;
- Revised timing of the existing traffic signal at Bank Street/Shaw Street/Trumbull Street;
- Installation of new traffic signals (from STOP sign control) at the following intersections:
  - Howard Street at Hamilton Street;
  - Howard Street at Relocated Hamilton Street (Roadway Improvement Option B only);
  - Howard Street at Walbach Street;
  - Howard Street at Shaw Street/Willetts Avenue/Pequot Avenue; and Pequot Avenue at Trumbull Street/Pfizer Drive.

In addition, on-street parking on Howard Street between Shaw Street and Walbach Street is proposed to be prohibited to maintain four lanes of traffic.

These analyses indicate that, in general, Level of Service C or better can be achieved at most intersections under Alternatives 4 and 6, with roadway Alternatives A, B, and C. The exceptions are the intersection of Howard Street at Hamilton Street and New Bridge Road in Alternative 4 with Roadway Improvement Option B, where LOS D is provided in the A.M. peak

highway hour; and the intersection of Bank Street at Howard Street/Reed Street in Alternative 4 in the P.M. peak highway hour.

## 4.10 Water Resources Impacts

The predominant water resource in the project area is the Thames River. Various potential impacts have been evaluated with respect to water quality and the Thames River. Water quality issues associated with stormwater runoff are presented in Section 4.7 of this document. Flood related impacts are presented in Section 4.11. Potential impacts to fisheries and living marine resources in the Thames River are presented in Section 4.12.

## 4.11 Flood Hazard Impacts

Each of the alternative development plans have been reviewed with respect to conformance with state floodplain policies and FEMA planning considerations as defined in part 60.22 of the National Flood Insurance Program regulations. A summary of flood hazard impact potential for each alternative follows. Figure 110-1 (presented in Section 2.10 of this document) graphically presents the FEMA Flood Zones in the MDP area.

### *4.11.1 Common Elements*

The proposed 2.1-acre waterfront commercial use area next to Shaw's Cove is a feature of Alternatives 2 through 6. While this is a flood prone area, the existing and proposed water-dependent activities must be located adjacent to coastal waters and cannot avoid being flood prone. New buildings would have to comply with FEMA structural standards.



The office incubator and retail type uses planned in Alternatives 2 through 6 would be located largely in designated flood hazard areas. The first floor levels would, therefore, need to either be elevated above the base flood, floodproofed, or allowed to flood with damages. Any increase in the square footage could be inconsistent with state floodplain policies (Section 25-68h).

The southern part of the Fort Area is subject to coastal flooding. The existing regional Water Pollution Control Facility which bisects Trumbull Street is in an original flood prone area; however, buildings and tanks have been elevated with fill material to reduce their risk. All new construction at this site must also be elevated.

Alternatives 2 through 6 include 2.5 acres of water-related uses at Trumbull Street and Smith Street in a flood prone area. This area includes the existing Fort Trumbull Marina and lobster packaging operations. Any future buildings will need to be designed to minimize flood hazards.

The proposed Columbia Cove area in Alternatives 2 through 6 is a water-dependent use in a flood prone area. Its location is unavoidable. The proposed hotel/conference center at the north end of the MDP area is at the edge of the flood hazard area. This affords the opportunity to avoid the flood prone area by moving the core building west to high ground or to elevate it above the base flood.

### *4.11.2 Alternative No. 1 – No Action*

Under the no action alternative, existing flood prone areas would remain subject to flooding and new construction would have to be in compliance with local

floodplain zoning and building standards. The floodplain has little impact on development of the state park.

### *4.11.3 Alternative No. 2 – Recreation/Tourism*

The portion of the Fort Area north of Hamilton Street consists of dry upland between the railroad and extension of Smith Street, with flood prone areas near the shoreline. The higher ground is suitable for the recreation center proposed in Alternative 2.

The central part of the Fort Area has a high rocky hill that extends above coastal flood levels. It is well suited for cultural uses. However, the proposed open space in Alternative 2 underutilizes this upland area.

The west side of Pequot Avenue south of Trumbull Street is not in a designated flood hazard area and is, therefore, suitable for the planned research and development office space, as well as other activities which are poorly suited for flood prone areas.

The north and south ends of the NUWC site, and its eastern coastline, are in flood prone areas. The proposed state park is consistent with open space floodplain usage. New buildings should be limited to upland areas, or designed to be insensitive to flood inundation.

### *4.11.4 Alternative No. 3 – Residential/Commercial*

The planned residential development on the west side of Howard Street in the Gateway Area is in a flood prone area and is inconsistent with state floodplain management policy (Section 25-68h). State funds cannot be used for residential uses in the floodplain.

This alternate includes a large area of residential development in the Fort Area and in the north end of



the NUWC property near Columbia Cove. About half of the residential development is in the floodplain and is inconsistent with state floodplain management policies (Section 25-68h). While construction is allowed in A-zones in accordance with specific building criteria, it is not advisable to locate residential structures, especially high density residences, in a flood hazard area when alternative locations exist.

The waterfront commercial area at South Cove is also in the floodplain, as is some retail and office areas. However, these latter uses are subject to less rigorous standards.

### *4.11.5 Alternative No. 4 – Business Campus*

The enlarged proposed residential area in the floodplain west of Howard Street in the Gateway Area is inconsistent with state floodplain management policy (Section 25-68h). State funds cannot be used for residential uses in the floodplain. The waterfront commercial area at Shaw's Cove and the limited retail and office areas are also in the floodplain but may not be considered intensive uses.

A significant portion of the proposed office incubator campus space is located in the desigNated floodplain area. State policy discourages any increase in the square footage of such building space in flood prone areas. However, in view of the large area of existing office space at NUWC that is being replaced, it could be proportioned to avoid a more intensive use. Building space should still be elevated and/or floodproofed. The western and southern part of the proposed business campus is not within the floodplain and is thus more suitable for the higher building densities.

The proposed hotel conference center area is partially within the floodplain. It is anticipated that the actual

building of moderate size could avoid the floodplain. As in previous alternatives, the proposed Columbia Cove area is in a floodplain and cannot avoid being in an exposed area.

### *4.11.6 Alternative No. 5 – Mixed Use 1*

The proposed land use west of the railroad would be office and office/incubator spaces in the floodplain. Any increase in the square footage of this type of activity could be considered an "intensive use" with respect to state floodplain management policies. New buildings would have to conform with floodplain zoning and building standards. The waterfront commercial area at Shaw's Cove remains flood prone as per previous alternatives.

The large flood prone area in the Fort Area on both sides of Smith Street would be developed with residential uses. Similar to Alternative 3, this is in conflict with the state floodplain management policies (Section 25-68h). Extensive fill would be necessary for this alternative and said fill is not eligible for state funding.

The proposed hotel/conference center is partially located within a floodplain area. As in other alternatives, it is anticipated that the actual building of moderate size could avoid the floodplain. The proposed Columbia Cove area is in the floodplain and cannot avoid the flood prone area.

### *4.11.7 Alternative No. 6 – Mixed Use 2*

The proposed Alternative 6 land uses in the Gateway Area are similar to Alternative 5. Any increase in square footage over existing conditions could be considered "intensive" with respect to floodplain



management policies. Buildings would need to be elevated and/or floodproofed.

The primary difference between Alternatives 5 and 6 is the location of residential uses away from the floodplain. The area east of Smith Street would be utilized for open space and athletic facilities, with higher density uses located on the higher ground, closer to the railroad. This also allows additional space for a larger hotel/conference center. Open space uses such as fields and recreational facilities are more appropriate in coastal flood hazard areas.

The Columbia Cove area would remain in a flood prone area as in other alternatives. This is an unavoidable location and the associated buildings must be designed accordingly.

### *4.11.8 Summary*

Alternatives 2 and 6 are most compatible with flooding issues in the MDP area due to the larger areas of park and open space, while Alternatives 3 and 5 are least compatible with flood prone areas with respect to their residential uses. Alternative 6 places open space/recreational facilities in the river side floodplain areas, while increasing the building density in upland areas. A summary of impacts is presented in Table 4.11-1.

**Table 4.11-1**
**Summary of Uses and Associated Flood Impacts**

| Area | Location | Flood Risk | Wave Risk | Alt. 1 | Alt. 2 | Alt. 3 | Alt. 4 | Alt. 5 | Alt. 6 |
|---|---|---|---|---|---|---|---|---|---|
| Gateway | North | High | Low | No proposed change. | Waterfront Commercial | Waterfront Commercial | Waterfront Commercial | Waterfront Commercial | Waterfront Commercial |
| | South | High | Low | No proposed change. | Office/ Commercial | Office/ Residential | Office/ Incubator | Office/Retail | Office/ Incubator |
| | | | | | | | | | |
| Fort | North | Moderate | Low | No proposed change. | Hotel/ Recreation | Residential | Hotel/ Conference | Hotel/ Residential | Hotel/ Conference |
| | Central | Low | Low | No proposed change. | Cultural/ Museum | Residential/ Open | Office/ Incubator | Residential/ Ath. Club | Recreation |
| | South | Moderate | Low | No proposed change. | WPCF | WPCF | WPCF | WPCF | WPCF |
| | Southeast | Moderate | Moderate | No proposed change. | Water-related Use | Water-related Use | Water-related Use | Water-related Use | Water-related Use |
| | | | | | | | | | |
| NUWC | South | High | Moderate | State Park | State Park | State Park | State Park | State Park | State Park |
| | Central | High | Moderate | Office | State Park | Residential | Office/ Incubator | Residential | Athletic Center |
| | North | High | Low | Water-related Use | State Park | Residential | Hotel/ Conference | Hotel/ Conference | Hotel/ Conference |
| | | | | | | | | | |
| Pequot | All | Low | Low | No proposed change. | R&D Office | R&D Office | R&D Office | R&D Office | R&D Office |

## 4.12 Biological Environment Impacts

### *4.12.1 Alternative No. 1 – No Action*

#### *Fisheries*

The Thames River estuarine waters are of significant value to many of Connecticut's freshwater and marine resources. The river provides productive feeding and spawning habitat to fish species, many of which are of commercial and recreational importance.

Under Alternative 1, water-related and waterfront uses include the proposed Fort Trumbull State Park, a high speed ferry terminal, and a biotech office park. Waterfront uses would include the use of Piers 4 and 7 for recreation and fishing. Additionally, Pier 7 would be used for boat mooring and R&D support. Building 45 would be retained by the Coast Guard along with the adjacent land and Pier 2.

The use of existing piers for fishing, recreation, and boat mooring would not significantly impact fisheries resources in the Thames River. No activities have been identified under this alternative that involve the disturbance of riverbed substrate, such as dredging, filling, or the construction of new piers or marinas. Any future proposed in-water activities would require a regulatory permit from either or both the Connecticut Department of Environmental Protection and the Army Corps of Engineers.

#### *Living Marine Resources*

The lower Thames River provides habitat for several shellfish species. However, the reach of the Thames River adjacent to the project area is classified as a prohibited shellfish area by the Bureau of Aquaculture.

The use of existing piers for fishing, recreation, and boat mooring would not be expected to impact marine resources.

### *Vegetation*

The MDP area is currently developed to very near its maximum density. The majority of the project area consists of commercial and industrial buildings, residences, sidewalks, parking lots, and roads. For the most part, vegetation is limited to small maintained lawns, some with ornamental trees. The study area contains several undeveloped parcels that are overgrown by invasive plan species that tend to thrive in areas that have been disturbed.

Under Alternative 1, the NUWC site would be redeveloped as mixed-use, including Fort Trumbull State Park, as well as recreational, waterfront, Coast Guard, and future development uses. This proposed redevelopment would possibly result in the loss of several lawns and a number of ornamental trees associated with the NUWC facility. However, the proposed state park and recreational uses would likely result in more, higher quality vegetation than that which currently exists. Additionally, it is likely that vegetated areas would be maintained so as to keep invasive species under control.

Under Alternative 1, the remainder of the project area would remain in the context of the existing land use patterns, with possible redevelopment of the area taking place on a parcel by parcel basis. The vacant parcels, if developed, would most likely be cleared of existing vegetation.



### *Inland Wetlands*

The small ephemeral watercourse located on the vacant parcel between Howard Street and Shaw Street is situated in a depressed channel with steep banks of fill material. Minimal areas of regulated wetland soils have been identified in this area. Under Alternative 1, the parcel containing this wetland area would remain in the context of the existing land use pattern.

### *Tidal Wetlands*

Tidal wetlands occur at the western edge of Bentley Creek between the regional Water Pollution Control Facility and the future Pfizer facility. This area is the focus of a restoration plan in conjunction with the planned Pfizer development. Pfizer is currently working with the Department of Environmental Protection's Office of Long Island Sound Programs to develop an acceptable restoration plan for this tidal wetland area.

### *Wildlife*

The MDP project area is characterized by commercial and industrial buildings, residences, sidewalks, parking lots, and roads. Due to the intensive development of these areas, there is insufficient natural habitat to support most wildlife species. The project area contains several undeveloped vegetated parcels. Although these areas do not offer significant natural habitat, and are unlikely to support most wildlife species, they probably support a limited number of wildlife species that have adapted to life in an urban or near urban environment. Several of these species benefit due to their interaction with humans.

Under Alternative 1, proposed redevelopment includes the NUWC parcel only. This area contains insufficient natural habitat to support most wildlife species. The remainder of the project area would remain in the context of the existing land use patterns, with possible redevelopment of the area taking place on a parcel-by-parcel basis. The vacant parcels, if developed, would result in the displacement of several ubiquitous wildlife species.

***Species of Special Concern***

The Thames River is the only resource listed in the Department of Environmental Protection's Natural Diversity Data Base, due to the occurrence of Atlantic sturgeon in the river. Potential fisheries impacts are described above.

### *4.12.2 Alternative No. 2 – Recreation/Tourism*

***Fisheries***

Under Alternative 2, potential impacts to fisheries are limited to those activities associated with the proposed land uses in and around Columbia Cove and the existing Fort Trumbull Marina.

The majority of land use concepts associated with the Recreation/Tourism alternative do not infringe upon the Thames River and would not result in in-water activities. This area of the Thames River shoreline has been heavily disturbed through the years, including extensive dredging and construction of shoreline structures. Shallow shoreline habitats which are conducive to many fisheries species are essentially nonexistent in the project area.

Fishing piers, associated with a future state park, are not likely to have an adverse affect on fisheries in the



Thames River nor would the reuse of existing marinas. Specific proposals involving in-water activities have not yet been developed. At such time as a specific activity is proposed, the proper controls to avoid environmental impacts would be prescribed.

Activities that involve the disturbance of riverbed substrate, such as dredging, filling, or the construction of new piers or marinas, could potentially have a negative impact on fisheries habitat if proper construction methods were not employed or if ongoing operational practices were not in keeping with best management practices and regulatory requirements. Any future proposed in-water activity would require regulatory permits from either or both the Connecticut Department of Environmental Protection and the Army Corps of Engineers, as well as local permits.

***Living Marine Resources***

Under Alternative 2, potential impacts to marine resources pertain to in-water activities as well as those which would occur along the Thames River shoreline. The lower Thames River provides habitat for several shellfish species. However, the reach of the Thames River adjacent to the project area is classified as a prohibited shellfish area by the Bureau of Aquaculture.

As with the No Action alternative, the use of existing piers for fishing, recreation, and boat mooring would not be expected to impact marine resources. Activities that involve the disturbance of riverbed substrate, such as dredging, filling, or the construction of new piers or marinas, could potentially have a negative impact on living marine resources if shellfish beds were present in these areas. However, existing data and information does not indicate the presence of

such resources in this area. Additional study associated with regulatory permitting would be necessary if such activities were proposed.

### *Vegetation*

The majority of proposed land use in Alternative 2 to the east of the railroad is recreational or tourism related. The state park would be expanded from approximately 16 acres to 30 acres. A small amount of lawn and other low-quality vegetation would likely be cleared for the proposed park and other identified uses. However, the park would likely result in more, higher quality vegetation than that which currently exists. Additionally, it is likely that vegetated areas would be maintained so as to keep invasive species under control.

### *Inland Wetlands*

The small ephemeral watercourse located on the vacant parcel between Howard Street and Shaw Street is situated in a depressed channel with steep banks of fill material. Minimal areas of regulated wetland soils have been identified in this area, with minimal functional value other than to convey stormwater. Under Alternative 2, the parcel containing this wetland area would be developed as an office/incubator use. The density of this development, as well as development in the other alternatives, is such that direct impact can be avoided. Given the low quality of this wetland, the potential exists to partially restore it during future development. Under this and all other alternatives, additional wetland delineation and survey would be necessary prior to conducting any construction activities.



### *Tidal Wetlands*

The Thames River shoreline has been altered by many decades of shoreline dredging, filling, and placement of structural barriers, leaving the area devoid of significant areas of tidal wetlands. Tidal wetlands do occur at the western edge of Bentley Creek between the regional Water Pollution Control Facility and the future Pfizer facility. This area is the focus of a restoration plan in conjunction with the planned Pfizer development. Pfizer is currently working with the Department of Environmental Protection's Office of Long Island Sound Programs to develop an acceptable restoration plan for this tidal wetland area.

### *Wildlife*

The MDP project area is characterized by commercial and industrial buildings, residences, sidewalks, parking lots, and roads. Due to the intensive development of these areas, there is insufficient natural habitat to support most wildlife species. The project area contains several undeveloped vegetated parcels. Although these areas do not offer significant natural habitat, and are unlikely to support most wildlife species, they probably support a limited number of wildlife species that have adapted to life in an urban or near urban environment. Several of these species benefit due to their interaction with humans.

Under Alternative 2, development of the vacant parcels would result in the displacement of several ubiquitous wildlife. The displacement of these species would be more than offset by the development of a natural area in Fort Trumbull State Park.

***Species of Special Concern***

The Thames River is the only resource listed in the Department of Environmental Protection's Natural Diversity Data Base, due to the occurrence of Atlantic sturgeon in the river. Potential fisheries impacts are described above.

### *4.12.3 Alternative No. 3 – Residential/Commercial*

***Fisheries***

Under Alternative 3, potential impacts to fisheries are limited to those areas associated with the development of Columbia Cove and the redevelopment of Fort Trumbull Marina. Therefore, impacts would be the same as those discussed under Alternative 2.

***Living Marine Resources***

Potential impacts to living marine resources associated with Alternative 3 would be the same as those discussed for Alternative 2.

***Vegetation***

Alternative 3 focuses on providing housing to meet the needs of the existing community and future residents. Fort Trumbull State Park would occupy approximately 16 acres. A small amount of lawn and other low-quality vegetation would likely be cleared for the proposed development. The proposed sTate park would likely result in more, higher quality vegetation than that which currently exists. It is likely that vegetated areas would be managed so as to maintain the health of the vegetation and to keep invasive species under control.



***Inland Wetlands***

Potential impacts to inland wetlands associated with Alternative 3 would be the same as those discussed for Alternative 2.

***Tidal Wetlands***

Potential impacts to tidal wetlands associated with Alternative 3 would be the same as those discussed for Alternative 2.

***Wildlife***

Under Alternative 3, development of the vacant parcels would result in the displacement of several wildlife species that have adapted to life in an urban or near-urban environment. The displacement of these species would be more than offset by the development of a natural area in the 16-acre Fort Trumbull State Park.

***Species of Special Concern***

Potential impacts to species of special concern associated with Alternative 3 would be the same as those discussed for Alternative 2.

### *4.12.4 Alternative No. 4 – Business Campus*

Potential impacts to fisheries resources, living marine resources, vegetation, inland wetlands, tidal wetlands, wildlife, and species of special concern associated with Alternative 4 would be the same as those discussed for Alternative 2.

### *4.12.5 Alternative No. 5 – Mixed Use 1*

Potential impacts to fisheries resources, living marine resources, vegetation, inland wetlands, tidal wetlands, wildlife, and species of special concern associated with Alternative 5 would be the same as those discussed for Alternative 2.

### *4.12.6 Alternative No. 6 – Mixed Use 2*

Potential impacts to fisheries resources, living marine resources, vegetation, inland wetlands, tidal wetlands, wildlife, and species of special concern associated with Alternative 6 would be the same as those discussed for Alternative 2.

## 4.13 Physical Environment Impacts

The physical environment of the project area includes topography, surficial geology, and bedrock geology. Potential impacts to the physical environment are common to all alternatives and are, therefore, evaluated together.

No dramatic changes are anticipated in topography in any of the alternatives. Localized regrading is probable on a site-by-site basis to accommodate future land uses. Placement of fill in flood prone areas may also be undertaken to raise base elevations or structures above the 100-year flood elevation. However, extreme modifications to area topography are not contemplated.

The general erodibility of soils which occur in the project area is low. However, site specific sedimentation and erosion controls will be required as part of any parcel development or redevelopment.



## 4.14 Air Quality Impacts

### *4.14.1 Short-Term Air Quality Impacts*

Potential short-term air quality related impacts in the project area are common to all alternatives and are, therefore, evaluated together in the ensuing discussion. Historically, the area has been a core of industry, manufacturing, and shipyard traffic. Thus, potential short-term air quality degradation would be similar to or less than that experienced during the peak of industry in the area.

The primary short-term air quality concerns relate to construction and demolition activities and their potential to generate fugitive dust and mobile source emissions. Such sources of dust are attributed to construction vehicle disturbance during hauling, loading, dumping, and bulldozing on any areas cleared for the proposed development. Meteorological conditions and the intensity of the activities as well as soil moisture content also govern the extent to which particles will become airborne.

Although underlain by soils of a stony nature, much of the area has been filled and disturbed over the years. As a result, soils in the project area would tend to be composed of smaller particles and since the area is not well vegetated, wind erosion could become a source of mobilization of dust. Standard controls can be implemented to reduce the impact from such fugitive dust emissions as well as the effects of wind erosion. Proper phasing of construction can reduce the potential for impact by minimizing the length of time that soil remains exposed.

Additionally, use of water or wetting agents to control dust from exposed soil or gravel areas can further minimize airborne particulate matter, as well as periodic sweeping and daily rinsing of truck tires. This

can reduce the impact of off-site tracking of soil, which occurs when residual soil particles are displaced from construction sites onto higher traffic roadways and then become air and waterborne.

Furthermore, even well-maintained trucks and other construction equipment typically emit small amounts of pollutants, such as nitrogen oxides, sulfur oxides, and carbon monoxide related to internal combustion or diesel engines. Proper maintenance of portable generators, on-site machinery, and vehicles is, thus, important to reduce the potential for higher smoke emissions associated with improperly operating equipment.

Mitigation of short-term air quality impacts is described in Section 5.0 of this document.

### *4.14.2 Long-Term Air Quality Impacts*

Long-term air quality impacts are primarily related to traffic and its associated air emissions. Vehicle emissions per mile of usage have been declining nationwide due to improved fuels, installation of pollution control devices, and the replacement of obsolete vehicles with newer models. As there will be additional traffic generated as a result of implementation of any of the identified alternatives (including the no action alternative), localized air quality impacts will also result. However, these are expected to be minimal and will not be regionally significant. It should be noted that the "no action" alternative (i.e. no MDP action) would result in the highest peak hour traffic, with no associated roadway improvement mitigation.

The fundamental goal in reducing long-term air quality degradation for this particular project is to provide improved flow of traffic in the general vicinity and major contributing arteries. Properly timed and



placed traffic signals and adequate sight distance at intersections and driveways, as well as appropriately sized traffic lanes to allow for passing and emergency stops, will reduce the length of time that vehicles are queued. Thus, vehicle emissions, which tend to be greater during idling and initial acceleration, can be minimized.

Encouragement of staggered work hours by larger employers in the project area can also help minimize the associated air quality impacts of high traffic volumes during peak commuting hours. Pfizer, Inc. currently practices this measure at their Groton facility and has indicated plans to do so at New London as well.

Additionally, the utilization of the local shuttle bus system and harbor shuttle, in conjunction with satellite parking areas, would also help minimize congestion in the core of the project area. Hence, some of the potential long-term impacts with respect to air quality have been addressed via the intended promotion of alternative modes of transportation, including biking and hiking. Thus, innate to the project is an underlying theme that has already identified urban air pollution concerns.

Air emissions from the Amtrak rail line are anticipated to be reduced by the year 2000, when electrification is expected to be operational. Electric trains are free from the emissions associated with diesel trains.

Air emissions from stationary sources will depend upon the exact type of buildings, equipment, and their uses. It can be assumed that new stationary sources will need to comply with current emission standards. Furthermore, the replacement of older equipment (i.e. furnaces, boilers, and the like) with new equipment

could reduce emission levels due to higher combustion efficiency, cleaner fuel, and treatment as needed.

## 4.15 Noise Impacts

### *4.15.1 Short-Term Impacts*

Potential short-term noise related impacts in the project area are common to all alternatives and are, therefore, evaluated together in the ensuing discussion.

The primary short-term noise concerns relate to construction and demolition activities and their potential to generate unacceptable levels of noise from construction vehicles and equipment.

Several factors should be considered with respect to receptors. Construction activities would be limited to the daytime, when rush hour traffic and railroad noise are at higher levels. The additional traffic and construction related noise is anticipated to be minimal in this environment. Additionally, the surrounding land uses in the area are primarily commercial in nature.

### *4.15.2 Long-Term Impacts*

The Amtrak railroad and local traffic in the project area are the predominant noise generators and would not likely change dramatically as a result of any of the proposed alternatives. No noise intensive land uses are proposed. Other loud short-duration noises related to the harbor (i.e. vessels, fog horns, etc.) will continue.

Traffic noise levels and acceptability are a function of vehicle counts, truck and bus counts, roadway grades, traffic speed, and stop/go traffic. Mitigation factors



include separation distances and the presence of barriers that attenuate noise levels. The existing railroad embankment is a very effective barrier, sheltering the existing neighborhoods from most of the project site. Therefore, no significant long term noise changes are anticipated.

There will be increases in off-site traffic levels, particularly along Howard Street and Bank Street as a result of the planned Pfizer facility as well as proposed uses within the Fort Trumbull MDP area. It is anticipated that increased traffic will create noise that will be consistent with an urban transportation hub. However, the geometric and lane improvements at intersections will minimize changes in noise from motor vehicles.

Although not part of this project, the conversion of the Amtrak railroad facilities to electric power will result in incidental noise reduction. Electric trains are lighter and run smoother than diesel trains under the same speed conditions.

Since they will not be travelling faster than current conditions, the noise levels associated with rail operations in the MDP area are not anticipated to increase. In areas outside of New London that will accommodate high speed travel, extensive noise and vibration monitoring programs have been undertaken by Amtrak. The Federal Railroad Administration requires that noise and vibration impacts be mitigated.

## 4.16 Solid Waste and Hazardous Materials Impacts

A discussion of the potential impacts of the six MDP alternatives relative to hazardous waste and environmental issues is presented below. In all cases, the primary impacts of the MDP project will stem from the following types of activities:

- Investigation and remediation of contaminated properties (drilling, excavation, asbestos sampling, etc.);
- Disposal of investigation and remediation related wastes (contaminated soil or ground water drill cuttings, monitoring well development water, etc.);
- Potential releases to the environment (air, water, land) during investigation, remediation, or demolition activities;
- Stabilization and disposal of residual waste materials left at or in properties (drums, piles, etc.); and
- Generation of hazardous wastes and/or storage of hazardous or petroleum products by the proposed new land uses in each alternative.

The potential impacts discussed for the alternatives do not differ significantly from each other except that as the proportion of residential and recreational land area increases, the degree of remediation required will increase proportionately, as the less restrictive industrial/commercial remediation standards cannot be utilized. This is particularly true on the northern portions of the NUWC parcel. Similarly, as the area dedicated to office/incubator and commercial space increases, so does the potential future generation of hazardous wastes and the use of chemical and petroleum products. Steps to mitigate the potential impacts are discussed in Section 5.0 of this document.

In the alternatives discussion, the various proposed land uses may require a greater degree of remediation if the intended use is to be residential (homes, condominiums, recreational areas, etc.) as opposed to industrial or commercial (offices, retail, industrial facilities, etc.). This two-tiered system is presented in



the Remediation Standard Regulations (RSR) in the evaluation of direct exposure risks. The RSR provides generally less restrictive remediation criteria which may be utilized in non-residential settings, provided certain land use restrictions and engineering controls ~~are~~ instituted.

The proposed MDP area includes the closed NUWC parcel, which occupies approximately 32 acres on the eastern side of the MDP area. Investigation and remediation of NUWC is being performed by the U.S. Navy under the Base Realignment and Closure (BRAC) process, independent of the MDP process. The BRAC clean-up at NUWC will be based on the Connecticut Remediation Standard Regulations (RSR) and the intended future uses of the NUWC parcel. Remediation of those areas of NUWC which will not be conveyed to the State of Connecticut (for a state park) or retained by the Navy and Coast Guard could require additional levels of remediation based on the future land use differences between the LRA's reuse plan and the alternatives proposed for the MDP.

In all cases, the need for and extent of site remediation will be governed by the relevant statutes and regulations as described in Section 2.15 of this document.

### *4.16.1 Alternative No. 1 – No Action*

Alternative 1, the No Action alternative, presumes that the ~~status~~ quo of the MDP ~~area is~~ maintained. Under the no action alternative, investigation, remediation, and/or demolition/rehabilitation of properties would be performed in an inconsistent manner (if at all) and would be driven primarily by the potential sale of individual properties. To a lesser degree, existing regulations would require the investigation/

remediation of some of the properties within the MDP area. Underground storage tank regulations, for example, would require monitoring, upgrading and replacement of registered underground tanks as well as the investigation and remediation of any releases associated with those tanks.

Current waste generation and chemical/petroleum products usage within the MDP area would continue essentially unchanged until such time as future regulations may impact upon them. Also, as the MDP area presently contains a number of mixed uses, including industrial and high risk commercial uses, other high risk industrial or commercial activities (with their attendant waste generation and chemical/petroleum usage) could relocate into the MDP area in the future.

Under the No Action alternative, potential contamination sources would go mostly uninvestigated and subsequently unremediated, allowing contaminants (where present) to migrate into and through soil and ground water in the area.

Under the No Action alternative, the NUWC parcel would, be remediated in accordance with the LRA's reuse plan.

### *4.16.2 Alternative No. 2 – Recreation/Tourism*

Under Alternative 2 – Recreation/Tourism, the area to the west of the Amtrak rail lines would be redeveloped into a mix of commercial, office, and light industrial usage. Many of the higher risk parcels are located in this area. Redevelopment under Alternative 2 in this area would allow the use of the higher industrial/commercial direct exposure standards, if appropriate land use restrictions and engineering controls are implemented. Areas east of the rail line are slated primarily for residential and recreational uses where



remediation to the generally more restrictive residential standards would be necessary, particularly in the northern portions of the NUWC parcel. These areas include the proposed locations for the hotel, recreation center, cultural/museum/active recreation area, the state park, and the riverwalk.

Under Alternative 2, the potential impacts would include those related to investigation, remediation, renovation and demolition, as well as the stabilization of residual wastes and the disposal of investigation and remediation related wastes.

The potential for future generation of wastes or use of chemical/petroleum products would be minimal and be limited to the office/incubator areas west of the rail line.

### *4.16.3 Alternative No. 3 – Residential Commercial*

Under the Residential/Commercial alternative, the majority of the MDP area would be redeveloped into residential and recreational areas requiring remediation to the more restrictive standards. The Residential/Commercial alternative would require demolition of a majority of structures within the MDP area. The area devoted to office/incubator space and commercial development is comparatively small and, thus, the potential future generation of hazardous wastes and storage/use of chemical or petroleum products is reduced.

### *4.16.4 Alternative No. 4 – Business Campus*

Under Alternative 4, the Business Campus concept, the residential and recreation dedicated areas would be minimized and the office/incubator areas would be greatly expanded, with the result that a significant

portion of the MDP area could utilize the less restrictive remediation standards. The expanded office/incubator and commercial acreage would result in a corresponding increase in the potential future generation of hazardous wastes and/or the use or storage of chemical and/or petroleum products.

### *4.16.5 Alternative No. 5 – Mixed Use 1*

Alternative 5 combines office/incubator and commercial development west of the rail lines and a mix of residential and recreational space east of the rail lines. The expected impacts from Alternative 5 are essentially the same as for the east and west portions under Alternatives 3 and 4 discussed above.

### *4.16.6 Alternative No. 6 – Mixed Use 2*

The impacts associated with Alternative 6 are essentially the same as those described in Alternative 5, with the primary difference being the relocation of the proposed residential areas outside of flood prone areas, with no proposed residential uses in the NUWC area. The residential uses are also clustered to minimize the area of coverage. The area immediately adjacent to the railroad is proposed for parking.

## 4.17 Cumulative Impacts

Cumulative impacts of the proposed MDP project and nearby activities are presented below by major category.

***Parks and Recreation*** – There will be a cumulative positive impact on parks and recreation in the Fort Trumbull area due to the creation of the Fort Trumbull State Park, the proposed riverwalk, and other proposed uses such as open space, athletic fields, and



the like. The state park will provide recreational benefits to the residents of New London, without adding the burden of operation and maintenance. This facility will enhance the local park system and add a major destination to Thames River Heritage Park proposal, making it a viable waterfront destination. This also makes an inner harbor ferry shuttle more attractive and provides a broader context for the region.

The park and recreational elements of the Fort Trumbull MDP area will be enhanced by the proposed Bentley Creek tidal wetland restoration and educational area. In a broader context, the area will benefit from the downtown New London revitalization, with a major transportation hub, including the planned electrification of the Amtrak line, additional ferry services, and the recent investment in a major downtown parking facility.

***Public Access*** – There will be a cumulative positive impact on public access based on the proposed state park, riverwalk, and other public access amenities described under the various alternatives. The adjacent Pfizer facility will also incorporate a public access component.

***Traffic*** – The traffic analysis conducted for this project has taken into account various off-site traffic generators, including the proposed Pfizer facility, background traffic, and projected traffic volumes which allow for the expansion of existing 1998 traffic volumes by 1.0% per year compounded annually. The increased projected traffic volume will have a cumulative negative impact which requires mitigation. It is anticipated that roadway and intersection improvements will be necessary both on and off-site to address these cumulative impacts. Analysis and improvements are described in Sections 2.8, 3.2, and

4.9 of this document. It should be noted that cumulative traffic impacts would result even with the "no action" alternative. In fact, the no action alternative is the highest peak traffic generator.

***Air Quality*** – Despite measures to reduce queue time and improve the traffic flow in the project area, cumulative traffic impacts will likely result in localized cumulative air impacts. However, impacts are expected to be minimal and will not be regionally significant. It should be noted that the "no action" alternative (i.e. no MDP action) would result in the highest peak hour traffic, with no associated roadway improvement mitigation.

***Hazardous Materials*** – Cumulative positive impacts are projected with respect to hazardous and contaminated materials. The MDP project in combination with the planned Fort Trumbull State Park and the Pfizer development will result in extensive remediation of past contamination. The risk of introducing new hazardous or toxic materials as a result of proposed land uses and development is projected to be low.

***Economic*** – Cumulative positive economic impacts are projected for the MDP area under any of the six alternatives in combination with the additional jobs and tax revenue which will result from Pfizer. Other cumulative factors include the downtown New London revitalization, the proposed expansion of Cross Sound Ferry Services, Inc., and the electrification of the Amtrak rail line.

***Wetlands*** – Two areas of degraded wetlands have been identified, one near Bentley Creek and the second behind Howard Street. Pfizer is currently working with the Department of Environmental Protection's Office of Long Island Sound Programs in an effort to restore



the tidal wetlands at Bentley Creek. Additional mitigation potential exists in the degraded freshwater wetland behind Howard Street. Future development plans under Alternatives 2 through 6 will address this area. Therefore, it is anticipated that the MDP project, in combination with nearby projects, will have a cumulative positive impact on wetlands.

***Aesthetics*** – Numerous aesthetic improvements are proposed as part of the MDP project and the adjacent Pfizer facility which will result in a positive cumulative impact. The former New London Mills brownfields site will be transformed into a global research facility. It is anticipated that the regional WPCF will undergo visual and odor improvements. Other aesthetic improvements are associated with the state park, riverwalk, and various alternative development plans.

***Noise*** – A temporary increase in noise is anticipated during the construction phases of development due to heavy equipment, demolition, and the like. Various methods are described in Section 5.0 to mitigate this impact. Additional noise is also anticipated from a general increase in traffic in the area. A slight reduction in noise may be expected upon electrification of the Amtrak line. This will be somewhat offset by the projected increase in rail activity (six additional trips per day). Overall noise levels are not anticipated to be significantly different from historic levels in this area.

***Marine Water Resources*** – There is potential for cumulative impacts in the establishment of new or refurbished marinas at Columbia Cove and South Cove near Bentley Creek. Any disturbance of marine water resources would likely be mitigated through specific project construction and operation components and improved public access to coastal resources.

***Stormwater*** – The treatment of stormwater runoff prior to discharge would be a locally significant positive impact. It is likely that stormwater treatment would also be provided for projects located outside of the MDP area, based on new stormwater management requirements which were not in existence at the time when many of the existing uses were developed.

***Cultural Resources*** – The MDP project will support and enable the restoration of a significant historic site at Fort Trumbull with great historic interest. Other areas of potential historic and archeologic sensitivity will be impacted by the contemplated work at the state park, MDP project activities, and the adjacent Pfizer site. All parties are working with the Connecticut Historic Commission to ensure that impacts are mitigated.

***Flood Protection*** – Additional flood protection will be afforded as a result of the MDP project and other nearby activities. Existing flood prone areas and buildings will be raised by the placement of fill material or by new building construction which conforms to the relevant regulations and policies.

***Neighborhood Relocation*** – Under most of the alternatives evaluated, a certain degree of displacement of residents and businesses will occur. Neighborhood relocation is limited to the MDP area, as there will be no relocation associated with nearby projects or planned activities. Mitigation measures related to neighborhood relocation are described in Section 5.0 of this document.



## 4.18 Unavoidable Adverse Environmental Impacts

Although a goal of this project has been environmental impact avoidance, minimization, and mitigation, certain adverse impacts are unavoidable. These are described below:

***Short-Term Construction Related Impacts*** – All of the identified alternatives will have a construction aspect, where it is anticipated that building demolition and construction will take place. Mitigation measures have been identified with respect to associated short-term air and noise quality. However, a certain degree of additional truck and equipment use and access will be necessary during this time period which is unavoidable. Potential soil erosion and sedimentation impacts have also been identified. These will be largely mitigated through proper construction management techniques.

***Long-Term Noise Impacts*** – Additional traffic may result in an increase of noise. Due to the nature of the source and its location, these impacts cannot be mitigated.

***Neighborhood Relocation*** – With the exception of Alternative 1, a certain degree of relocation of residential dwellings and/or businesses will occur as a result of project implementation. Measures have been identified in Section 5.0 of this document to mitigate this impact.

***Traffic*** – Increases in traffic will be largely mitigated through proposed roadway and intersection improvements. However, additional traffic will result.

***Air*** – Increases in traffic, both by the MDP project and nearby planned projects, will result in an incremental cumulative impact on air quality. Impacts will be localized and will not be regionally significant.

***Cultural Resources*** – All of the reuse alternatives may potentially have an adverse affect on sensitive cultural resources due to physical destruction and/or alteration of resources. Mitigation will be achieved as described in Section 5.0 of this document.

## 4.19 Irreversible and Irretrievable Commitment of Resources

The implementation of any of the six alternatives would consume nonrenewable resources during the construction and implementation (i.e., construction supplies, fuel, etc). Since these resources can not be reused, they are considered to be irreversibly and irretrievably committed. Similarly, disposal of demolition material at a landfill and/or solid waste disposal facility will take up capacity in such facilities which is irreversible and irretrievable.

Each of the development alternatives would require a certain level of public services such as fire and police protection. However, as described in Section 4.5, impacts to these services will be minimal.

## 4.20 Certificates, Permits, Approvals

### *4.20.1 Pertinent Regulations and Statutes*

Table 4.20-1 presents some of the pertinent local, state, and federal regulations and statutes which may affect activities proposed in the MDP area.



**TABLE 4.20-1**
**Pertinent Regulations and Statutes**

| Activity | Local | State | Federal |
|---|---|---|---|
| Freshwater Wetlands & Watercourses | CGS-21a-36 Planning & Zoning Commissions, Inland Wetlands and Watercourses | CGS-22a-36 CWA 401 WQC | CWA 404 Corps |
| Soil Erosion & Sed. Control | CGS-22a-329 CGS-22a-36 | Construction Permit CWA-402 NPDES | SCS |
| Floodplains | CGS-22a-36 | SCEL, CGS-22a-342 CGS-25-68b, Flood Management Certificate | FEMA |
| Stream flow Rates | CGS-22a-36 Planning & Zoning | Diversion Act CGS-22a-365 Stocked Streams CGS-26-141a CWA 401 WQC | |
| Discharges | | CGS-22a-430 CWA Section 401 WQC | Clean Water Act 103 Dredge Spoil |
| Storm Drainage | Planning & Zoning CGS-22a-30 | CGS-22a-365 | CWA 402(P) |
| Navigable Waters | Harbor Management Plan | Structures & Dredging CGS-22a-359 | Rivers & Harbor Act Section 10, Corps. |

### *4.20.2 Tidal Wetlands and Structures, Dredging and Fill Permits*

A permit or certificate of permission is required from the Department of Environmental Protection (DEP) Office of Long Island Sound Programs (CGS Section 22a-361 or 22a-363b) for any work or construction activity within tidal, coastal, or navigable waters (those waterward of the high tide line). Permit application review is based upon an assessment of adverse impacts and includes determination of consistency with coastal policies.

Additionally, any development activities for which permits or certifications are issued and which would impact the coastal area must be determined to be consistent with CCMA requirements. Hence, it may be necessary to obtain permits for the proposed activities on the existing piers at NUWC and other waterfront areas.

### *4.20.3 Stormwater Construction General Permits*

Section 402 of the Federal Water Pollution Control Act regulates discharges to waterbodies and watercourses. EPA has delegated jurisdiction to the Connecticut DEP. Stormwater discharges from construction sites where five or more acres are to be disturbed require a permit pursuant to 40 CFR 122.26. The DEP Bureau of Water Management has issued a general permit that covers these discharges. Registration describing the site and the construction activity must be submitted to DEP at least 15 days prior to the initiation of construction. A stormwater pollution prevention plan, including measures for erosion and sediment controls and post-construction stormwater management, must be prepared.



DEP general stormwater permits for construction activities in tidal areas specify post construction management requirements, including retention (i.e. infiltration) of the first inch of runoff from the site. If retention not possible, detention may be required. The general permit also requires 80% total suspended solids removal and velocity dissipation. These elements will be factored into the Municipal Development Planning process and project design.

### *4.20.4 Army Corps of Engineers Permits*

The U.S. Army Corps of Engineers (ACOE) regulates federally defined wetlands and rivers below the ordinary high water mark under Section 404 of the Clean Water Act.

Section 10 of the Rivers and Harbors Act of 1899 assigned the Corps of Engineers to regulate structures and work in navigable waters, which includes the Thames River. A Section 404 permit is required when wetlands or waterways are filled. Regulated activities include dredging, disposal of dredged materials, excavation, filling, boat ramps, breakwaters, jetties, wharves, permanent moorings, piles, navigation aids, drainage discharge pipes, and the like.

It is probable that future development of Columbia Cove with a public or private marina, and the proposed water-related commercial area along Bentley Creek, will include federally regulated activities.

The Section 10 and Section 404 permit process includes referrals to other federal agencies including the U.S. Fish and Wildlife Service and National Marine Fisheries. These permits also require a 401 Water Quality Certificate from the Department of Environmental Protection.

Disposal of dredge spoils is also regulated by the U.S. Army Corps of Engineers' Section 103 permit program. This could affect the use of Columbia Cove or South Cove sites if dredging and off-shore disposal were sought.

### *4.20.5 401 Water Quality Certificate*

Any applicant for a federal license or permit; including a Section 404 dredge and fill permit from the U.S. Army Corps of Engineers, a bridge construction permit from the U.S. Coast Guard, or a permit from the Federal Energy Regulatory Commission (FERC); must obtain a 401 Water Quality Certificate from DEP if the proposed activity will result in any discharge into the navigable waters. Such discharges include, among other things, the discharge of dredged and fill material, stormwater during construction, incidental discharge of sediments from dredging or excavating, the discharge of stormwater from a facility once it is constructed, and any excavation, land clearing, and grading in or affecting the navigable waters.

This program, administered by the DEP Bureau of Water Management's Inland Water Resources Division and the Office of Long Island Sound Programs, regulates any applicant for a federal license or permit who seeks to conduct an activity which may result in any discharge into the navigable waters, including all wetlands, watercourses, and natural and man-made ponds. Such persons must obtain certification from DEP that the discharge is consistent with the federal Clean Water Act and the Connecticut Water Quality Standards. Any conditions contained in a water quality certification become conditions of the federal permit or license.



The Connecticut Department of Environmental Protection has issued a Water Quality Certificate for Corps of Engineers Section 404 Category I activities and some Category II activities, provided that certain conditions are met.

### *4.20.6 Flood Management Compliance Certification*

Sections 25-68b through h of the Connecticut General Statutes authorizes the Connecticut Department of Environmental Protection to regulate proposed state activities in floodplains including any grant or loan which affects land use or land use planning in floodplains, plus the placement of fill or erection of structures in floodplains. The DEP Commissioner also regulates actions by state agencies affecting floodplains.

Section 25-68d states that "(a) No state agency shall undertake an activity or a critical activity within or affecting the floodplain without first obtaining approval from the commissioner of a certification submitted in accordance with subsection (b) or exemption by the commissioner from such approval in accordance with subsection (d)."

Any state agency proposing an activity within or affecting the floodplain must certify it does not:

- obstruct flood flows;
- result in adverse increase in flood elevations;
- cause an adverse increase in flood velocities; or
- pose a hazard to human life, health or property.

and that it does:

- comply with National Flood Insurance Program;
- comply with floodplain zoning; and
- promote long-term non-intensive floodplain uses.

A key requirement is to promote long-term non-intensive floodplain uses, or conversely to avoid intensive floodplain uses. DEP representatives have identified intensive floodplain uses as including:

- residential uses in the floodplain, even if raised with fill material or elevated structurally;
- conversion of non-residential uses to residential;
- any increase in the square footage of commercial or industrial uses.

For residential uses, Connecticut uses a stricter standard than FEMA, requiring the lowest enclosed floor to be one foot above the 500-year frequency flood.

### *4.20.7 STCApproval/ConnDOTPermits/Approvals*

Development projects, new developments or expansion of existing developments, with 200 or more parking spaces or 100,000 gross square feet of building floor area require submittal to the Connecticut State Traffic Commission (STC) for a Certificate of Operation as a Major Traffic Generator. This process, whether or not the development abuts a state highway, is required prior to commencement of construction. Upon review of submitted documents, the STC may issue a Certificate of Operation for the project or require further improvement strategies to mitigate impacts. For the proposed MDP area, documentation must be submitted as a major traffic generator.

This project will also require a permit from the City of New London to construct improvements on city streets. A state right-of-way encroachment permit is required for any off-site modification of state highways.



### *4.20.8 Amtrak Railroad Permits*

Any work which occurs in the railroad right-of-way or directly along the rail line would require approvals and/or permits from Amtrak. Most notably, any proposed modifications to the underpasses, such as roadway realignment or structural modifications, would need to be coordinated with, and approved by Amtrak.

### *4.20.9 Discharge Permits*

The Connecticut Department of Environmental Protection regulates discharges of water or other substances pursuant to Connecticut General Statutes Section 22a-430(a) into the waters of the state, including rivers and wetlands. The federal/state National Pollutant Discharge Elimination System (NPDES) program regulates the discharge of sewage, industrial process waters, and storm drainage. A DEP discharge permit is also required for sanitary sewage discharges of over 50,000 gpd to a publicly owned treatment facility.

### *4.20.10 Local Inland Wetland Permits*

Any work in inland wetlands will require a permit from the City of New London. The project area is highly developed and contains many areas that are underlain by artificial fill. A small ephemeral watercourse is located on a vacant parcel located between Howard Street and Shaw Street in the Gateway Area. The watercourse is approximately six feet wide and conveys stormwater approximately 350 feet from a corrugated metal pipe that inlets at its eastern end to a corrugated metal pipe that outlets at its western end. Based on investigations by a certified soil scientist and wetland biologist, minimal areas of regulated wetland occur in this area.

Although this wetland and watercourse are of poor functional quality, any work which is conducted in this area (including any restoration) would likely require a local wetlands permit. Individual projects within the MDP area would require wetland delineation and survey.

#### *4.20.11 Coastal Consistency Site Plan Review*

Section 22a-90 to 113 requires projects within coastal boundaries to be consistent with the goals and policies of the Connecticut Coastal Management Act. A local coastal consistency site plan review will be required since this project lies within the regulated coastal boundary. The Connecticut Coastal Management Act authorizes local jurisdiction from mean high water to the coastal zone boundary. The entire MDP area lies within the coastal zone.

#### *4.20.12 Other Likely Permits/Approvals*

Other local, state, and federal permits may be required, depending upon the exact nature of proposed work, including local planning and zoning permits and City Council approvals.

## 5.0 MITIGATION OPPORTUNITIES

### 5.1 Overview

Throughout the environmental impact evaluation, attempts have been made to avoid impacts. In instances where impact avoidance was not possible, mitigation measures have been sought. An underlying theme throughout each proposed alternative is improvement to the overall community and the environmental, cultural, and economic health of both New London and the Southeastern Connecticut Region. Hence, innate



to this project is the goal of providing mitigation for past uses and neglect as well as the historic lack of public access to regionally significant resources.

### 5.2 Land Use Mitigation Opportunities

The Fort Trumbull area has been targeted for renewal and revitalization for many years. The current zoning reflects the historic planning philosophy of the city. Inconsistencies between current land uses and land classifications in the *Conservation and Development Policies Plan for Connecticut* are also noted. The MDP is a tool to correlate land uses with long adopted policies and zoning. Accordingly, in an effort to mitigate these past inconsistencies, zoning for the project area will be updated through the MDP process.

### 5.3 Socioeconomic Mitigation Opportunities

The general intent and effect of the proposed alternatives would improve the socioeconomic climate in the project area. Taking into account job losses, any of the six alternatives would provide positive growth to the region's economy via short-term construction employment, permanent employment opportunities, and taxable property revenues. There would also be a net gain in spin-off activity outside of the area via the execution of any of the identified alternatives. Positive socioeconomic growth in the MDP area may be characterized as mitigation. No other mitigation opportunities have been identified.

### 5.4 Neighborhood/Housing Mitigation Opportunities

Various modes of mitigation are available for displaced individuals, families, and businesses. The

following discussion describes the relocation assistance process (i.e., mitigation) which will be implemented for any displacees in the Fort Trumbull MDP area.

Individuals and families who are displaced as a result of this project will be provided assistance in accordance with the Uniform Relocation Assistance Act (Chapter 135 Connecticut General Statutes). The purpose of this Act is to establish a uniform policy for the fair and equitable treatment of all persons displaced by state and local real property acquisition projects. Any individual, family, or business displaced by this project will be offered relocation assistance services for the purpose of locating a suitable replacement property. Relocation services will be provided by qualified personnel employed by the city.

The purpose of relocation services and assistance is to provide displaced households with an orderly, timely, and efficient move, and to keep them informed of services and payments that are available. Relocation services and assistance will be administered by the New London Development Corporation (NLDC) through a relocation consultant. A relocation counselor representing the NLDC is assigned to assist all displaced households in finding a suitable replacement dwelling.

The relocation counselor will personally interview displacees to:

- determine their needs and preferences;
- explain relocation benefits;
- offer assistance;
- assure the availability of a functionally equivalent property in advance of displacement;
- provide current listings of functionally equivalent properties;



- supply information on other federal and state programs offering assistance to displacees;
- offer transportation, if necessary;
- provide the amount of the replacement housing payment in writing;
- inspect dwellings for decent, safe and sanitary acceptability; and
- provide counseling to minimize hardships.

No relocation payment received will be considered as income or resources for the purpose of the Internal Revenue Code of 1954 or for the purposes of determining eligibility or the extent of eligibility of any persons for assistance under the Social Security Act or any other federal law. Further, no relocation payment received will be considered income or resources under state law per Section 8-277.

Displaced persons will be notified at the initiation of negotiations as to the prospective date when their property will be acquired. They will be given adequate time and assistance in finding a suitable space to occupy. No person lawfully occupying property will be required to move without at least 90 days written notice. However, persons who have not located replacement property by the time the building is scheduled for demolition may be required to move to a temporary location. Temporary moves are discouraged. NLDC will pay the cost of temporary moves, and efforts will continue to find a suitable permanent location. No one will be required to move before he or she has been given an opportunity to obtain replacement property, except under the following conditions:

- failure to pay rent;
- maintenance of a nuisance or use of the premises for illegal purposes;
- materially breaching rental contract;

- refusal to consider accommodations meeting relocation standards;
- refusal to admit a member of the relocation office staff; or
- maintenance of a situation requiring eviction under state or city law.

The relocation office staff is available to assist all displaced businesses to ensure that they are provided an orderly, timely, and efficient move. Displaced businesses are encouraged to call or visit the relocation office whenever there are questions or problems relative to their move.

The Uniform Act provides that a person may file a written appeal to the agency if the person believes that the agency has failed to properly determine the person's eligibility for, or the amount of a payment authorized by the Act.

If an individual qualifies as a displaced person, he or she is entitled to payment for actual reasonable moving costs and certain related expenses incurred in moving. The methods of moving and the various types of moving cost payments are explained below.

Displaced individuals and families may choose to be paid on the basis of actual, reasonable moving costs and related expenses, or according to a fixed moving cost schedule based on the number of furnished rooms in the dwelling. Payment may be made for actual reasonable moving costs and related expenses when the move is performed by a commercial mover. Reimbursement will be limited to a 50-mile distance. Related expenses may include:

- packing and unpacking personal property;
- disconnecting and reconnecting household appliances;



- temporary storage of personal property; or
- insurance while property is in storage or transit.

A replacement dwelling must be decent, safe, and sanitary, meeting all of the minimum requirements established by state regulations and conforming to applicable housing and occupancy codes, and should be functionally equivalent to the present dwelling. While not necessarily identical to the present dwelling, the replacement should:

- have similar number of rooms and living space;
- be located in an area not subject to unreasonable adverse environmental conditions;
- generally not be less desirable than the present location with respect to public utilities and commercial and public facilities;
- be located on a site that is typical in size for residential development with normal improvements;
- be reasonably accessible to place of employment; and
- be currently available and within an individual's financial means.

There are two basic length of occupancy requirements which determine the type of replacement housing payment. Length of occupancy simply means counting the number of days that an individual actually occupied a dwelling before the date of initiation of negotiations by the acquiring agency for the purchase of the property. The term "initiation of negotiations" means the date the acquiring agency makes the first personal contact with the owner of real property, or his representative, to give a written offer for the property to be acquired.

The type of payment depends on whether the displacee is an owner or a tenant, and how long they have lived in the property being acquired prior to

negotiations. Rental assistance is available for owner-occupants and tenants of 90 days or more. Down payment assistance is available for owner-occupants of 90 to 179 days and tenants of 90 days or more. Purchase supplement is available for owner-occupants of 180 days or more.

Rental assistance payment is designed to enable rental of a functionally equivalent decent, safe, and sanitary replacement dwelling for a 48-month period. If the displacee chooses to rent a replacement dwelling and the rental payments are higher than what they have been paying, they may be eligible for a rental assistance payment up to $4,000.

Owner-occupants of 90 days to 179 days and tenant-occupants of 90 days or more may be eligible for a down payment and incidental assistance payment not to exceed $4,000. The maximum down payment and incidental assistance payment for which they may be entitled would be equal to that amount eligible had the individual rented a comparable replacement dwelling, or the actual amount needed for down payment and incidental costs, whichever is less.

Incidental expenses include the reasonable costs of a title search, recording fees, attorney's fees, and certain other related closing costs, but do not include expenses such as real estate taxes and property insurance. The combined amount of the down payment and incidental expenses cannot exceed the maximum payment of $4,000.

If an owner has occupied their home for 180 days or more immediately prior to the initiation of negotiations for the acquisition of their property, they may be eligible, in addition to the fair market value of your property, for a supplemental payment not to exceed



$15,000 for all costs necessary to purchase a functionally equivalent decent, safe, and sanitary (DSS) replacement dwelling. The replacement dwelling must be purchased and occupied within one year of the date of receipt of final payment. If the property is acquired by eminent domain, a DSS replacement dwelling must be purchased and occupied within one year of the date the full amount of the purchase offer is deposited with the court for the property or the date of offer of a functionally equivalent replacement housing, whichever is later.

The purchase supplement includes:

*Price Differential* – The price differential is the amount by which the estimated acquisition price of a replacement dwelling exceeds the acquisition costs of the displacement dwelling. The price differential payment and the following payments are in addition to the acquisition price paid for the current property.

*Increased Mortgage Interest Costs* – Reimbursement may be made for increased mortgage interest costs if the interest rate on the new mortgage exceeds that of the present mortgage. To be eligible, the acquired dwelling must have been encumbered by a bona fide mortgage which was a valid lien for at least 180 days prior to the initiation of negotiations.

*Incidental Expenses* – Reimbursed may also be made for other expenses such as reasonable costs incurred for title search, recording fees, and certain other closing costs, but not including prepaid expenses such as real estate taxes and property insurance.

The total amount of the purchase supplement cannot exceed $15,000 according to the law.

Specific to the Fort Trumbull MDP project, an additional $10.5 million will be available for relocation assistance. Ten million dollars will be in the form of Connecticut Housing Finance Authority (CHFA) low rate financing loan money. Two hundred and fifty thousand dollars will be available in the form of down payment assistance to residents and an additional $250,000 will be available through Small Business Assistance Program relocation funding.

## 5.5 Community Facilities and Services Mitigation Opportunities

No significant negative impacts have been identified with respect to community facilities and services. The proposed state park and other recreation areas, such as the riverwalk and museums, will have positive impacts and can be considered forms of mitigation for the historic lack of public access to regionally unique natural and cultural resources. No other mitigation opportunities have been identified.

## 5.6 Aesthetic/Visual Resource Mitigation Opportunities

A number of enhancements to visual aspects of the project area have been proposed which include improved views of the Thames River via maintained open space and the riverwalk, as well as aesthetic improvements to the WPCF and the proposed Fort Trumbull State Park. No other mitigation opportunities have been identified.



## 5.7 Public Utilities and Services Mitigation Opportunities

Utility improvements and upgrades will be performed in the project area for all action alternatives, as well as to the WPCF. These modifications will constitute mitigation for the proposed changes to the MDP area and as a capital improvement for the City of New London. The following lists proposed improvements:

1. Under Alternatives 2 through 6, the layout of the water distribution system infrastructure will be modified and upgraded to accommodate new or modified street alignments.

2. An interconnection will be provided with the City of New London for the state park to accommodate a separate private water system under several master meters at the perimeter of the park. The Coast Guard and the Naval facilities will also be provided water from the New London water system via easements across the state park or in a relocated street.

3. As necessary, new sanitary sewers will be constructed along any relocated road/driveway alignments.

4. The existing storm drainage system will be modified to accommodate any new roadway alignments and to correct deficiencies in the existing system. Stormwater quality renovation elements, such as inlet chambers (Vortechnics or Stormceptors) and/or infiltration systems will be incorporated as necessary to meet stormwater general permit requirements.

5. Pipe design will utilize conventional engineering for storm sewer systems, thereby providing pipes

sizes that are proportionally larger under the more intensive land uses.

## 5.8 Cultural Resources Mitigation Opportunities

### *5.8.1 Archeological Review Process*

Archeological sites may contain information concerning the history and lives of earlier occupants of the Fort Trumbull area. The Connecticut Historical Commission has indicated that archeological investigations should be conducted to recover any existing archeological and cultural resources from areas that will be disturbed by future development. However, archeological investigations should not prevent future development of the project area.

The Connecticut Historical Commission (CHC) has defined the archeological review process in its *Environmental Review Primer for Connecticut's Archeological Resources* (Poirier 1987). The process generally includes four stages of investigation for site identification, evaluation of significance, and site mitigation These stages of investigation are the archeological assessment survey (Phase 1a), reconnaissance survey (Phase 1b), intensive-level survey (Phase 2), and data recovery (Phase 3). At each stage of investigation, options can be explored for preserving archeological sites.

Archeological assessment surveys (Phase 1a) have been conducted for the Fort Trumbull MDP area (Reeve, Keegan and Keegan 1998, TAMS 1998). Assessment surveys involved documentary investigations and sensitivity modeling in order to evaluate whether prehistoric and/or historic period archeological sites are possible or likely in the project area. A detailed summary of this work is presented in Section 2.7 of this document.



Archeological reconnaissance surveys (Phase 1b) are often conducted in sensitive areas to identify whether prehistoric and/or historic period archeological sites are present or absent. Archeological reconnaissance surveys usually employ rapid and cost-effective shovel test excavations at broad intervals, or backhoe trenching to investigate stratigraphic patterns or disturbances, and to identify whether artifacts and/or architectural features are present that reflect various periods of human occupation. Due to the need for excavation and possible use of heavy equipment, reconnaissance surveys can only be conducted after property access is procured. These surveys can be staged over periods of time if necessary.

If no archeological sites are identified during the reconnaissance survey, CHC does not usually recommend additional investigations. When archeological sites are identified, numerous options exist for future development. The sensitive areas can be preserved as open space; they can be integrated into passive use activities; or additional archeological investigations can be conducted to evaluate whether the site or sites are significant.

Intensive-level surveys (Phase 2) are often conducted at archeological sites that cannot be preserved in development plans. The objective of intensive surveys is to identify whether sites are significant (e.g., meet eligibility standards for the National Register of Historic Places). Intensive surveys usually involve sampling designs oriented to identify architectural features and associated artifact assemblages such as systematic excavations (one meter squares). Field work, artifact analyses, specialized analyses (floral, faunal, radiometric dating, etc.), and report preparations are often involved in Phase 2 archeological surveys.

Most sites are not significant due to documented prior disturbances or lack of preserved feature and/or artifact contexts. Intensive surveys often provide adequate samples for many sites. Usually CHC does not recommend additional investigation for sites that are not National Register eligible. If significant features and artifact assemblages are present, sites can be preserved or removed through data recovery (Phase 3) mitigation.

Data recovery (Phase 3) excavations usually investigate the best preserved portions of archeological sites. As with other stages of archeology, data recovery is a systematic process. Architectural and soil features are sampled or fully excavated, and structures or architectural features are exposed and documented, often with the help of machine grading. Field work, artifact analyses, specialized analyses (floral, faunal, radiometric dating, etc.), and report preparations are often involved in Phase 3 archeological surveys. In most instances, data recovery removes significant archeological sites, and the CHC does not recommend additional investigation.

Other forms of mitigation include documentation of demolished structures and their settings through preparation of written descriptions and histories, photo-documentation and photo essays, educational information, and the like.

### *5.8.2 Proposed Site-Specific Mitigation*

#### *Archaeologically Sensitive Areas*

Archeological reconnaissance surveys (Phase 1b) will be conducted to identify the presence or absence of preserved archeological sites in the MDP area. Phase 1 b surveys will be conducted in representative areas which have been identified as having moderate to



highly archeological sensitivity (see Figures 2.7-2, 2.7-3, and 2.7-4) where ground disturbance would result from implementation of the MDP, following its adoption.

A specific testing design will be devised for identifying areas of least soil disturbances, and greatest possibilities for preserved artifact assemblages and features in order to identify significant historic and prehistoric archeological sites. As part of this analysis, the reconnaissance survey will specifically investigate the archaeological visibility and integrity of the former Fort Trumbull Glass Company factory and the A. Bragan Ship Yard.

Archeological reconnaissance surveys (Phase 1b) for historic archeological sites will also involve additional research into the historic contexts of specific properties. Historic research will include title searches, tax assessments, and census information about ethnicity and occupations of former residents.

If archeological sites are identified in Phase 1b and cannot be preserved, Phase 2 archeological surveys will be conducted to evaluate the significance of identified archeological sites. At each stage of investigation, options will be explored for preserving archeological sites. If archeological sites are demonstrated to be highly significant (i.e., National Register eligible) and cannot be preserved, then data recovery (Phase 3) excavations will likely be undertaken to remove and analyze archeological remains. These future efforts and decision-making processes will be fully coordinated with the Connecticut Historical Commission. CHC will have input during the MDP approval process. Implementation conditions may also be specified in the MDP approval.

Based on a review of the archaeological assessment survey and the administrative draft of this DEIE, the CHC has indicated that the archeological assessment conducted for the Fort Trumbull MDP area is consistent with the *Environmental Review Primer for Connecticut's Archaeological Resources*. Further, CHC concurred with the archaeological sensitivity determinations as presented herein.

CHC has recommended that reconnaissance surveys be conducted as described above with respect to those areas of moderate to high archaeological sensitivity in order to identify, evaluate, and professionally consider archaeological resources.

### *Structural Sensitivity*

Numerous mitigative recommendations have been made by CHC in an October 13, 1998 letter to the Department of the Navy regarding documentation, interpretation, and preservation of structures at the NUWC property. Only two buildings in the future development area are specifically referenced in these recommendations. These are . . . Building 34 (Bowditch Hall) and Building 14. Documentation of Bowditch Hall was recommended. Additionally, preservation covenants were recommended for Bowditch Hall and Building 14 within the future development area to require consultation with the State Historic Preservation Office prior to any proposed alteration, including demolition, that would be inconsistent with the National Park Service's *Standards for Rehabilitation*. A complete copy of CHC correspondence is included herein as Appendix F.

The State Historic Preservation Office has also recommended that additional historic and architectural evaluation be professionally undertaken with respect



to those military-related structures identified on the 1919 map of Fort Trumbull and the adjacent neighborhood that are outside the present NUWC property. These include structures south of Trumbull Street (Map 21, Block 68, Lot 15) and west of 16 East Street (Map 21, Block 105, Lot 8). Accordingly, this analysis will be conducted in consultation with CHC.

## 5.9 Traffic and Parking Mitigation Opportunities

The implementation of any of the alternatives, including the No Action alternative, will result in significant impacts to traffic and transportation at numerous intersections. However, these impacts can be mitigated. Roadway improvements are proposed as described in Section 3.0 of this document. These improvements will offset the traffic impacts projected in Section 4.0.

## 5.10 Water Resources Mitigation Opportunities

The most significant water resource mitigation opportunity in the MDP area is upgrading the stormwater drainage system. These improvements are described in Sections 4.7 and 5.7 of this document.

Improvements adjacent to the project area at Bentley Creek are being accomplished by Pfizer, Inc. as part of their development project. No other water resource mitigation opportunities have been identified.

## 5.11 Flood Hazard Mitigation Opportunities

The following mitigation measures are proposed for flood hazard areas:

1. New developments will be planned and designed in conformance with FEMA standards and requirements.

2. A flood emergency response/evaluation program will be developed for the proposed project. It will include identification of a responsible agency, flood hazard monitoring, warning and/or alert systems, posted evacuation routes, shelters, and provisions for special assistance to residents and businesses.

3. The reported sea level rise trend in New London is 0.0086 feet per year, equal to about one inch per decade (NOAA). Consequently, it may be prudent to design new long-term development projects in coastal areas to accommodate sea level rise. All critical facilities must be designed for the FEMA base flood. An additional one-foot "factor of safety" for sea level rise may be contemplated.

4. Buildings will be designed such that priority will be given to locating low intensity uses on the first floor.

5. Floodproofing of areas not currently floodproofed will be evaluated.

6. Flooding improvements at the two railroad underpasses will be evaluated.

## 5.12 Biological Environment Mitigation Opportunities

No major impacts to the biological environment are anticipated. However, there is potential for mitigation at the planned state park, as well as creation of additional open space. The clean-up efforts described under Section 5.16 may also improve biological habitat.



The small ephemeral watercourse located on the vacant parcel between Howard Street and Shaw Street is situated in a depressed channel with steep banks of fill material. Minimal areas of regulated wetland soils have been identified in this area, with minimal functional value other than to convey stormwater. The density of development in the identified alternatives is such that direct impact can be avoided. Given the low quality of this wetland, the potential exists to partially restore it during future development.

Recognizing that the Fort Trumbull area is intensely developed, with little in the way of biological resources, there may be an opportunity in the design phase to improve existing conditions by developing planting plans and landscaping designs which create habitat. This could include the planting of "habitat islands" or hedgerows vegetated with native plant species that encourage use by wildlife.

## 5.13 Physical Environment Mitigation Opportunities

There are no anticipated significant impacts to the physical environment in the project area and no mitigation opportunities have been identified.

## 5.14 Air Quality Mitigation Opportunities

### *5.14.1 Short-Term Impact Mitigation Measures*

Several controls are proposed for minimizing short-term impacts to air quality from fugitive dust and other pollutant emissions. The following mitigation measures have been identified for reducing the length of time in which soils are exposed, off-site tracking, and vehicle and equipment emissions:

1. Construction will be properly phased to minimize the length of time which soils are exposed before

final materials are placed and landscaping is completed;

2. Water or wetting agents will be used on exposed soil or gravel areas.
3. Periodic sweeping of construction sites and driveways will be performed.
4. Truck tires and equipment leaving the construction site will be periodically cleaned.
5. Portable generators, on-site machinery, and vehicles will be properly maintained.

#### *5.14.2 Long-Term Impact Mitigation Measures*

The following mitigation measures have been identified for improving the flow of traffic and minimizing potential long-term impacts to air quality:

1. Traffic signals will be properly timed and placed.
2. Intersections and driveways will be engineered to provide adequate and safe stopping and sight distance.
3. Traffic lanes will be appropriately sized to allow for passing and emergency stops.
4. Larger employers in the project area will be encouraged to stagger work hour shifts outside of peak commuting hours.
5. Employers will be encouraged to provide on-site amenities such as automatic teller machines, dry cleaning services, cafeterias, and the like, to eliminate lunch hour errands by employees which result in additional car trips. Pfizer has indicated that these types of services will be provided on-site. There is also potential for these type of facilities in the hotel/conference center



which is proposed in several of the land use alternatives.

6. Alternative modes of transportation, such as bus and ferry shuttle, will be promoted.

### 5.15 Noise Mitigation Opportunities

#### *5.15.1 Short-Term Impact Mitigation Measures*

Construction activities will be limited to the daytime, when rush hour traffic and railroad noise are at higher levels, in an effort to minimize short-term impacts of increased noise levels and disturbance.

#### *5.15.2 Long-Term Impact Mitigation Measures*

No significant impacts to long-term noise levels have been identified. As part of the MDP design, buffering in the form of trees, parking, berming and other aesthetic treatments will be evaluated for reduction of noise from local traffic and from the railroad.

### 5.16 Solid Waste/Hazardous Materials Mitigation Opportunities

The MDP area will be investigated and remediated in accordance with state and federal regulations. Investigation/remediation factors and future land use factors are discussed below.

Under the MDP action alternatives, many of the existing buildings will be razed. Prior to demolition, the requisite pre-demolition building surveys for lead paint and asbestos will be performed and identified hazards mitigated. Each area where potential subsurface (soil/groundwater) contamination is identified will be investigated and remediated in accordance with the Connecticut Remediation Standard

Regulations (RSR) and in accordance with the intended land use(s).

### *5.16.1 Investigation/Remediation Factors*

During investigation and remediation of projects within the MDP area, the following techniques will be utilized to mitigate potential releases of contaminants:

1. Wherever possible and practicable, non-intrusive/non-invasive techniques will be utilized. Such techniques as x-ray fluorescence will be used to perform lead paint surveys instead of destructive sampling methods. Presumption will be made that certain obvious asbestos-containing materials contain asbestos, rather than performing destructive sampling.
2. Established investigation and sampling protocols will be followed which minimize the potential for releases.
3. All investigation related wastes (drill cuttings, well development water, etc.) will be containerized as appropriate, so that waste characterization and handling-disposal can be appropriately performed.
4. Physical barriers will be used during remediation activities (siltation fencing, negative air pressure enclosures, etc.).
5. Investigations will be performed in a phased manner to better anticipate potentially hazardous conditions (i.e., perform a soil gas survey to define likely hot spots prior to more invasive drilling techniques).



6. Adequate waste characterization will be performed on any residual waste materials identified at properties within the MDP area to define potential hazards and allow proper handling/disposal.
7. Pre-demolition abatement will be performed of environmental hazards such as asbestos, lead paint (if necessary), fuel oil tanks, and the like, to eliminate potential releases.
8. Only properly trained personnel with appropriate experience and medical clearances will be utilized.
9. Field screening instruments will be utilized to identify potential hazards and utilize necessary personal protective equipment as indicated, based on the identified level of hazard.
10. Wastes will be pretreated prior to discharge from potential remedial systems including off-gas treatment from soil vapor extraction systems and treatment of recovered ground water from remedial or dewatering systems.

### *5.16.2 Future Land Use Factors*

As presently defined, the various land uses outlined in the action alternatives do not specifically enumerate processes and operations which may indicate the generation, use, or storage of hazardous wastes or materials or chemical or petroleum products. In general, instituting the use of best management practices (BMP's) for various future land uses in the MDP area will serve to mitigate the effects of the impacts future development from environmental concerns. Typical BMP's include such items as: requiring secondary containment around all tanks, drums or other product/waste containers to eliminate spill potential.

# 6.0 CONSULTATION AND COORDINATION

## 6.1 Scoping

At the onset of the MDP process, a series of scoping meetings took place with various regulatory agencies and interested parties. Only those scoping meetings that have taken place following initiation of the CEPA process are described herein.

A scoping meeting took place with Navy representatives at the NUWC property on June 19, 1998. In addition to NUWC and Navy personnel and their consultants, NLDC and its consultants, New London planning staff, DECD, and DEP were represented at this meeting.

A formal scoping meeting was held at the offices of DECD at 505 Hudson Street in Hartford, Connecticut on June 22, 1998. The State Departments of Economic and Community Development, Transportation, Environmental Protection and the Office of Policy and Management were represented at this meeting.

Informal scoping sessions have also taken place via telephone, email, and written correspondence. A great deal of coordination has taken place with the Connecticut Historical Commission, the Department of Environmental Protection, the City of New London, and Pfizer, Inc.

## 6.2 Consultation and Coordination with Agencies/ Organizations

General presentations on the project and planning process have been made to the New London City Council, the Redevelopment Agency, Water Pollution Control Authority, and Planning and Zoning. Progress reports were made to the City Council at each of its bimonthly meetings since May of 1998. Project



reports and updates were also provided at publicly noticed meetings of the New London Development Corporation.

Project coordination meetings have taken place on an almost weekly basis, primarily attended by NLDC and its consultants. Other individuals and agencies have been routinely invited to these meetings for pertinent discussion topics and workshops. Included in this representation has been City of New London planning staff, DECD, DEP, CHC, Pfizer and its consultants, and others.

## 6.3 Public Outreach

A strong public outreach program has been implemented in association with this project from the onset. Pre-dating the CEPA process, NLDC began holding monthly neighborhood meetings with area residents, businesses, and other interested parties. A combination of notice techniques were utilized which varied from meeting to meeting. These techniques included newspaper advertisements, mailings to area residents and property owners, and public announcements at City Council meetings. Newspaper reporters covered the majority of these meetings. Table 6.3-1 presents a summary of meeting dates and agendas.

**TABLE 6.3-1**
**Summary of Neighborhood Meetings**

| Date | Main Speakers | General Topics Covered |
|---|---|---|
| April 27, 1998 | Dr. Claire Gaudiani, NLDC President<br>James Mahoney, NLDC Executive Director<br>Richard Collier, Wallace Roberts and Todd<br>Jane Stahl, DEP Assistant Commissioner<br>Rita Zangari, DECD Deputy Commissioner<br>Joseph Desautel, The Downes Group | Project Background and Philosophy<br>Introduction of Consultants<br>Planning Overview<br>Plans for Fort Trumball State Park<br>State Support for Pfizer<br>Explanation of the MDP process |
| May 18, 1998 | Dr. Claire Gaudiani, NLDC President<br>Tom Bowen, City New London<br>James Mahoney, NLDC Executive Director | Introduction<br>Wastewater Treatment Facility Report<br>Project Update |
| June 15, 1998 | James Mahoney, NLDC President<br>Reid Burdick, New London City Councilor<br>Philip Michalowski, HMA, Inc.<br>Richard Collier, Wallace Roberts and Todd | Introduction<br>Neighborhood Coffees<br>Neighborhood Relocation Process<br>Preliminary Land use Concepts |
| July 22, 1998 | James Mahoney, NLDC President<br>Marguerite Wilbur, The Downes Group<br>Jeanine Bonin, Milone & MacBroom, Inc.<br>Jack Shanahan, CHC | Property Acquisition Update<br>Municipal Development Plan Process<br>Environmental Conditions Inventory<br>State Historic Evaluation Process |
| September 2, 1998 | James Mahoney, NLDC President<br>Chip Fitsmorris, Pfizer, Inc.<br>Mark Samse, CuH$_2$A, Pfizer Consultant<br>Jeanine Bonin, Milone & MacBroom, Inc. | Introduction<br>Pfizer Project Update<br><br>CEPA Process/Existing Conditions Inventory |
| October 1, 1998 | James Mahoney, NLDC President<br>Robert Flannagan, Flannagan Associates<br>Richard Collier, Wallace Roberts and Todd<br>Jeanine Bonin, Milone & MacBroom, Inc. | Property Acquisition Update<br>The Appraisal Process<br>Land Use Alternatives<br>Environmental Conditions/EIE Update |

A period of public comment, questions, and answers was provided during each of these meetings

## 6.4 Public Review

Formal notice of the existence of this document has been published in area newspapers and in the Connecticut Law Journal. A period of no less than 45 days will be provided for notice, distribution, and review of the Draft Environmental Impact Evaluation by any interested parties. Upon receiving comment, DECD will review comments, perform any additional environmental study and analysis, and amend the evaluation as appropriate.

Upon completion of the 45 day public comment period, the sponsoring agency (in this case the Department of Economic and Community Development) must forward the following information to the Office of Policy and Management, for determination of the adequacy of the evaluation: (1) all public notice documentation; (2) a brief summary of the public hearing, if one is held, (3) comments received from all interested parties; (4) the agency decision relative to proceeding with the proposed action; and (5) a discussion of the intentions for initiation of actions for minimizing impacts. This constitutes the Record of Decision (final EIE document and the measures for mitigation identified therein).

The CEPA process concludes with the review of the EIE and Record of Decision by OPM and their determination of whether or not regulatory requirements have been satisfied. The final EIE is the basis for the implementation of the project. A Municipal Development Plan is then created consistent with the findings of the CEPA process. A mandatory public hearing is held upon completion of the MDP. Procedures for the adoption of the MDP are set forth in Section 32-224(c) of the Connecticut General Statutes. This process must include a finding by the OPM that the plan is not inimical to the overall goals and objectives of

the state. Upon obtaining such a finding, the plan would then be legally adopted by the city and approved by DECD.

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Persons Contacted

The following individuals were interviewed during the preparation of the Environmental Impact Evaluation:

City of New London:

- Office of Development and Planning: Bruce Hyde, Peter Gillespie, Ned Hammond
- Office of Finance: Donald Gray (Director), and the City Assessor
- Marketing Director: Kathryn Shelton
- Chief Samuels, personal communication, October 6, 1998
- Deputy Chief Gavin, personal communication, October 6, 1998
- Fire Department administrative staff, personal communication, July 1998
- Captain Edwards, personal communication, July 1998

Department of Environmental Protection:

- Pamela Adams, DEP Parks
- Paul Bodner, DEP Air Management Bureau
- Arthur Christian, DEP Inland Water Resources Division
- David Fox, DEP Planning
- Joan Hoezel, DEP Office of Long Island Sound Programs
- David Simpson, DEP Marine Fisheries Office, personal communication, July 13, 1998
- Tom Savoy, DEP Fisheries

Connecticut Historical Commission

- Dawn Maddox
- David Poirer, Ph.D.
- Jack Shanahan, SHPO

Connecticut Office of Policy and Management: Jeffrey Smith



Connecticut Department of Transportation: Ralph Steadham Jr.

U.S. Navy: Robert Ostermueller, John Templeton, Tina Delinger, Timothy Smith

TAMS Consultants, Inc.: Malaina Bowker and Stephen Bedford

Pfizer, Inc.: James Serbia

Southeast Connecticut Council of Governments: Richard Erickson, Thomas Sidel

Eastern Connecticut Chamber of Commerce: Harry Raucher.

Connecticut Mystic and More: Rita M. Schmidt and Debra Donovan (Conference Director)

SEA-RED (SouthEast Area-Regional Economic Development): Cedric Cam

Norwich Community Development Corporation: Theodore Montgomery

Anchor Associates, R.E.: Peter Connair

U.S. Properties: Susan Howard

New England RE Group: Steve Perry

Miner & Silverstein Appraisal: Bob Silverstein/Chris Miner

Flanagan Associates: Robert and Steve Flanagan

Professional Service Group

## APPENDIX A

### Environmental Assessment

STATE OF CONNECTICUT DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT INFRASTRUCTURE AND REAL ESTATE PROJECTS

### ENVIRONMENTAL ASSESSMENT

**Date**: June 30, 1998 **Staff Contact**: Peter Simmons

**Municipality**: New London

**Project**: New London Waterfront Redevelopment

**Funding Source**: Multiple **State Funds**: $

**State Agency Review Stage 1** X **Stage 2** __

**Project Description**: Redevelopment of the New London waterfront area in the vicinity of the former Naval Underwater Warfare Center (NUWC), Pequot Avenue, the New London Waste Water Treatment Plant, and Fort Trumbull. The project area is approximately 75 acres in size and includes a residential area of 68 properties, which are accessed primarily by Trumbull Street and Walbach Street. The project is anticipated to be developed in several phases: A) Aesthetic and operational upgrades to the WWTP, B) Conversion of the Fort Trumbull site into a State Recreational/Historic Park, C) reuse/redevelopment of the former NUWC site and upland areas as a mixed use with a potential research & development/business park.

**Project Activities**:

*Proposed DECD Activities:* 1) Acquisition and relocation of the residents and businesses in the Fort Trumbull peninsula project area. 2) Demolition of the existing structures.



3) Reconstruction of the roadway and utility infrastructure, to serve the project area. 4) Environmental site assessments and remediation of contaminated properties identified during the project-planning phase, 5) potential future investment in private business locations and expansions.

*Proposed DEP Activities:* 1) development of Fort Trumbull as a State Park. This project may be subject to a separate DEP CEPA review, 2) loan to the City for WWTP improvements.

*This environmental assessment is conducted in accord with the agency's Environmental Classification Document.*

**RCSA sec. 22a-1a-3 Determination of environmental significance (direct/indirect)**

1) *Impact on air and water quality or on ambient noise levels*
   a) *Air* – N/A
   b) *Water Quality* – Storm water discharges from the site will need a DEP permit and mechanical water quality devices will likely be required as part of the storm water management system.
   c) *Noise – N/A*
2) *Impact on a public water supply system or serious effects on groundwater, flooding, erosion, or sedimentation*
   a) *Water Supply* – DEP notes that the New London municipal water supply is marginally meeting the current demand. System improvements are needed to increase the systems capacity. The New London water supply is experiencing drought-like conditions – reservoirs are at 38%

capacity. Other water supplies in the area are not experiencing supply problems of this nature. DPH is reviewing the situation. The city's water supply plan update (5 year) is due to be submitted during April 1998. The City has submitted an application for a water diversion permit to the DEP to develop the Hunts Brook diversion to increase the water supply. DEP also identified the replacement of the Great Swamp pump station as a possible action, which could increase the available volume of potable water in the city system. The project demands on the water supply system will need to be evaluated.

b) *Groundwater* – The area is within a GB-Class area.

c) *Flooding* – Portions of the project area are within the 100-year floodzone. DECD stormwater management certification will be needed to comply with the Floodplain Management Act (25-68 CGS). New construction will be required to comply with proper flood management standards. Portions of the access and egress are within the flood zone; therefore, a flood management plan with evacuation measures is warranted.

3) *Effect on natural land resources and formations, including coastal and inland wetlands, and the maintenance of in-stream flows* – The area is subject to the Connecticut Coastal Management Act. The act requires that coastal sites be developed for water dependent uses. The US Navy and Coast Guard will occupy a portion of the NUWC site and use the dock and wharf presently within the project area. City of New London coastal site plan review is necessary. A tidal wetland area is south of the site along Bentley Creek. No mapped tidal wetlands are within the project area. The DEP general permit for stormwater



discharges within 500 feet of a tidal wetland will require the stormwater system to retain the volume of run-off generated by 1 inch of rainfall. This condition will apply if unmapped tidal wetland vegetation is present within the project area.

4) *Disruption or alteration of an historic, archeological, cultural or recreational building, object, district, site or surroundings* – conversion of Fort Trumbull into a State Park will preserve the historic site and ensure public access to this cultural resource. The properties identified for acquisition will need to be assessed for historic significance. Coordination with SHIPO has been initiated and will continue throughout development process through DECD.

5) *Effect on natural communities and upon critical species of animal or plant and their habitats: interference with the movement of any resident or migratory fish or wildlife species* – The Natural Diversity Database does not record the presence of threatened or endangered species in the project area. An on-site survey will be conducted. The project activities will not disturb the Thames River habitat area adjacent to the peninsula and will be coordinated through the CAM process.

6) *Use of pesticides, toxic or hazardous materials or any other substance* in *such quantities as to create extensive detrimental environmental impact* – N/A

7) *Substantial aesthetic or visual effects* – The project will improve the aesthetics and operation of the WWTP. Open space will be developed adjacent to Fort Trumbull. The specific reuse plans for the buildings of the former NUWC has not been identified. The US Navy and Coast Guard will maintain some presence on the Former NUWC property. The inland residential and commercial properties are proposed

to be acquired and redeveloped as a research & development and office area. All site development will be managed through a comprehensive plan to assure long-term maintenance of these aesthetic improvements.

8) *Inconsistency with the written and/or mapped policies of the statewide Plan of Conservation and Development and such other plans and policies developed or coordinated by the Office of Policy and Management or other agency* – The project area is classified by the C & D Plan as a Regional Center. Some areas within the project area are designated for Conservation due to tidal and coastal flooding. The proposed development is consistent with the state's development priorities.

9) *Disruption or division of an established community or inconsistency with adopted municipal or regional plans* – The proposed waterfront development will cause the acquisition, relocation and demolition of approximately 68 residential properties in the Trumbull Street and Walbach Street area. This area is proposed for possible reuse as research and development and related economic development activities to be complimentary to the former NUWC site. Relocations will be addressed through a plan and process in conformance with the Uniform Relocation Assistance Act (URAA).

10) *Displacement or addition of substantial numbers of people* – see above comment

11) *Substantial increase in congestion (traffic, recreational, other)* – The existing roadway system historically served both the New London Mills operation and the NUWC operation (peak employment of about 5000) north of the NLM site. *The May 1994 CONNDOT Arterial/Freeway System Study* reports that 0.9



miles of Route 1 and 1.4 miles of Route 213 in New London are approaching capacity. Portions of Routes 213, 1 and 85 may be at service levels above capacity by 2020 if the anticipated growth of the city meets expectations. A traffic study will be needed to determine the need for a generator permit from the State Traffic Commission.

12) *A substantial increase in the type or rate of energy use as a direct or indirect result of the action* – no negative impacts are anticipated due to future state of the art design practices.

13) *The creation of a hazard to human health or safety* – N/A

14) *Any other substantial impact on natural, cultural, recreational or scenic resources* – N/A

**Conclusion:**

1. The acquisition of residential properties and the relocation of the residents may be an impact to the community. The relocation assistance would conform to the Uniform Relocation Assistance Act (URA) provisions.

2. DPH reports that the adequacy of the water supply needs to be evaluated for this project development. The cumulative impact should be evaluated considering other development projects underway in the city.

3. The proposed Fort Trumbull State Park is a DEP responsibility and may be reviewed through a separate CEPA process. The reuse of this historic property as a state park is consistent with state objectives.

4. WWTP improvements are a DEP responsibility. Non-hydraulic improvements to the WWTP may not require CEPA review (per DEP)

5. The project conforms to the Statewide Plan of Conservation and Development. The development will comply with the appropriate CCMA requirements.

6. Traffic improvements necessary to safely provide access and egress to the site will be subject to STC approval. Improvements required to the state transportation system will be conditioned to the generator permit.

7. The historic/archeological resources will be evaluated and documented/salvaged. Project activities will be fully coordinated with SHPO.

8. Environmental investigations and remedial action of contamination are exempt from CEPA review. Recommendation: The preparation of an Environmental Impact Evaluation for the waterfront project is prudent to measure the impacts, and to develop the proper scope for the proposed improvements. The state CEPA should be fully coordinated with the US Navy NEPA document being prepared for the NUWC site and with the Fort Trumbull State Park CEPA. A joint DECD/DEP document on the waterfront development should be considered.

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## APPENDIX B
## Housing Availability

### EXHIBIT 1

### City of New London Inventory of Multi-Family Housing 1996

| NAME | LOCATION | DATE BUILT | UNITS | PUBLICLY ASSISTED |
|---|---|---|---|---|
| Rogers | 33 Granite Street | 1855 | 16 | |
| Crocker House | 166 State Street | 1872 | 96 | |
| Hilltop | 156 Garfield | 1875 | 24 | |
| Highland Arms | 43 Granite Street | 1920 | 31 | |
| Bateswoods | Boulder Drive | 1946 | 160 | State-assisted (F) |
| Briarcliff | Colman Street | 1951 | 142 | State-assisted (F) |
| Londonberry Gardens | 220 Third Avenue | 1954 | 86 | Other (F) |
| Nautilus Arms | 177 Nautilus Drive | 1960 | 39 | |
| Harbor Housing | 292 Pequot Avenue | 1961 | 65 | |
| Ocean Reef | 54 Nob Hill Road | 1962 | 163 | |
| 84 Pequot Avenue | | 1962 | 42 | |
| 335 Broad | 335 Broad Street | 1964 | 15 | |
| Gorden Court | Gorden Court | 1964 | 38 | State-assisted (E) |
| Riozzi Court | Riozzi Court | 1964 | 42 | State-assisted (E) |
| 264 Hempstead | | 1964 | 21 | |
| Farmington Arms | 70 Farmington Avenue | 1964 | 36 | |
| Heritage House | 64 Dell Avenue | 1965 | 60 | |
| Winthrop High Rise | Crystal Avenue | 1965 | 127 | Federally-assisted (F) |
| Hawthorne Hill | 15 Hawthorne Drive | 1967 | 136 | |
| 280 Gardner | | 1967 | 24 | |
| 63 Niles Hill Rd | | 1968 | 18 | |
| Niles Hill Commons | 113 Niles Hill Road | 1968 | 34 | |
| Winthrop Square | 59 Federal Street | 1970 | 314 | Other (F) |
| Whalers Point | 159 Hawthorne Drive | 1970 | 246 | |
| Parkside West | 283 Willetts Avenue | 1970 | 137 | |

| | | | | |
|---|---|---|---|---|
| Sandpiper Dunes | Nautilus Drive | 1970 | 254 | |
| Williams Park | 127 Hempstead Street | 1970 | 100 | Federally-assisted (E) |
| Castle Hill | 307 Crystal Avenue | 1971 | 96 | |
| Garfield Avenue | 149 Garfield Avenue | 1972 | 38 | |
| Parkside South | 116 Viets Street | 1972 | 40 | |
| G.W. Carver | 202 Colman Street | 1972 | 130 | State-assisted (E) |
| Bristol Arms | 14 Bristol Street | 1972 | 21 | |
| Squire One | 11 Anthony Road | 1974 | 171 | |
| Jefferson Gardens | Michael Road | 1974 | 204 | Other (F) |
| Gull Harbor | 83 Mansfield | 1975 | 102 | |
| 281 Gardner | | 1976 | 66 | |
| 206 Pequot Avenue | | 1978 | 16 | |
| Mohican | 281 State Street | 1981 | 146 | Other (E) |
| Huntington Towers | 149 Huntington Street | 1983 | 144 | Other (E) |
| 85 Niles Hill Rd | | 1985 | 14 | |
| Oceanside | 611 Ocean Avenue | 1987 | 71 | |
| Candlewood | 453 Bayonet Street | 1990 | 23 | |

(F) Family (E) Elderly

Source: City of New London Plan of Conservation and Development, 1997; City of New London Consolidated Plan for Housing and Community Development.

## EXHIBIT 2

## Rental Housing Availability

| Date | City | Type | Rent | Heat/Hot Water Incl. | Electricity Included | Security Deposit | Pets | Amenities |
|---|---|---|---|---|---|---|---|---|
| 11 | Groton | 1 & 2 BR | | | | | | Apartment Complex/Near Base |
| 18 | Groton | 1 & 2 BR | | | | | | Carpet/AC/Dish/Near EB & PF |
| 18 | Groton | 1 & 2 BR | | | | | | Apartment Complex/Near EB & PF |
| 25 | Groton | 1 & 2 BR | | Y | | | | Apartment Complex |
| 25 | Groton | 1 & 2 BR | $ 585 | | | | | Apartment Complex |
| 2 | Groton | 1 & 2 BR | 585+ | | | | | Apartment Complex |
| 11 | Groton | 1 BR | | | | | | Parking |
| 25 | Groton | 1 BR | | | | | N | Parking |
| 2 | Groton | 1 BR | | | | | N | Parking |
| 11 | Groton | 1 BR | $ 595 | Y | Y | | N | |
| 11 | Groton | 1 BR | $ 585 | Y | N | | | AC/Dish/Carpet/Near EB & PF |
| 11 | Groton | 1 BR | $ 550 | N | N | | N | Parking/Near base |
| 11 | Groton | 1 BR | $ 550 | N | N | | | Storage/Parking/Lease |
| 11 | Groton | 1 BR | $ 525 | Y | N | | | Apartment Complex |
| 18 | Groton | 1 BR | $ 595 | Y | Y | | N | |
| 18 | Groton | 1 BR | $ 560 | Y | | | | Near EB & PF |
| 18 | Groton | 1 BR | $ 500 | N | N | | | Garage |
| 18 | Groton | 1 BR | $ 450 | N | N | Y | N | |
| 25 | Groton | 1 BR | $ 595 | Y | Y | | N | |
| 25 | Groton | 1 BR | $ 650 | | | | | Yard |
| 25 | Groton | 1 BR | $ 560 | Y | | | | Near EB & PF |
| 25 | Groton | 1 BR | $ 500 | N | N | | | Garage |
| 25 | Groton | 1 BR | $ 450 | | | Y | N | |
| 2 | Groton | 1 BR | $ 595 | Y | Y | | N | |
| 2 | Groton | 1 BR | $ 575 | | | | | WD/Near EB & PF |
| **Average 1 BR Rental Groton** | | | **$ 552** | **Fair Market Rents New London-Norwich 1 BR: $594** | | | | |
| **Median 1 BR Rental Groton** | | | **$ 560** | | **Above = 5** | **Below = 11** | | |
| | | | | | | | | |
| | | | | | | | | |
| 11 | Groton | 1,2,&3 BR | | Y | N | | | Apartment Complex |
| 11 | Groton | 1,2,&3 BR | | Y | | | | Apartment Complex |
| 11 | Groton | 1,2,&3 BR | | | | | | Apartment Complex/W&D/AC |
| 18 | Groton | 1,2,&3 BR | | | | | | Apartment Complex |
| 18 | Groton | 1,2,&3 BR | | Y | | | Y | Apartment Complex/Near EB & PF |
| 25 | Groton | 1,2,&3 BR | | | | | | Apartment Complex |
| 25 | Groton | 1,2,&3 BR | 525+ | | | | | Apartment Complex |
| 2 | Groton | 1,2,&3 BR | | | | | | Apartment Complex/WD/ Fireplace |
| 18 | Groton | 1,2,3 BR & T | $ 695 | | | | | Apartment Complex |
| 11 | Groton | 2 BR | | Y | N | | | AC/Dish/Carpet/Near EB & PF |
| 11 | Groton | 2 BR | | | | | | Parking/Carpet/near Base/ Hookups |
| 11 | Groton | 2 BR | | | | | | Apartment Complex |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 11 | Groton | 2 BR | | | | | | Townhouse/Garage/Storage |
| 18 | Groton | 2 BR | | | | | | Apartment Complex |
| 18 | Groton | 2 BR | | Y | | | N | Waterview |
| 25 | Groton | 2 BR | | | | | | Apartment Complex |
| 2 | Groton | 2 BR | | | | | | Apartment Complex |
| 11 | Groton | 2 BR | $ 525 | N | N | | | Parking |
| 11 | Groton | 2 BR | $ 600 | N | N | Y | N | |
| 11 | Groton | 2 BR | $ 585 | Y | Y | | | Carpet/Storage |
| 11 | Groton | 2 BR | $ 765 | | | Y | N | Townhouse/HW floors/Basement |
| 18 | Groton | 2 BR | $ 540 | Y | | | | |
| 18 | Groton | 2 BR | $ 585 | Y | | | | Apartment Complex |
| 18 | Groton | 2 BR | $ 500 | | | | | Hookups |
| 18 | Groton | 2 BR | $ 765 | | | Y | | Townhouse/Basement/HW Floors |
| 18 | Groton | 2 BR | $ 650 | N | N | | | Parking/Yard/Near EB & PF |
| 18 | Groton | 2 BR | $ 725 | | | | N | Garage/Carpet |
| 2 | Groton | 2 BR | $ 585 | Y | | | | Apartment Complex |
| 2 | Groton | 2 BR | $ 725 | | | | N | Garage/Hookups |
| **Average 2 BR Rental Groton** | | | **$ 629** | **Fair Market Rents New London-Norwich 2 BR: $723** | | | | |
| **Median 2 BR Rental Groton** | | | **$ 593** | | **Above = 4** | **Below = 12** | | |
| | | | | | | | | |
| | | | | | | | | |
| 25 | Groton | 2 BR T | $ 765 | | | Y | | HW Floors/Basement |
| 25 | Groton | 2 BR T | | | | | | Apartment Complex |
| 2 | Groton | 2 BR T | | | | | | Apartment Complex |
| 18 | Groton | 3 BR | $ 750 | N | N | | | |
| 25 | Groton | 3 BR | $ 750 | N | N | | | |
| 2 | Groton | 3 BR | | | | | N | Attic/Storage/Parking |
| 2 | Groton | 3 BR | | | | | N | Hookups |
| 11 | Groton | S,1 & 2 BR | $535+ | Y | N | | | Apartment Complex/Near EB PF |
| 18 | Groton | S,1 & 2 BR | | | | | | Apartment Complex |
| 25 | Groton | S,1 & 2 BR | | | | | | Apartment Complex |
| 2 | Groton | S,1 & 2 BR | | | | | | Apartment Complex |
| 11 | Groton | Studio | $ 499 | | | N | | |
| 2 | Groton | | $ 650 | | | | | |
| 11 | New London | 1 & 2 BR | | | | | | Townhouses/Basement/Carpet/ Deck |
| 18 | New London | 1 & 2 BR T | | | | | | Apartment Complex |
| 11 | New London | 1 BR | | | | | | Apartment Complex |
| 11 | New London | 1 BR | $515+ | | | | | Apartment Complex |
| 18 | New London | 1 BR | | Y | Y | | | Furnished/Cable |
| 18 | New London | 1 BR | | | | | | |
| 18 | New London | 1 BR | | | | | | Apartment Complex |
| 18 | New London | 1 BR | 515+ | | | | | Apartment Complex |
| 18 | New London | 1 BR | | | | | | Apartment Complex |
| 25 | New London | 1 BR | 515+ | | | | | |
| 2 | New London | 1 BR | | Y | Y | | | Carpet |
| 2 | New London | 1 BR | | | | | | Apartment Complex |
| 18 | New London | 1 BR | | Y | | | | Appliances/Carpet |
| 18 | New London | 1 BR | | | | | | |
| 11 | New London | 1 BR | | | | | | Apartment Complex |
| 11 | New London | 1 BR | $ 525 | Y | N | | N | Furn./Beachfront/No smoking |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 11 | New London | 1 BR | $ 480 | Y | N | | N | Furn. |
| 11 | New London | 1 BR | $ 600 | Y | Y | | | Furn/Cable/Near Hospital |
| 11 | New London | 1 BR | $ 450 | | | | N | |
| 11 | New London | 1 BR | $ 425 | Y | | | N | Parking |
| 11 | New London | 1 BR | $ 495 | Y | | | | |
| 11 | New London | 1 BR | $ 400 | | | | | Parking |
| 11 | New London | 1 BR | $ 375 | | | | | |
| 11 | New London | 1 BR | $ 500 | | | | Y | |
| 11 | New London | 1 BR | $ 640 | Y | Y | | | |
| 11 | New London | 1 BR | $ 525 | Y | Y | | | |
| 11 | New London | 1 BR | $ 575 | Y | | | | Appliances |
| 11 | New London | 1 BR | $ 500 | Y | | | | |
| 11 | New London | 1 BR | $ 700 | N | N | | | Skylight/WD/Garage |
| 11 | New London | 1 BR | $ 525 | Y | | | | Ceilings/Windows/HW Floors |
| 18 | New London | 1 BR | $ 480 | Y | | Y | | Furnished |
| 18 | New London | 1 BR | $ 400 | | | Y | N | |
| 18 | New London | 1 BR | $ 415 | | | | | Parking |
| 18 | New London | 1 BR | $ 525 | | | | | Fireplace |
| 18 | New London | 1 BR | $ 425 | | | | N | |
| 18 | New London | 1 BR | $ 595 | Y | | | | |
| 18 | New London | 1 BR | $ 450 | | | | | |
| 18 | New London | 1 BR | $ 400 | | | | | Parking |
| 18 | New London | 1 BR | $ 495 | Y | Y | | | |
| 18 | New London | 1 BR | $ 450 | N | N | | | Porch/Hookups/Yard/Parking |
| 18 | New London | 1 BR | $ 580 | N | N | | | Ceiling/Skylight/Yard |
| 18 | New London | 1 BR | $ 600 | Y | | | | |
| 18 | New London | 1 BR | $ 525 | Y | Y | Y | | |
| 18 | New London | 1 BR | $ 525 | Y | Y | | | |
| 18 | New London | 1 BR | $ 640 | Y | Y | | | View |
| 18 | New London | 1 BR | $ 540 | | | | | Near CGA |
| 18 | New London | 1 BR | $ 525 | Y | | | | |
| 18 | New London | 1 BR | $ 525 | Y | | | | Parking/Appliances/Storage/ Laundry |
| 25 | New London | 1 BR | $ 480 | Y | | | | Furnished |
| 25 | New London | 1 BR | $ 525 | Y | | | | Carpet/Appliances/Laundry Parking |
| 2 | New London | 1 BR | $ 480 | Y | | | | Furnished |
| 2 | New London | 1 BR | $ 475 | Y | Y | | | |
| 2 | New London | 1 BR | $ 425 | | | | | |
| 2 | New London | 1 BR | $ 495 | N | N | | | HW Floors/Yard |
| 2 | New London | 1 BR | $ 425 | | | Y | N | |
| 2 | New London | 1 BR | $ 575 | | | | N | Carpet/Appliances |
| 2 | New London | 1 BR | $ 500 | Y | Y | | | Porch HW Floors |
| 2 | New London | 1 BR | $ 375 | Y | | Y | | |
| 2 | New London | 1 BR | $ 450 | N | N | | N | Carpet/Appliances |
| 2 | New London | 1 BR | $ 550 | | | | | Parking Appliances |
| 2 | New London | 1 BR | $ 675 | Y | Y | | | Fireplace |
| 2 | New London | 1 BR | $ 525 | Y | Y | | N | |
| 2 | New London | 1 BR | $ 390 | | | Y | | |
| 2 | New London | 1 BR | $ 550 | Y | Y | | | |
| 2 | New London | 1 BR | $ 500 | | | | Y | Carpet |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 2 | New London | 1 BR | $ 495 | Y | Y | | | |
| 2 | New London | 1 BR | $ 525 | Y | | | | Carpet/Parking/Appliances Laundry |
| **Average 1 BR Rental New London** | | | **$ 504** | **Fair Market Rents New London-Norwich 1 BR: $594** | | | | |
| **Median 1 BR Rental New London** | | | **$ 500** | | **Above = 7** | **Below = 24** | | |
| | | | | | | | | |
| | | | | | | | | |
| 11 | New London | 2 BR | $ 625 | N | N | Y | | Fireplace/Parking |
| 11 | New London | 2 BR | $ 450 | N | N | | | Parking/Fireplace/Laundry |
| 11 | New London | 2 BR | $ 550 | N | N | | N | |
| 11 | New London | 2 BR | $ 575 | N | N | | | Parking |
| 11 | New London | 2 BR | $ 650 | N | N | | | |
| 11 | New London | 2 BR | $ 695 | Y | Y | | | |
| 11 | New London | 2 BR | $ 900 | | | | | 2 Bath/Pool/Laundry |
| 11 | New London | 2 BR | $ 550 | Y | | | | |
| 11 | New London | 2 BR | $ 535 | N | N | | | |
| 11 | New London | 2 BR | $ 700 | | | | | Porch/Storage |
| 11 | New London | 2 BR | $ 625 | Y | | | | Apartment Complex |
| 11 | New London | 2 BR | $ 625 | N | N | | | Basement/HW Floors |
| 18 | New London | 2 BR | $ 625 | | | Y | | Fireplace/Parking |
| 18 | New London | 2 BR | $ 525 | N | N | | N | |
| 18 | New London | 2 BR | $ 550 | N | N | | | |
| 18 | New London | 2 BR | $ 550 | Y | Y | Y | | Porch/Balcony/ |
| 18 | New London | 2 BR | $ 825 | | | | | |
| 18 | New London | 2 BR | $ 625 | Y | | | | HW Floors/Laundry/Yard |
| 18 | New London | 2 BR | $ 525 | Y | | | | Hookups/Storage |
| 18 | New London | 2 BR | $ 625 | | | | | Apartment Complex |
| 18 | New London | 2 BR | $ 550 | Y | | | | |
| 18 | New London | 2 BR | $ 695 | Y | Y | | | View |
| 18 | New London | 2 BR | $ 700 | N | N | | | Porch/Hookups/Storage |
| 18 | New London | 2 BR | $ 425 | N | N | | | |
| 18 | New London | 2 BR | $ 425 | N | N | | | |
| 18 | New London | 2 BR | $ 625 | Y | Y | | | Apartment Complex |
| 18 | New London | 2 BR | $ 525 | N | N | | | Apartment Complex |
| 25 | New London | 2 BR | $ 625 | Y | Y | | | |
| 25 | New London | 2 BR | $ 525 | Y | Y | | | |
| 2 | New London | 2 BR | $ 550 | | | Y | | |
| 2 | New London | 2 BR | $ 595 | Y | Y | | | |
| 2 | New London | 2 BR | $ 575 | N | N | | N | Hookups |
| 2 | New London | 2 BR | $ 625 | | | | | Fireplace/Parking |
| 2 | New London | 2 BR | $ 585 | N | N | | N | |
| 2 | New London | 2 BR | $ 500 | | | | | Garage |
| 2 | New London | 2 BR | $ 525 | N | N | | | |
| 2 | New London | 2 BR | $ 650 | | | | | Garage |
| 2 | New London | 2 BR | $ 550 | Y | | | | |
| 2 | New London | 2 BR | $ 625 | | | | | |
| 2 | New London | 2 BR | $ 625 | Y | Y | | | |
| 2 | New London | 2 BR | $ 450 | | | | | |
| 2 | New London | 2 BR | $ 625 | Y | Y | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 2 | New London | 2 BR | $ 525 | | | | | |
| 2 | New London | 2 BR | $ 550 | | | | | No Pets |
| **Average 2 BR Rental New London** | | | **$ 589** | **Fair Market Rents New London-Norwich 2 BR: $723** | | | | |
| **Median 2 BR Rental New London** | | | **$ 575** | | **Above = 1** | **Below = 42** | | |
| | | | | | | | | |
| 2 | New London | 3 BR | | Y | | | | |
| 2 | New London | 2/3 BR | | | | | | |
| 11 | New London | 3 BR | $ 715 | N | N | | | |
| 11 | New London | 3 BR | $ 525 | N | N | | | |
| 18 | New London | 3 BR | $ 575 | | | | N | Parking |
| 18 | New London | 3 BR | $ 850 | | | | | Parking/Attic/WD |
| 18 | New London | 3 BR | $ 750 | N | N | | N | Basement/Attic/Yard/Parking |
| 18 | New London | 3 BR | $ 650 | | | | | |
| 25 | New London | 3 BR | $ 595 | Y | Y | | | Furnished/AC |
| 2 | New London | 3 BR | $ 750 | Y | Y | | | |
| 2 | New London | 3 BR | $ 595 | N | N | | | |
| 2 | New London | 3 BR | $ 650 | | | | N | HW Floors/No Smokers |
| 2 | New London | 3 BR | $ 840 | | | | | WD/Attic |
| 2 | New London | 3 BR | $ 700 | | | | N | Parking |
| **Average 3 BR Rental New London** | | | **$ 683** | **Fair Market Rents New London-Norwich 3 BR: $905** | | | | |
| **Median 3 BR Rental New London** | | | **$ 675** | | **Above = 0** | **Below = 12** | | |
| 18 | New London | 4 BR | $ 600 | N | N | | | |
| 18 | New London | 4 BR | $ 600 | N | N | | | |
| 2 | New London | 4 Rooms | $ 500 | N | N | | | |
| 11 | New London | Efficiency | $ 600 | N | N | | | Furn. |
| 11 | New London | Efficiency | $ 300 | | | N | | |
| 18 | New London | Efficiency | $ 600 | Y | Y | | | Furnished |
| 18 | New London | Efficiency | $ 395 | | | | N | Furnished/Parking |
| 25 | New London | Efficiency | $ 600 | N | N | | | Furnished |
| 25 | New London | Efficiency | | | | | | Furnished |
| 2 | New London | Efficiency | $ 600 | Y | Y | | | Furnished |
| 2 | New London | Efficiency | $ 425 | | | | | |
| 2 | New London | Efficiency | $ 425 | N | N | | | |
| 18 | New London | S & 1 BR | | | | | | |
| 2 | New London | S & 1 BR | | | | | | Apartment Complex |
| 11 | New London | S,1,2,&3 BR | 550+ | Y | | | | Apartment Complex |
| 18 | New London | S,1,2,&3 BR | 550+ | | | | | Apartment Complex |
| 2 | New London | S,1,2,&3 BR | 550+ | | — | | | Apartment Complex/Near EB & PF |
| 11 | New London | Studio | | Y | Y | | | Furn. |
| 11 | New London | Studio | $ 475 | Y | N | | | |
| 11 | New London | Studio | $ 300 | | | Y | | |
| 11 | New London | Studio | | | | | | Apartment Complex |
| 11 | New London | Studio | $ 450 | | | | Y | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 18 | New London | Studio | | Y | Y | | | Furnished |
| 18 | New London | Studio | $ 475 | Y | | | | |
| 18 | New London | Studio | $ 300 | | | Y | | |
| 18 | New London | Studio | $ 460 | Y | Y | | | |
| 18 | New London | Studio | $ 475 | Y | Y | | | |
| 2 | New London | Studio | $ 460 | Y | Y | | | |
| 18 | New London | | $ 500 | | | Y | | |
| 25 | New London | | $ 500 | | | Y | | Furnished |
| 2 | New London | | $ 500 | | | Y | | |
| 11 | Waterford | 1 BR | $ 675 | | | | N | Beachfront |
| 11 | Waterford | 1 BR | $ 595 | | | | | |
| 18 | Waterford | 1 BR | $ 540 | | | | | |
| 18 | Waterford | 1 BR | $ 595 | | | | | |
| 25 | Waterford | 1 BR | $ 540 | | | | | |
| 2 | Waterford | 1 BR | $ 550 | Y | | | N | |
| 2 | Waterford | 1 BR | $ 550 | Y | | | | |
| 11 | Waterford | 2 BR | $ 600 | N | N | | | |
| 11 | Waterford | 2 BR | $ 695 | | | | | |
| 18 | Waterford | 2 BR | $ 695 | | | | | |
| 25 | Waterford | 2 BR | $ 595 | | | | | |
| 25 | Waterford | 2 BR | $ 695 | | | | | |
| 2 | Waterford | 2 BR | $ 525 | | | | | Furnished |
| 25 | Waterford | Studio | | | | | | Furnished |

## EXHIBIT 3

### Ownership Housing Availability

### Active Residential Listings Under $100,000
### City of New London

| PROPERTY DESCRIPTION | LIST PRICE |
|---|---|
| **SINGLE FAMILY HOMES** | |
| 5 Bedroom, 2 Bath | $39,000 |
| 3 Bedroom, 1 Bath | $45,000 |
| 3 Bedroom, 1 1/2 Bath | $49,900 |
| 3 Bedroom, 1 Bath | $49,900 |
| 3 Bedroom, 2 Bath | $53,900 |
| 3 Bedroom, 1 Bath | $56,000 |
| 2 Bedroom, 1 Bath | $57,000 |
| 1 Bedroom, 1 Bath | $58,900 |
| 3 Bedroom, 2 Bath | $59,900 |
| 2 Bedroom, 1 1/2 Bath | $62,900 |
| 3 Bedroom, 2 Bath | $62,900 |
| 2 Bedroom, 1 Bath | $69,000 |
| 2 Bedroom, 1 Bath | $69,000 |
| 3 Bedroom, 1 Bath | $69,900 |
| 1 Bedroom, 1 Bath | $69,900 |
| 2 Bedroom, 1 Bath | $69,900 |
| 3 Bedroom, 1 Bath | $69,900 |
| 2 Bedroom, 1 Bath | $69,900 |
| 3 Bedroom, 1 1/2 Bath | $69,900 |
| 3 Bedroom, 1 Bath | $71,900 |
| 3 Bedroom, 1 Bath | $71,900 |
| 3 Bedroom, 2 Bath | $72,500 |
| 6 Bedroom, 1 Bath | $75,000 |
| 3 Bedroom, 1 1/2 Bath | $75,000 |
| 2 Bedroom, 1 Bath | $75,900 |
| 3 Bedroom, 1 1/2 Bath | $76,000 |
| 2 Bedroom, 1 1/2 Bath | $76,900 |
| 3 Bedroom, 1 Bath | $78,000 |
| 3 Bedroom, 1 Bath | $78,700 |
| 3 Bedroom, 2 Bath | $78,900 |

| | |
|---|---|
| 4 Bedroom, 2 Bath | $79,900 |
| 3 Bedroom, 1 Bath | $79,900 |
| 4 Bedroom, 1 1/2 Bath | $79,900 |
| 3 Bedroom, 1 Bath | $79,900 |
| 3 Bedroom, 1 Bath | $80,000 |
| 5 Bedroom, 1 Bath | $80,000 |
| 2 Bedroom, 1 Bath | $80,999 |
| 3 Bedroom, 1 1/2 Bath | $82,900 |
| 4 Bedroom, 1 Bath | $84,000 |
| 3 Bedroom, 1 Bath | $84.900 |
| 3 Bedroom, 1 1/2 Bath | $87,000 |
| [Illegible] room, 2 Bath | $88,500 |
| 4 Bedroom, 1 Bath | $89,000 |
| 4 Bedroom, 2 Bath | $89,000 |
| 3 Bedroom, 1 1/2 Bath | $89,000 |
| 4 Bedroom, 1 1/2 Bath | $89,000 |
| 3 Bedroom, 1 Bath | $89,500 |
| 3 Bedroom, 1 1/2 Bath | $89,900 |
| 3 Bedroom, 1 Bath | $91,000 |
| 4 Bedroom, 1 1/2 Bath | $92,000 |
| 3 Bedroom, 2 Bath | $92,900 |
| 3 Bedroom, 1 1/2 Bath | $93,000 |
| 2 Bedroom, 1 Bath | $94,000 |
| 2 Bedroom, 2 Bath | $94,900 |
| 3 Bedroom, 1 Bath | $95,000 |
| 3 Bedroom, 1 Bath | $99,900 |
| 2 Bedroom, 1 Bath | $99,900 |
| 3 Bedroom, 1 1/2 Bath | $99,900 |
| **CONDOMINIUMS** | |
| 3 Bedroom, 1 1/2 Bath | $39,900 |
| [Illegible] Bedroom, 1 Bath | $39,900 |
| [Illegible] Bedroom, 1 Bath | $46,900 |
| 2 Bedroom, 1 1/2 Bath | $48,900 |
| 3 Bedroom, 1 1/2 Bath | $49,000 |
| 2 Bedroom, 1 Bath | $49,900 |
| 2 Bedroom, 1 Bath | $49,900 |
| 2 Bedroom, 1 Bath | $51,000 |



**Residential Listings Between $100,000 and $150,000**
**City of New London**

| PROPERTY DESCRIPTION | LIST PRICE |
|---|---|
| **SINGLE FAMILY HOMES** | |
| 3 Bedroom, 1 1/2 Bath | $102,900 |
| 3 Bedroom, 2 Bath | $105,000 |
| 4 Bedroom, 2 Bath | $109,900 |
| 3 Bedroom, 2 1/2 Bath | $109,900 |
| [Illegible] room, 1 1/2 Bath | $109,900 |
| [Illegible] Bedroom, 2 Bath | $109,900 |
| 4 Bedroom, 2 Bath | $110,000 |
| 3 Bedroom, 1 Bath | $112,000 |
| 4 Bedroom, 1 1/2 Bath | $112,000 |
| 3 Bedroom, 1 Bath | $112,000 |
| 5 Bedroom, 1 1/2 Bath | $114,900 |
| 3 Bedroom, 2 Bath | $114,900 |
| 2 Bedroom, 1 Bath | $115,000 |
| 2 Bedroom, 1 Bath | $115,000 |
| 3 Bedroom, 2 Bath | $116,000 |
| 3 Bedroom, 2 Bath | $117,500 |
| 3 Bedroom, 1 Bath | $119,000 |
| 3 Bedroom, 1 1/2 Bath | $119,900 |
| 4 Bedroom, 1 1/2 Bath | $123,900 |
| 3 Bedroom, 1 1/2 Bath | $124,900 |
| 3 Bedroom, 1 1/2 Bath | $134,900 |
| 4 Bedroom, 2 Bath | $137,000 |
| 3 Bedroom, 2 Bath | $141,500 |
| 3 Bedroom, 2 Bath | $144,900 |
| 4 Bedroom, 2 Bath | $145,000 |

Source: Southeastern Connecticut Online REALTOR Multiple Listing Servic

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# APPENDIX C
## Listing of Properties within the MDP Area

### Appendix Table A-1: BUILDINGS AT NAVAL UNDERSEA WARFARE CENTER (NUWC)

| | Name | Use | GBA (SF) | Year | Remarks | Frame | Hgt. | Condition | Reuse Pot. | W/I Historic Dist. |
|---|---|---|---|---|---|---|---|---|---|---|
| **Coast Guard** | | | | | | | | | | |
| 45 | Ueph E1/E4 | Off/Shop/Res | 14-537 | 1938 | Coast Guard office, shop & residential | Masonry/ Wood | 2.5 | Average | Coast Guard | |
| 12 | Haz Flam Sthse | Misc | 320 | 1944 | Leased to Coast Guard | Masonry/ Wood | 1 | Avg/Fair | Coast Guard | |
| 86 | Storage Shed | Misc | 500 | 1944 | Estimaed Size | Masonry/ Wood | 1 | Avg/Fair | Coast Guard | |
| 62 | Enlst Dining Fac | Misc | 75 | 1930 | Walk-in cooler behind Bldg. 45 | Steel | 1 | Avg/Fair | Coast Guard | |
| NAVY | | | | | | | | | | |
| 9 | EM Silencing Facility | Off | 2,592 | 1991 | Navt Retained | Masonry/ Wood | 2 | Avg/Good | Navy | |
| **of Connecticut** | | | | | | | | | | |
| 8 | Veh Hold Shed | Shop/Gar | 4,982 | 1949 | 12 bay garage/Shop | Masonry/ Wood | 1 | Fair | Garage | |
| 13 | Admin Off | Office/Shop | 11,583 | 1860 | Half granite/Half Alum Siding | Masonry/ Wood | 2 | Fair | Admin/ Shop | Contributing |
| 15 | Auto Veh Shop | Misc/Gatehouse | 646 | 1949 | Gatehouse by Trumbull St. | Wood | 1 | Fair/Poor | Demo | |
| 22 | Rdt & E Storage | Shop | 2,850 | 1948 | Utility Connection to Other Buildings (95) | Masonry/ Wood | 1 | Fair | Demo | |
| 27 | Pub Pre 1950 Fd | Office | 16,555 | 1860 | att. 4 unit town house/Caretaker Office/Stone Row | Masonry/ Wood | | Avg/Fair | Admin. | Contributing |
| 28 | Detectn Sys Lab | Office | 9,514 | 1943 | Waterview location | Masonry/ Wood | 2 | Fair | Demo | Contributing |
| 32 | Rdt & E Storage | Office | 14,544 | 1849 | Fort Trumbull | Masonry | 2 | Fair | Museum | Contributing/ NHR |
| 33 | Detectn Sus Lab | Shop | 3,228 | 1943 | Former Heat Plant | Masonry/ Wood | 1 | Fair | Demo | |
| 36 | Ocean Scien Lab | Office | 26,272 | 1943 | Asbestos Mitigation underway | Wood | 2 | Fair/Poor | Demo | Non-Contrib. |
| 42 | Museum/Memrl Bl | Misc | 676 | 1776 | Block House | Masonry/ Wood | 1 | Fair | Museum | Contributing/ NHR |
| 49 | Pw Maint Strge | Misc | 1,490 | 1920 | Storage under Bldg 36 | Masonry/ Wood | 1 | Fair/Poor | Demo | Non-Contrib. |
| 50 | Gate/Sent House | Misc | 72 | 1943 | Gatehouse on Walbach | Wood | 1 | Fair | Demo | Non-Contrib. |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 52 | Recreation Pav | Misc | 100 | 1950 | Greenhouse behind Bldg 27 | Steel | 1 | Fair | Demo | |
| 53 | Astro/Asphy Lab | Misc | 448 | 1943 | Hut on Fort | Masonry/ Wood | 1 | Fair | Demo | Non-Contrib. |
| 84 | Fund 50-69 Fd | Residential | 1,415 | 1963 | Single Family Unit | Wood | 1 | Fair | Demo | |
| 85 | Fund 50-69 Jr | Res | 3,300 | 1963 | Duplex | Wood | 1 | Fair | Demo | |
| 89 | Subst >499 Kv | Misc | 152 | 1965 | Platform Top/Storage under | Masonry/ Conc | 2 | Fair | Demo | |
| 90 | Pw Maint Strge | Misc | 522 | 1990 | Shredder | Masonry | 1 | Fair | Demo | |
| 94 | Comm Sys Lab | Spec | 8,248 | 1972 | Periscope Bldg | Steel | 2 | Avg/Fair | Demo | Contributing |
| 95 | Comm Reserch Lab | Misc | 480 | 1975 | Pre-Eng. Steel Bld w/ Trailer attached | Steel | 1 | Fair/Poor | Demo | |
| 97 | Rdt & E Storg La | Shop/Off | 5,068 | 1977 | Utility H/U for adjacent bldgs | Masonry/ Steel | 1 | Fair | Demo | |
| 01 | Rdt & E Storg La | Off/Lab | 7,650 | 1984 | Arch Building (Radio testing) | Masonry/ Steel | 2 | Avg/Fair | Demo | |
| 07 | Pw Maint Strge | Misc | 1,440 | 1989 | Pre-eng. Steel Bld. | Steel | 1 | Avg/Fair | Bathroom | |
| llc Sale | | | | | | | | | | |
| 2 | Detectn Sys Lab | Office/ Research L | 91,000 | 1990 | Good quality office building | Steel/ Concrete | 4 | Good | High-Office | |
| 14 | Materials Lab | Shop/Research | 8,567 | 1860 | Later addition around historic core | Masonry/ Wood | 2 | Fair/poor | Limited | Contributing |
| 21 | Admin Off | Mish | 392 | 1945 | Contractor office | Wood | 1 | Fair/poor | Limited | Non-Contrib. |
| 34 | Admin Off | Off/Auditorium | 22,000 | 1943 | Bowditch Hall | Wood | 3 | Fair | Limited | Contributing |
| 37 | Environmental Lab | Shop/Off | 9,005 | 1920 | Secured Bldg/Fenced Roof/ No Windows | Wood | 2 | Fair/poor | Limited | Non-Contrib. |
| 38 | Fire Station | Shop/Gar/Off/ Res | 10,675 | 1943 | Fire Station/Labs/Diving Team @ Pier 1 | Wood | 2 | Fair | Limited | |
| 39 | Detectn Sys Lab | Office | 11,406 | 1943 | Former Barracks Bldg | Wood | 2 | Fair | Limited | |
| 40 | Admin Off | Misc | 476 | 1943 | Gatehouse by Hamilton St | Wood | 1 | Fair | Limited | |
| 41 | Admin Off | Office | 18,494 | 1943 | Former Infirmery | Wood | 3 | Fair | Limited | Contributing |
| 43 | Gen Whse/Bulk | Shop/Off | 35,231 | 1943 | Shipping & Rec | Wood | 2 | Fair/Poor | Limited | Contributing |
| 44 | Gymnasium | Rec/Shop | 48,850 | 1943 | Swimming Pool & Testing Shop in lowest level | Wood | 3 | Fair/Poor | Limited | Contributing |
| 78 | Detectn Sys Lab | Misc | 350 | 1960 | Concrete Pad by Boat Ramp | Conc | | Fair | None | |
| 80 | Detetn Sys Lab | Office/Res | 177,170 | 1962 | Cafeteria on Top Floor | Steel Concrete | 3 | Fair | Limited | Contributing |
| 80T | Admin Off | Office | 6,912 | 1973 | Modular office | Wood | 1 | Fair | Limited | |
| 96 | Tec Service Lab | Off/Shp | 96,965 | 1976 | Satellite Dishes & Chiller on Roof top | Steel Concrete | 4 | Avg | Med.-Office | Contributing |
| 98 | Gen Strg Shed | Misc | 456 | 1978 | Addition at back of Bldg. 43 | Wood | | Fair | Limited | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 99 | Heat Plant Bldg | Utility | 5,116 | 1980 | Steam Plant | Steel Masonary | 1 | Avg | Medium | |
| 103 | Telecom Center | Office/Comm | 2,120 | 1985 | Pre-Eng. Steel Bld w/shielded core | Steel | 1 | Avg | Limited | |
| 22T | Admin Off | Office | 10,000 | 1982 | 2 story modular Building | Wood | 2 | Fair | Limited | |

**Appendix Table A-2: GATEWAY PROPERTIES**

| | PARCEL | ADDRESS | PRPTY TYPE | USE | TOTAL ASSESSD | LAND AREA | Total BLDG SF | Permit History | Improvement Cost | Living Area | BLDG TYPE | ROOF TYPE | BLDG HGT | YR BLT | Condition | Units | Units Oc. | Vacant/ Available SF | Reuse Potential | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 16 | 175 Howard Street | Gas Station | C-Auto | $101,430 | 10,000 | 2,360 | 1991 | $27,000 | 1,429 | Masonry/Wood | Flat | 1 | 1950 | Fair | | | | Interim | |
| | 33 | 210 Howard Street | Office Building | C-OFF | $138,320 | 4,533 | 4,683 | 1990 | $144,000 | 3,168 | Wood Frame | Gable | 3 | 1900 | Avg- | | | | Interim | |
| | 34 | 194 Howard Street | Office Building | C-OFF | $3,311,840 | 50,094 | 50,448 | 1996 | $46,400 | 50,304 | Mas/Steel | Flat | 3 | 1985 | Good- | | | 40,358 | Long Term | |
| | 27 | 221 Howard Street | Rest/Club | C-Rest | $157,220 | 10,000 | 3,080 | 1993 | $13,760 | 2,912 | Masonry/Wood | Gable | 1 | 1950 | Avg | | | 0 | Interim | |
| | 3 | 229 Howard Street | Store/Shop | C-Ret | $78,540 | 3,500 | 2,280 | 1989 | $23,000 | 2,280 | Masonry/Wood | Flat | 1 | 1946 | Avg- | | | | Interim | |
| | 32 | 216 Howard Street | Office Building | C-Ret | $80,570 | 3,000 | 1,900 | 1998 | $3,200 | 1,900 | Masonry/Wood | Tar/Gravel | 1 | 1955 | Avg- | | | 1,265 | Interim | |
| | 1 | 152 Howard Street | Comm Whare | C-WHS | $109,760 | 5,850 | 5,402 | | | 0 | Masonry | Gable | 1 | 1920 | Fair | | | 0 | Interim | |
| | 3.c | 162 Hamilton Street | Comm Whare | C-WHS | | | 7,076 | | | 7,076 | Masonry/Wood | Gable | 1 | 1900 | Fair- | | | 0 | Limited | |
| | 2 | 65 Hamilton Street | Comm Whare | C-WHS | $90,860 | 7,031 | 3,302 | | | 3,302 | Masonry/Wood | Gable | 1.5 | 1950 | Fair | | | 0 | Limited | |
| | 3.a | 162 Hamilton Street | Comm Whare | C-WHS | | | 3,928 | | | 3,926 | Masonry/Wood | Flat | 2 | 1910 | Poor | | | 3,928 | Limited | |
| | 1 | Harris Street | Whare | C-WHS | $60,970 | 3,844 | 2,000 | 1995 | $200 | 2,000 | Masonry/Wood | Gable | 1 | 1970 | Fair- | | | 0 | Limited | |
| | 3 | 162 Hamilton Street [1] | Comm Whare | C-WHS | $308,940 | 71,000 | 21,600 | | | 21,600 | Masonry/Wood | Irregular | 3 | 1900 | Fair- | | | 14,256 | Limited | |
| | 6 | 23 Hamilton Street | Comm Whare | C-WHS | $197,750 | 24,394 | 11,762 | None | $0 | 11,762 | Masonry/Wood | gable | 2 | 1870 | Poor | | | 11,762 | Limited | |
| | 19.a | 150 Howard Street | Wharehouse | C-WHS | | | 8,760 | | | 8,760 | Wood Frame | Flat | 2 | 1978 | Fair | | | 0 | Interim | |
| | 19 | 150 Howard Street | Wharehouse | C-WHS | $508,550 | 77,972 | 19,253 | | | 17,820 | Wood Frame | Gable | 2 | 1920 | Fair | | | 0 | Limited | |
| | 14 | 175R Howard Street | Comm Whare | C-WHS | $77,280 | 16,806 | 3,535 | None | $0 | 3,535 | Wood Frame | Gable | 2 | 1900 | Fair | | | 0 | Limited | For Sale w/ 2 family |
| | 3.d | 162 Hamilton Street | Comm Whare | C-WHS | | | 5,002 | | | 5,002 | Wood Frame | Gable | 2 | 1920 | Poor | | | 5,002 | Limited | |
| | 3.b | 162 Hamilton Street | Comm Whare | C-WHS | | | 588 | | | 588 | Wood Frame | Gable | 1 | 1930 | Poor | | | 0 | Limited | |
| | 13.a | Howard Street Rear | Comm Whare | C-WHS | | | 11,640 | None | $0 | 11,640 | Wood Frame | Shed | 2 | 1900 | Poor | | | 11,640 | Limited | |
| | | | | | | | | | | | | | | | | | | | | |
| | 9 | 37 Hamilton Street | Single Family | R | $25,900 | 2,108 | 2,311 | None | 0 | 1,292 | Wood Frame | Gable | 2 | 1900 | Poor | 1 | 0 | | Limited | |
| | 6 | 232 Shaw Street | Single Family | R | $60,340 | 3,021 | 2,328 | | | 1,480 | Wood Frame | Monsard | 2 | 1900 | Fair- | 1 | 1 | | Limited | |
| | 25 | 211R Howard Street | Single Family | R | $108,290 | 8,050 | 3,989 | 1993 | $6,000 | 1,991 | Wood Frame | Gable | 2 | 1900 | Fair | 1 | 1 | | Limited | |
| | 20 | 189 Howard Street | Halfway House | R | $69,810 | 5,760 | 3,234 | 1995 | $50 | 2,002 | Wood Frame | Gable | 2 | 1900 | Fair | 1 | 1 | | Limited | |
| | 26 | 215 Howard Street | Single Family | R | $57,050 | 42,400 | 720 | | | 488 | Wood Frame | Gable | 1.5 | 1900 | Fair | 1 | 1 | | Limited | |
| | 18 | 185 Howard Street | Two Family | R | $124,110 | 5,400 | 3,119 | 1994 | $46,000 | 2,403 | Wood Frame | Gable | 3 | 1900 | Avg- | 2 | 0 | | Limited | For Sale/Renovated |
| | 12 | 161 Howard Street | Two Family | R | $86,380 | 5,200 | 4,135 | | | 3,020 | Wood Frame | Gable | 2.5 | 1900 | Fair | 2 | 2 | | Limited | |
| | 25.a | 211 Howard Street | Single Family | R | | | 1,104 | | | 1,064 | Wood Frame | Gambrel | 1.5 | 1910 | Fair | 1 | 1 | | Limited | |
| | 15 | 175 Howard Street Rear | Two Family | R | $67,550 | 2,798 | 3,987 | 1990 | $12,000 | 2,318 | Wood Frame | Gable | 2 | 1900 | Fair | 2 | 2 | | Limited | |
| | 36.2 | 170 Howard Street | Two Family | R | $59,430 | 1,310 | 3,770 | | | 1,768 | Wood Frame | Gable | 2 | 1900 | Fair- | 2 | 2 | | Limited | |
| | 36.1 | 172 Howard Street | Two Family | R | $71,690 | 2,651 | 3,372 | 1991 | $8,000 | 1,598 | Wood Frame | Gable | 2 | 1882 | Fair- | 2 | 1 | | Limited | For Sale |
| | 2 | 237 Howard Street | Two Family | R | $77,690 | 7,555 | 4,137 | 1995 | $500 | 2,002 | Wood Frame | Gable | 2 | 1900 | Fair- | 2 | 2 | | Limited | |
| | 24 | 209 Howard Street | Two Family | R | $113,050 | 5,940 | 4,938 | 1995 | $5,500 | 2,410 | Wood Frame | Gable | 2 | 1900 | Fair+ | 2 | 2 | | Limited | |
| | 30 | 12 Harris Street | Two Family | R | $93,220 | 4,508 | 4,872 | | | 2,593 | Wood Frame | Gable | 2 | 1900 | Poor | 2 | 2 | | Limited | |
| | 13 | 163 Howard Street | Two Family | R | $115,430 | 28,080 | 4,709 | | | 3,295 | Wood Frame | Gable | 2.5 | 1900 | Poor | 2 | 0 | | Limited | |
| | 29 | 16 Harris Street | Two Family | R | $81,760 | 4,692 | 4,812 | | | 2,721 | Wood Frame | Gable | 2 | 1900 | Poor | 2 | 2 | | Limited | |
| | 8 | 224 Shaw Street | Two Family | R | $83,230 | 4,697 | 4,414 | | | 2,142 | Wood Frame | Gable | 2 | 1900 | Poor | 2 | 2 | | Limited | |

**Appendix Table A-2: GATEWAY PROPERTIES – Continued**

| LOC | PARCEL | ADDRESS | PRPTY TYPE | USE | TOTAL ASSESSD | LAND AREA | Total BLDG SF | Permit History | Improvement Cost | Living Area | BLDG TYPE | ROOF TYPE | BLDG HGT | YR BLT | Condition | Units | Units Oc. | Vacant/ Available SF | Reuse Potential | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 10 | 39 Hamilton Street | Three Family | R | $73,290 | 2,300 | 4,308 | | | 3,141 | Wood Frame | Gable | 2 | 1900 | Poor | 3 | 0 | | Limited | |
| | 4 | 239 Howard Street | Three Family | R | $84,840 | 3,671 | 4,016 | | | 2,886 | Wood Frame | Gable | 2 | 1900 | Fair | 3 | 2 | | Limited | |
| | | | | | | | | | | | | | | | | | | | | |
| | 5 | Hamilton Street | Municipal | VL | $560 | 1,500 | 0 | | | | | | | | | | | | | |
| | 7 | Hamilton St. | Municipal | VL | $1,610 | 1,900 | 0 | | | | | | | | | | | | | |
| | 8 | 33 Hamilton Street | Developed | VL | $31,570 | 6,942 | 0 | | | | | | | | | | | | | |
| | 11 | 157 Howard Street | Municipal | VL | $17,430 | 2,400 | 0 | | | 0 | | | | | | | | | | |
| | 19 | Shaw St. | Municipal | VL | $41,930 | 59,677 | 0 | | | 0 | Vacant Land | | | | | | | | | |
| | 21 | 195 Howard Street | Vacant Land | VL | $27,720 | 11,680 | 0 | | | 0 | | | | | | | | | | |
| | 22 | 197 Howard Street | Parking Lot | VL-PL | $46,690 | 11,914 | 0 | | | 0 | | | | | | | | | | |
| | 23 | 203 Howard Street | Parking Lot | VL-PL | $40,250 | 5,508 | 0 | | | 0 | | | | | | | | | | |
| | 38 | Shaw Street | Res Devel | VL | $3,850 | 3,648 | 0 | | | | Vacant Land | | | | | | | | | |
| | 5 | 243 Howard Street | Vacant Land | VL | $25,410 | 8,593 | 0 | | | 0 | | | | | | | | | | |
| | 7 | 230 Shaw Street | Vacant Land | VL | $18,200 | 2,600 | 0 | | | 0 | | | | | | | | | | |
| City of New London Assessor's Office and RKG Associates, Inc. | | | | | | | | | | | | | | | | | | | | |

**Appendix Table A-3: Fort Trumbull Area Properties**

| LOC | PARCEL | ADDRESS | USE | TOTAL ASSESSD | LAND AREA | Total BLDG SF | Permit History | Improvement Cost | Living Area | BLDG TYPE | ROOF TYPE | HGT | YR BLT | Condition | Units | Units Occ. | Vacant/ Available SF | Reuse Potential | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 107 | 30 | 36 Walbach St. | C-Rest | $66,080 | 1,430 | 2,100 | 1990/91 | $118,000 | 1,050 | Masonry/wood | Flat | 1 | 1957 | Fair+ | | | | Interim | Fort Trumbull Café |
| 105 | 3 | 87 Walbach Street | R-Rest | | | 500 | | | 500 | Wood Frame | Gable | 2 | 1890 | Fair | | | 500 | Limited | Former Deli on first Floor vacant |
| 105 | 20 | 35 Smith Street | R-Rest | | | 888 | | | 888 | Masonry | Flat | 3 | 1910 | Fair | | | 888 | Limited | Former Deli on first floor vacant & Five apartments |
| | | | | | | | | | | | | | | | | | | | |
| 68 | 16 | 95 Trumbull Street | C-Mill | $581,350 | 38,650 | 18,689 | 1994 | $100 | 18,455 | Masonry | Flat | 3 | 1853 | Fair | | | 11,213 | Limited | Mostly vacant; |
| 105 | 13 | 82 Trumbull Street | C-Mill | $138,040 | 9,100 | 23,399 | 1997 | $10,000 | 8,352 | Masonry | Flat | 3.5 | 1918 | Poor | | | 14,047 | Limited | Boarded up windows; no heat; [illegible] |
| | | | | | | | | | | | | | | | | | | | |
| 107 | 17, 18 | 72 Goshen Street | C-OFF | $372,890 | 14,438 | 8,178 | 1990/91 | $180,800 | 5,530 | Masonry/Wood | Gable | 2 | 1900 | Avg | | | | Interim | Office for NUWC Contractor; Parking at rearside (20 car +) |
| 106 | 6 | 50 Smith Street | C-OFF | $169,540 | 12,314 | 4,263 | | | 2,793 | Wood Frame | Gable | 2 | 1890 | Avg | | | 4,263 | Interim | Recent Conversion to office; rented by NUWC |
| | | | | | | | | | | | | | | | | | | | |
| 108 | 2 | 72 Smith Street | C-Auto | $48,160 | 8,210 | 1,512 | 1995 | $1,500 | 1,512 | Masonry | Shed | 1 | 1957 | Fair- | | | | Limited | |
| 108 | 1 | 32 Walbach St/Portion [1] | C-Whs | $342,680 | 87,120 | 7,760 | | | 2,800 | Wood Frame | Shed | 2 | 1900 | Fair- | | | | Limited | Amtrak railyard & roundhouse |
| | | | | | | | | | | | | | | | | | | | |
| 108 | 14 | 79 Goshen Street | C-Other | $175,490 | 12,660 | 7,578 | | | 3,789 | Masonry | Gable/Hip | 1 | 1922 | Avg- | | | | Interim | Stucco; Parking at side for 15 Cars |
| 108 | 3 | 68 Smith Street | C-Other | $222,390 | 12,550 | 5,680 | 1990 | $10,000 | 2,894 | Concrete | Gable | 1 | 1930 | Avg- | | | | Limited | |
| 68 | 14 | 93 Trumbull Street | C-Other | $83,680 | 4,500 | 240 | | | 0 | O Bld-Restroom | | 1 | 1988 | Fair | | | | Limited | |
| | | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | | |
| 105 | 4 | 28 East Street | R | $145,800 | 9,305 | 2,662 | 1992 | $2,900 | 1,374 | Wood Frame | Gable | 2 | 1890 | Fair | 1 | 1 | | Limited | |
| 105 | 9 | 12 East Street | R | $47,110 | 2,298 | 1,778 | | | 1,064 | Wood Frame | Gable | 1.5 | 1890 | Fair | 1 | 1 | | Limited | Waterview |
| 105 | 10 | 10 East Street | R | $56,960 | 2,240 | 1,942 | | | 1,149 | Wood Frame | Gable | 1.5 | 1890 | Fair | 1 | 1 | | Limited | |
| 105 | 11 | 8 East Street | R | $55,300 | 1,738 | 1,862 | | | 1,114 | Wood Frame | Gable | 1.5 | 1890 | Avg+ | 1 | 1 | | Limited | Well-Maintained, Updated Exterior |
| 105 | 15 | 15 Smith Street | R | $50,330 | 3,240 | 1,768 | 1991 | $60,000 | 1,028 | Wood Frame | Gable | 2 | 1890 | Avg+ | 1 | 1 | | Limited | Updated; above average cond |
| 105 | 16 | 17 Smith Street | R | $50,960 | 3,294 | 1,729 | | | 1,131 | Wood Frame | Gable | 2 | 1890 | Fair | 1 | 1 | | Limited | |
| 105 | 3 | 87 Walbach Street | R-Mixed | $208,320 | 12,644 | 1,858 | 1998 | $10,000 | 1,380 | Wood Frame | Gable | 2 | 1890 | Fair | 1 | 0 | | Limited | |
| 105 | 3.c | 16 East Street | R | | 0 | 2,515 | | | 1,488 | Wood Frame | Gable | 1 | 1890 | Avg | 1 | 1 | | Limited | |
| 105 | 3.b | 79 Smith Street | R | | 0 | 1,590 | | | 732 | Masonry/Wood | Gable | 1 | 1870 | Fair | 1 | 1 | | Limited | |
| 105 | 8 | 16 East Street | R | $140,700 | 18,297 | 4,450 | | | 2,858 | Wood Frame | Gable | 1 | 1942 | Poor | 1 | 0 | | Limited | Poorly Maintains; Appears Vacant; Waterview |
| 106 | 1 | 78 Smith Street | R | $53,820 | 6,210 | 1,450 | | | 928 | Wood Frame | Gable | 2 | 1820 | Poor | 1 | 0 | | Limited | |
| 106 | 8 | 41 Goshen Street | R | $52,010 | 6,338 | 3,897 | 1994 & 96 | $8,000 | 1,848 | Wood Frame | Gable | 2 | 1890 | Fair- | 1 | 0 | | Limited | Being renovated; ext. partially done; gutted/vacant/unlivable |
| 107 | 8 | 96 Smith Street | R | $57,820 | 6,260 | 2,852 | 1995 | $3,000 | 1,589 | Wood Frame | Gable | 1.5 | 1878 | Poor | 1 | 1 | | Limited | No Shower in bath |
| 107 | 10 | 86 Smith Street | R | $49,280 | 2,613 | 1,974 | 1992 | $500 | 1,474 | Wood Frame | Gable | 2 | 1890 | Poor | 1 | 1 | | Limited | |
| 107 | 19 | 88 Goshen Street | R | $59,990 | 11,321 | 1,334 | 1990 | $7,000 | 598 | Wood Frame | Gable | 1 | 1890 | Fair+ | 1 | 1 | | Limited | At rear of Sonalysi office; next to rail yard |
| 107 | 20 | 64 Goshen Street | R | $51,520 | 5,100 | 1,530 | | | 590 | Wood Frame | Gable | 1 | 1890 | Fair | 1 | 1 | | Limited | Resided |
| | | | | | | | | | | | | | | | | | | | |
| 105 | 3.a | 81-83 Walbach Street | R | | 0 | 3,525 | 1995 | $20,700 | 2,100 | Wood Frame | Gable | 2 | 1890 | Fair+ | 2 | 1 | | Limited | Updated |
| 105 | 5 | 22 East Street | R | $62,680 | 11,784 | 2,527 | 1995/96 | $10,000 | 1,594 | Wood Frame | Gable | 2 | 1890 | Avg | 2 | 2 | | Limited | Well-Maintained, Updated Exterior |

**Appendix Table A-3: Fort Trumbull Area Properties – Continued**

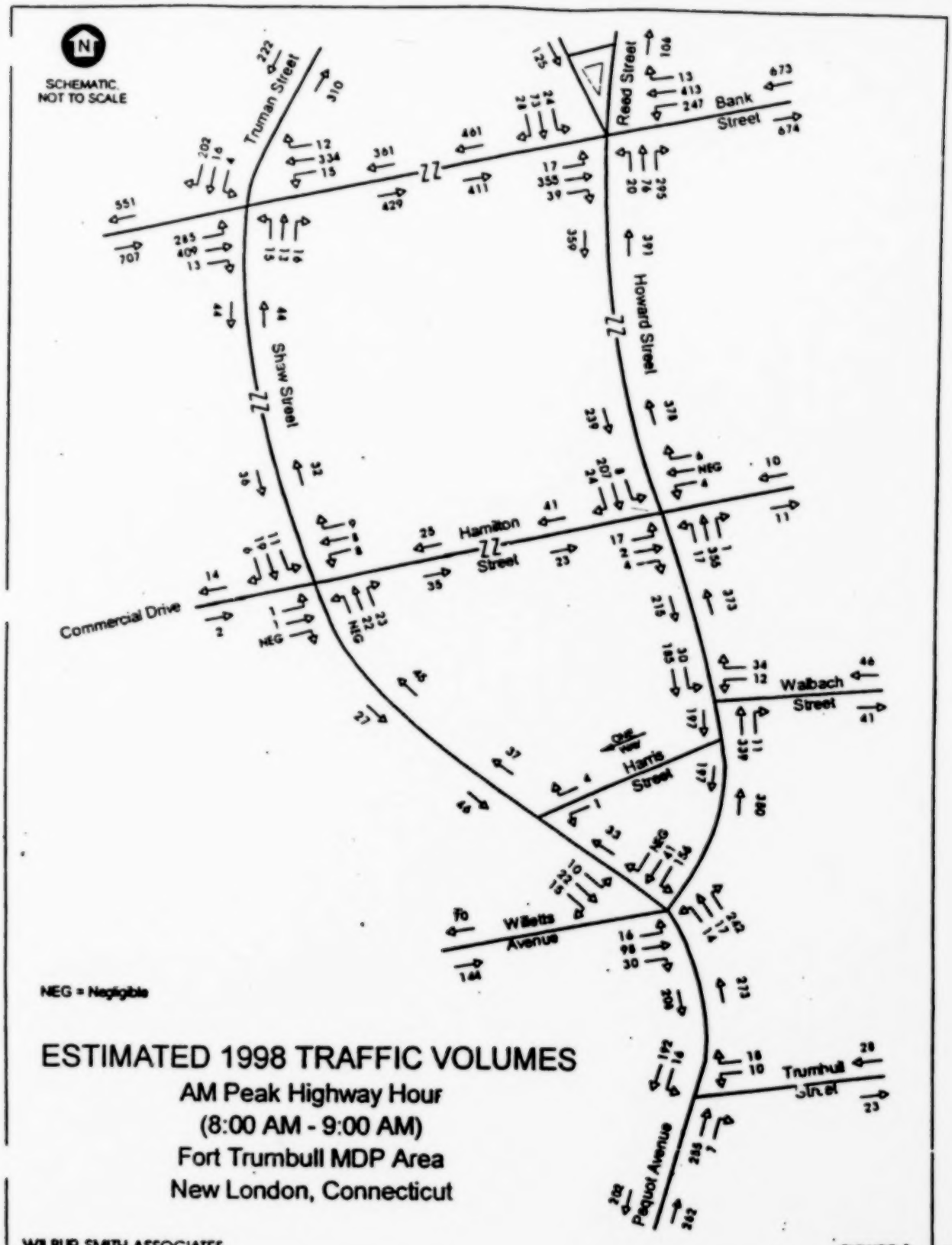
| LOC | PARCEL | ADDRESS | USE | TOTAL ASSESSD | LAND AREA | Total BLDG SF | Permit History | Improvement Cost | Living Area | BLDG TYPE | ROOF TYPE | HGT | YR BLT | Condition | Units | Units Oc. | Vacant/ Available SF | Reuse Potential | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 105 | 12 | 90 Trumbull Street | R | $97,650 | 8,050 | 5,348 | | | 3,672 | Wood Frame | Gable | 2 | 1890 | Poor | 2 | 2 | | Limited | Asb. Siding |
| 105 | 14 | 11-13 Smith Street | R | $71,400 | 4,978 | 3,840 | 1990 | $1,400 | 1,872 | Wood Frame | Gable | 2 | 1890 | Fair | 2 | 1 | | Limited | Roof falling; prop updated |
| 105 | 18 | 27 Smith Street | R | $63,910 | 4,590 | 2,872 | | | 1,592 | Wood Frame | Gable | 2 | 1920 | Fair | 2 | 2 | | Limited | |
| 105 | 8.a | 14 East Street | R | | 0 | 2,708 | | | 1,811 | Wood Frame | Gable | 1.5 | 1942 | Poor | 2 | 2 | | Limited | Waterview |
| 105 | 8.b | 16 East Street Rear | R | | 0 | 1,268 | | | 832 | Wood Frame | Gable | 1.5 | 1890 | Poor | 2 | 1 | | Limited | Red |
| 107 | 12 | 12 Chelsea Street | R | $79,860 | 7,271 | 3,904 | 1993/98 | $25,000 | 2,018 | Wood Frame | Gable | 2 | 1890 | Fair | 2 | 2 | | Limited | 1994 Vac. Hse-vandalized |
| 108 | 5 | 54-56 Smith Street | R | $37,310 | 13,880 | 2,072 | | | 2,072 | Wood Frame | Gable | 2 | 1870 | Fair | 2 | 2 | | Limited | Masonite; noticeable maintenance & upkeep |
| 108 | 9 | 49 Goshen Street | R | $66,670 | 7,154 | 2,182 | 1994/95 | $38,050 | 1,330 | Wood Frame | Gable | 1.5 | 1890 | Fair | 2 | 2 | | Limited | New windows, Paint, needs siding |
| 108 | 10 | 53 Goshen Street | R | $70,140 | 14,269 | 3,868 | | | 2,088 | Wood Frame | Gable | 2 | 1890 | Fair | 2 | 2 | | Limited | Shakes; needs paint |
| 108 | 12 | 59 Goshen Street | R | $77,350 | 8,158 | 3,883 | 1992 | $3,200 | 2,240 | Masonry/Wood | Gable | 2 | 1920 | Fair | 2 | 2 | | Limited | Brick/Stucco |
| 107 | 11 | 4 Chelsea Street | R | $78,820 | 3,635 | 3,488 | 1994 | $400 | 2,268 | Masonry/Wood | Gable | 2 | 1900 | Fair- | 2 | 1 | | Limited | Brick/Stucco |
| 107 | 13 | 6 Chelsea Street | R | $70,560 | 4,080 | 3,707 | | | 1,638 | Wood Frame | Gable | 2 | 1890 | Poor | 2 | 2 | | Limited | Poorly Maintained despite some upgrades |
| 107 | 14 | 8 Chelsea Street | R | $71,400 | 3,876 | 4,404 | | | 2,110 | Wood Frame | Gable | 2 | 1890 | Poor | 2 | 2 | | Limited | Poorly Maintained despite some upgrades |
| 107 | 22 | 58 Goshen Street | R | $58,860 | 4,146 | 3,662 | 1992 | $3,000 | 1,776 | Wood Frame | Gable | 2 | 1900 | Poor | 2 | 2 | | Limited | Has new roof; masonite |
| 107 | 24 | 54 Goshen Street | R | $69,790 | 5,214 | 2,872 | | | 1,386 | Wood Frame | Gable | 2 | 1900 | Fair | 2 | 2 | | Limited | New windows, shake siding |
| 107 | 25 | 50 Goshen Street | R | $68,250 | 4,002 | 3,160 | | | 1,564 | Wood Frame | Gable | 2 | 1900 | Avg- | 2 | 2 | | Limited | Newer siding, windows |
| 107 | 27 | 46 Goshen St. | R | $70,210 | 3,327 | 3,208 | | | 1,624 | Wood Frame | Gable | 2 | 1910 | Fair | 2 | 2 | | Limited | Has newer windows; masonite |
| 107 | 28 | 42 Goshen Street | R | $70,770 | 2,468 | 3,712 | 1990 | $9,000 | 2,024 | Wood Frame | Gable | 2 | 1912 | Fair- | 2 | 2 | | Limited | Has garage; new furnace in 1990 |
| | | | | | | | | | | | | | | | | | | | |
| 105 | 4.a | 28 East Street | R | | | 4,165 | | | 3,072 | Masonry/Wood | Flat | 3 | 1890 | Fair | 3 | 2 | | Limited | |
| 105 | 1 | 77 Walbach St. | R | $92,820 | 7,500 | 4,992 | | | 3,100 | Wood Frame | Gable | 2 | 1890 | Fair | 3 | 2 | | Limited | |
| 105 | 17 | 19 Smith Street | R | $99,610 | 6,750 | 5,266 | 1990 | $1,800 | 3,208 | Wood Frame | Gable | 2 | 1890 | Avg- | 3 | 3 | | Limited | Well-Maintained, New Roof |
| 105 | 19 | 31 Smith Street | R | $78,640 | 4,050 | 3,688 | 1994 | $8,350 | 2,558 | Wood Frame | Gable | 3 | 1890 | Fair+ | 3 | 3 | | Limited | Former Store; Well-Maintained, Older Property |
| 107 | 9 | 90 Smith Street | R | $98,000 | 6,250 | 5,850 | 1995/96 | $2,600 | 3,209 | Wood Frame | Gable | 2 | 1890 | Fair | 3 | 3 | | Limited | |
| | | | | | | | | | | | | | | | | | | | |
| 106 | 4 | 66 Smith Street | R | $100,170 | 8,233 | 4,441 | 1996 | $1,000 | 2,730 | Masonry/Wood | Flat | 2 | 1890 | Avg- | 4 | 4 | | Limited | Brick/Stucco |
| 105 | 20 | 35 Smith Street | R-Mixed | $129,430 | 4,410 | 8,027 | | | 3,873 | Masonry | Flat | 3 | 1910 | Fair | 5 | 5 | | Limited | Former Deli on first floor vacant & Five apartments |
| | | | | | | | | | | | | | | | | | | | |
| 68 | 11 | Lot 11, Trumbull Street | VL | $47,600 | 8,190 | | | | 0 | | | | | | | | | | |
| 68 | 12 | Lot 12, Trumbull Street | VL | $28,900 | 14,742 | 0 | | | 0 | | | | | | | | | | |
| 58 | 13 | Lot 13, Trumbull Street | VL | $71,610 | 10,200 | 0 | | | 0 | Outbuilding | na | na | | | | | | | |
| 07 | 7 | Smith Street | VL | $37,660 | 3,500 | | | | | Antennae | | | | | | | | | |
| 06 | 13 | 69B Goshen Street | VL | $23,170 | 6,651 | | | | | | | | | | | | | | |
| 06 | 7 | 44 Smith Street | VL | $23,170 | 8,448 | | | | 0 | | | | | | | | | | |
| 07 | 16 | 16 Chelsea Street | VL | $12,320 | 10,681 | | | | 0 | | | | | | | | | | |
| 07 | 21 | Goshen Street | VL | $39,480 | 5,600 | | | | 0 | Outbuilding | na | na | | | | | | | |
| 07 | 26 | Walbach Street | VL | $39,620 | 5,400 | | | | 0 | Outbuilding | na | na | | | | | | | |
| | 37 | 37 Smith Street | VL | $401,170 | 121,097 | 0 | | | | Public Tank | na | | | | | | | | Processing Facility on Barge |

City of New London Assessor's Office and RKG Associates, Inc.

**Appendix Table A-4: LOWER PEQUOT AVENUE PROPERTIES**

| MAP | BLOCK | PARCEL | ADDRESS | USE | LAND AREA | # Of Bldg | Total BLDG SF | Permit History | Impr. Cost | Finished Area | BLDG TYPE | ROOF TYPE | BLDG HGT | YR BLT | Condition | Units | Units Occ. | % Vac. | Vacant/ Available SF | Reuse Potential | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 22 | 89 | 4 | 21 Pequot | C-Mill | 25,000 | 1 | 21,152 | | | 21,152 | Masonry/Wood | Flat | 3 | 1890 | Fair | | | 0% | 0 | Limited | Pfizer Hold Out due to litigation |
| | | | | | | | | | | | | | | | | | | | | | |
| 22 | 89 | 1 | 5 Pequot Ave | R | 4,275 | 1 | 3,096 | | | 2,064 | Wood Frame | Gable | 2 | 1890 | Poor | 2 | 0 | | | Limited | Demo Struct 10/98 |
| 22 | 89 | 2 | 11 Pequot Ave | R | 4,264 | 1 | 3,970 | | | 1,748 | Wood Frame | Gable | 2 | 1900 | Poor | 2 | 0 | | | Limited | Fire Damage 94; Demo Struct 10/98 |
| | | | | | | | | | | | | | | | | | | | | | |
| 22 | 89 | 3 | 17 Pequot | VL | 6,175 | 0 | | | | | Bldg Not There | | | | | | | | | | Vacant Lot |

# APPENDIX D
## Traffic Volume Data/Graphics

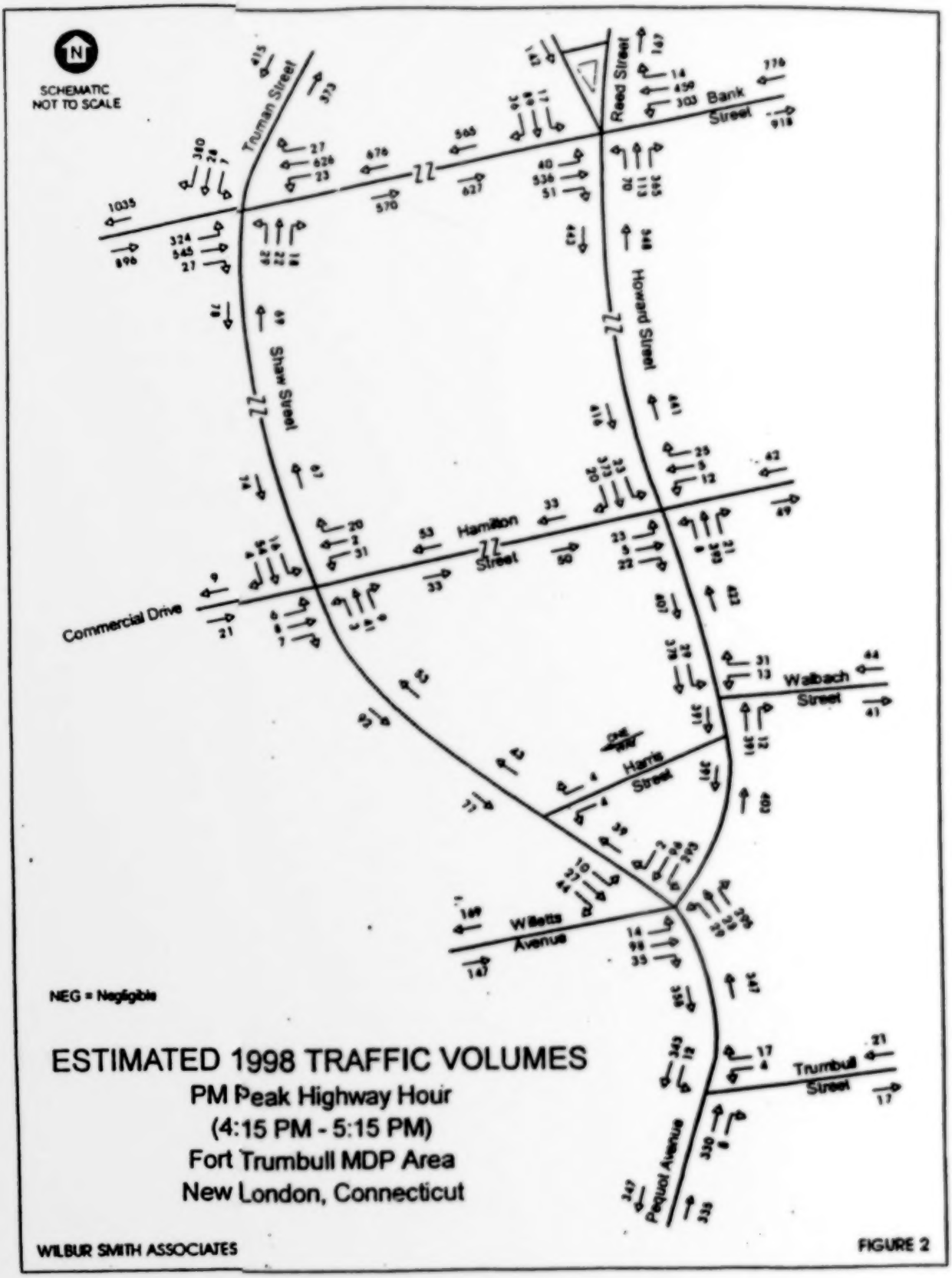


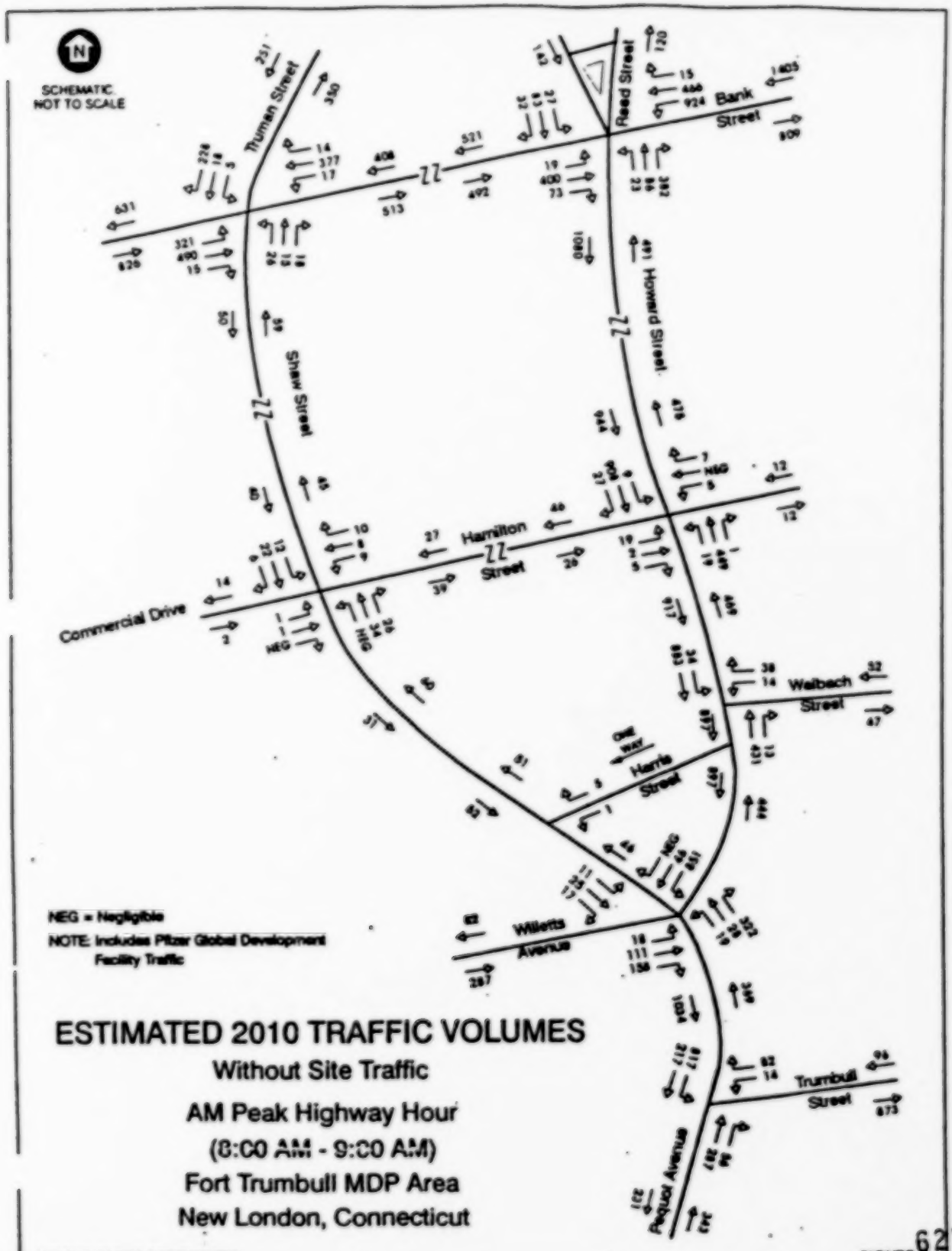

# ESTIMATED 1998 TRAFFIC VOLUMES

## AM Peak Highway Hour
## (8:00 AM - 9:00 AM)
## Fort Trumbull MDP Area
## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 1


SCHEMATIC
NOT TO SCALE
Truman Street
Reed Street
Bank Street
Howard Street
Shaw Street
Hamilton Street
Commercial Drive
Walbach Street
Harris Street
Willetts Avenue
Trumbull Street
Pequot Avenue
NEG = Negligible
ESTIMATED 1998 TRAFFIC VOLUMES
PM Peak Highway Hour
(4:15 PM - 5:15 PM)
Fort Trumbull MDP Area
New London, Connecticut
WILBUR SMITH ASSOCIATES
FIGURE 2




# ESTIMATED 2010 TRAFFIC VOLUMES

## Without Site Traffic

## AM Peak Highway Hour

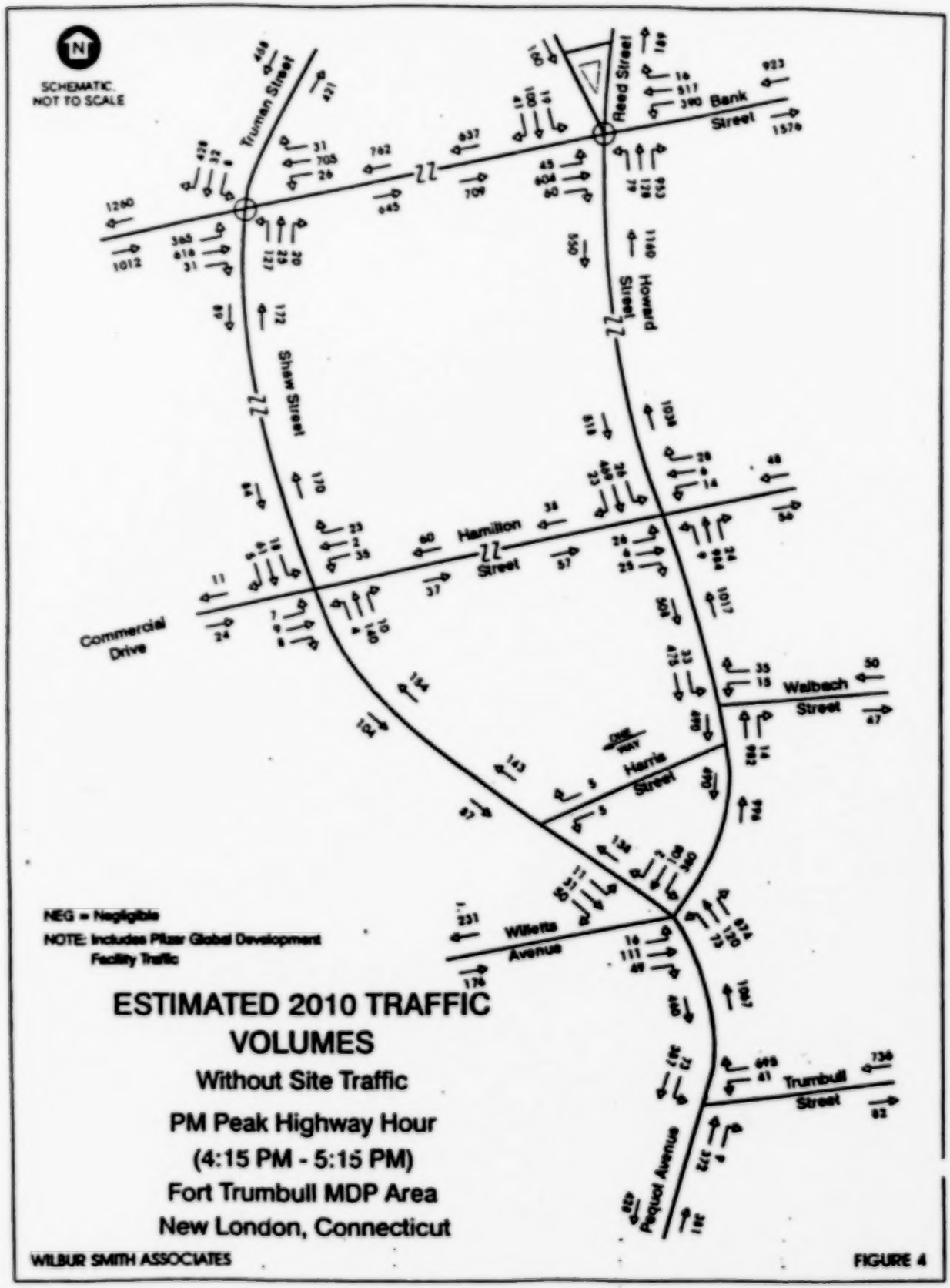
## (8:00 AM - 9:00 AM)

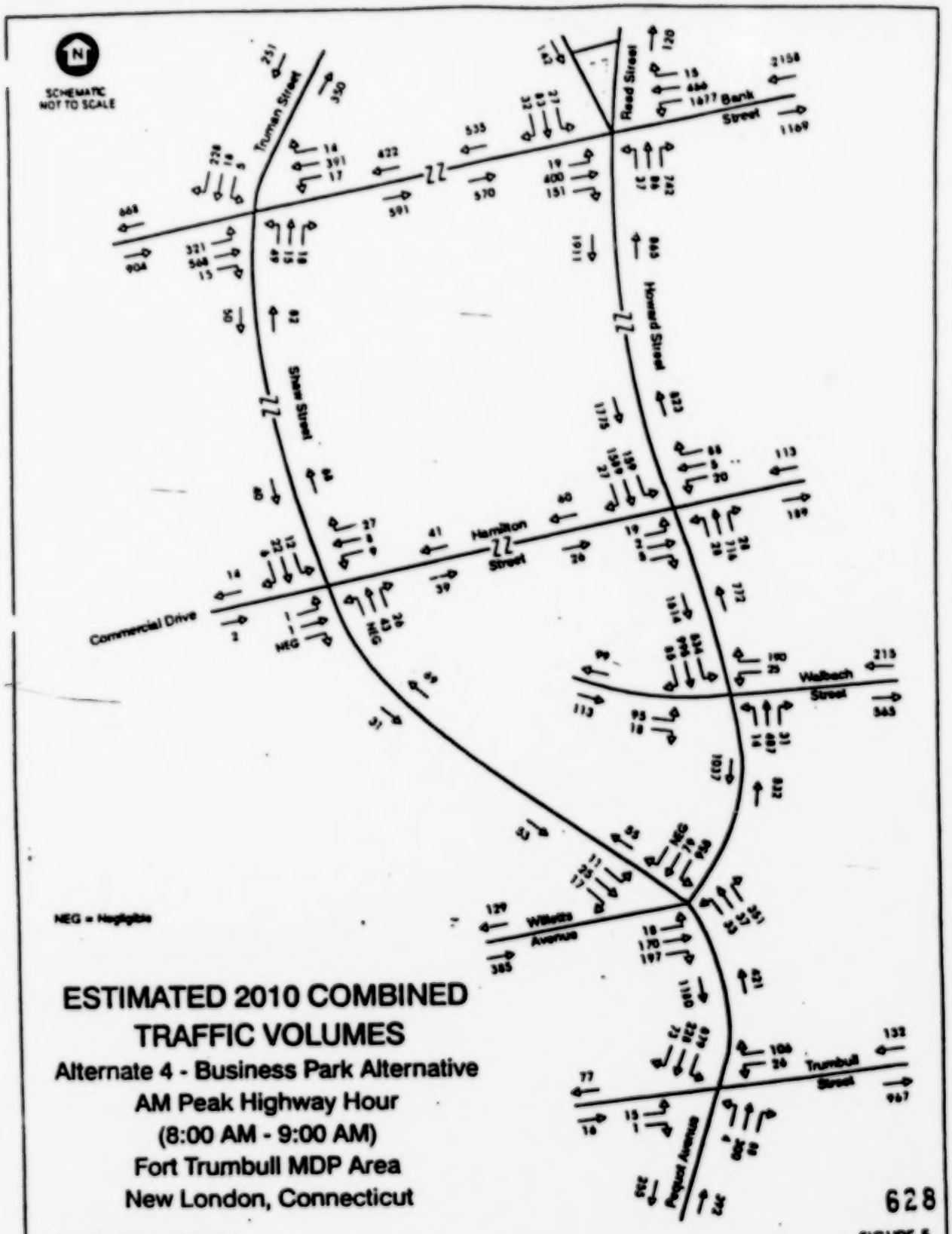
## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 5


SCHEMATIC
NOT TO SCALE
Truman Street
Reed Street
Bank Street
Howard Street
Shaw Street
Hamilton Street
Commercial Drive
Walbach Street
Harris Street
Willetta Avenue
Trumbull Street
Pequot Avenue
NEG = Negligible
NOTE: Includes Pfizer Global Development Facility Traffic
ESTIMATED 2010 TRAFFIC VOLUMES
Without Site Traffic
PM Peak Highway Hour
(4:15 PM - 5:15 PM)
Fort Trumbull MDP Area
New London, Connecticut
WILBUR SMITH ASSOCIATES
FIGURE 4




# ESTIMATED 2010 COMBINED TRAFFIC VOLUMES

Alternate 4 - Business Park Alternative

AM Peak Highway Hour

(8:00 AM - 9:00 AM)

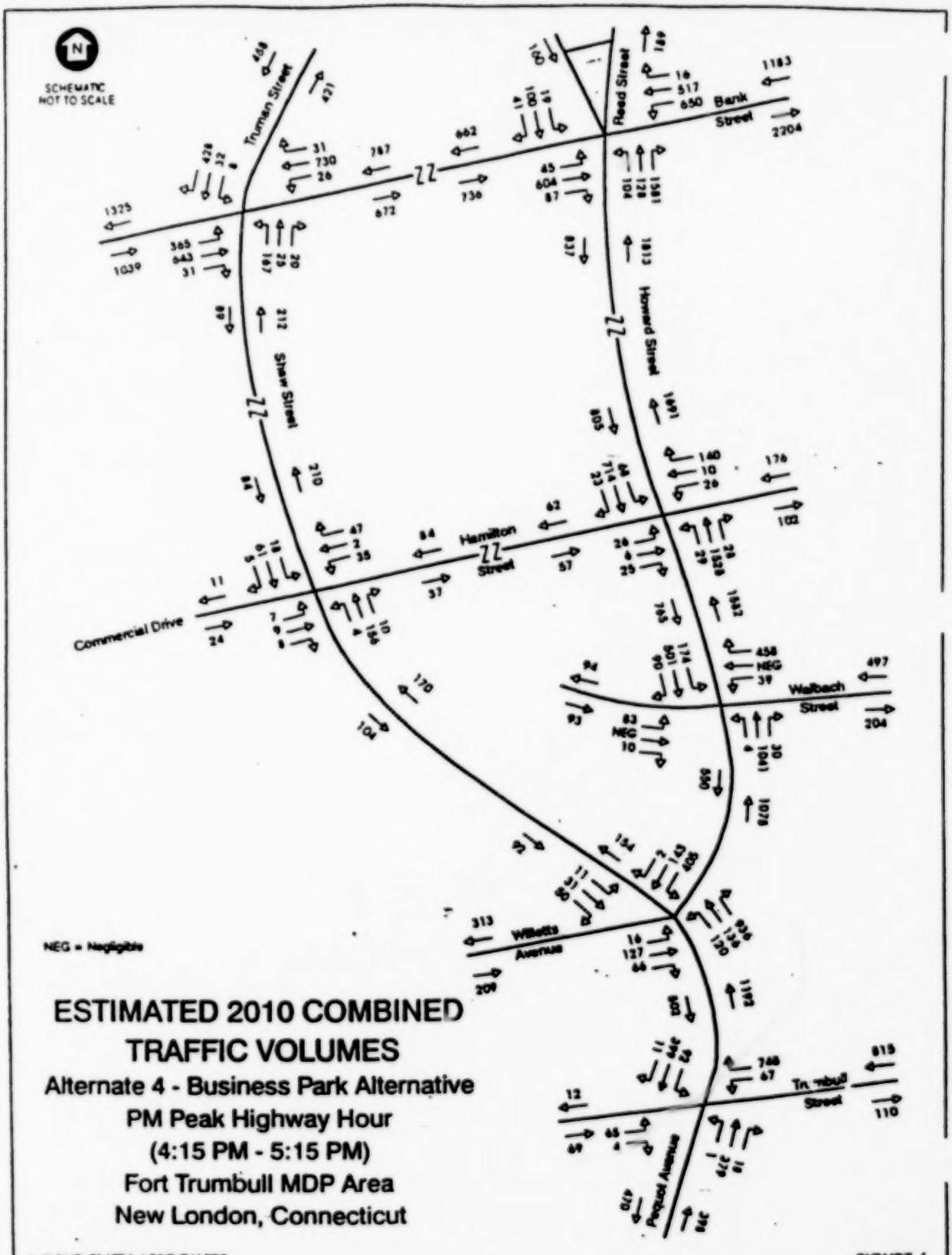
Fort Trumbull MDP Area

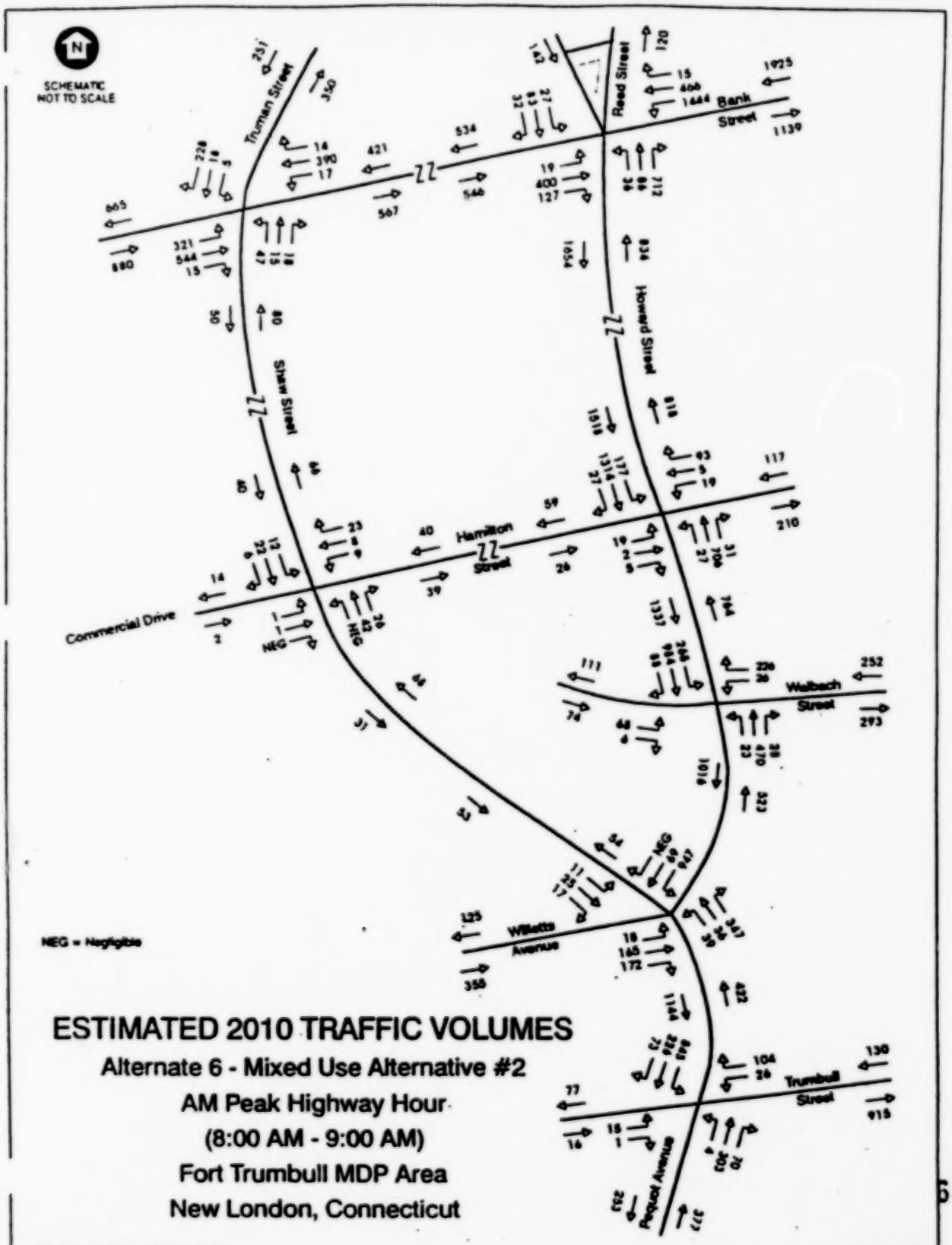
New London, Connecticut

628

WILBUR SMITH ASSOCIATES

FIGURE 5


SCHEMATIC
NOT TO SCALE
Truman Street
Read Street
Bank Street
Shaw Street
Howard Street
Hamilton Street
Commercial Drive
Walbach Street
Willetts Avenue
Tr mbull Street
Pequot Avenue
NEG = Negligible
ESTIMATED 2010 COMBINED
TRAFFIC VOLUMES
Alternate 4 - Business Park Alternative
PM Peak Highway Hour
(4:15 PM - 5:15 PM)
Fort Trumbull MDP Area
New London, Connecticut
WILBUR SMITH ASSOCIATES
FIGURE 6




# ESTIMATED 2010 TRAFFIC VOLUMES

## Alternate 6 - Mixed Use Alternative #2

## AM Peak Highway Hour

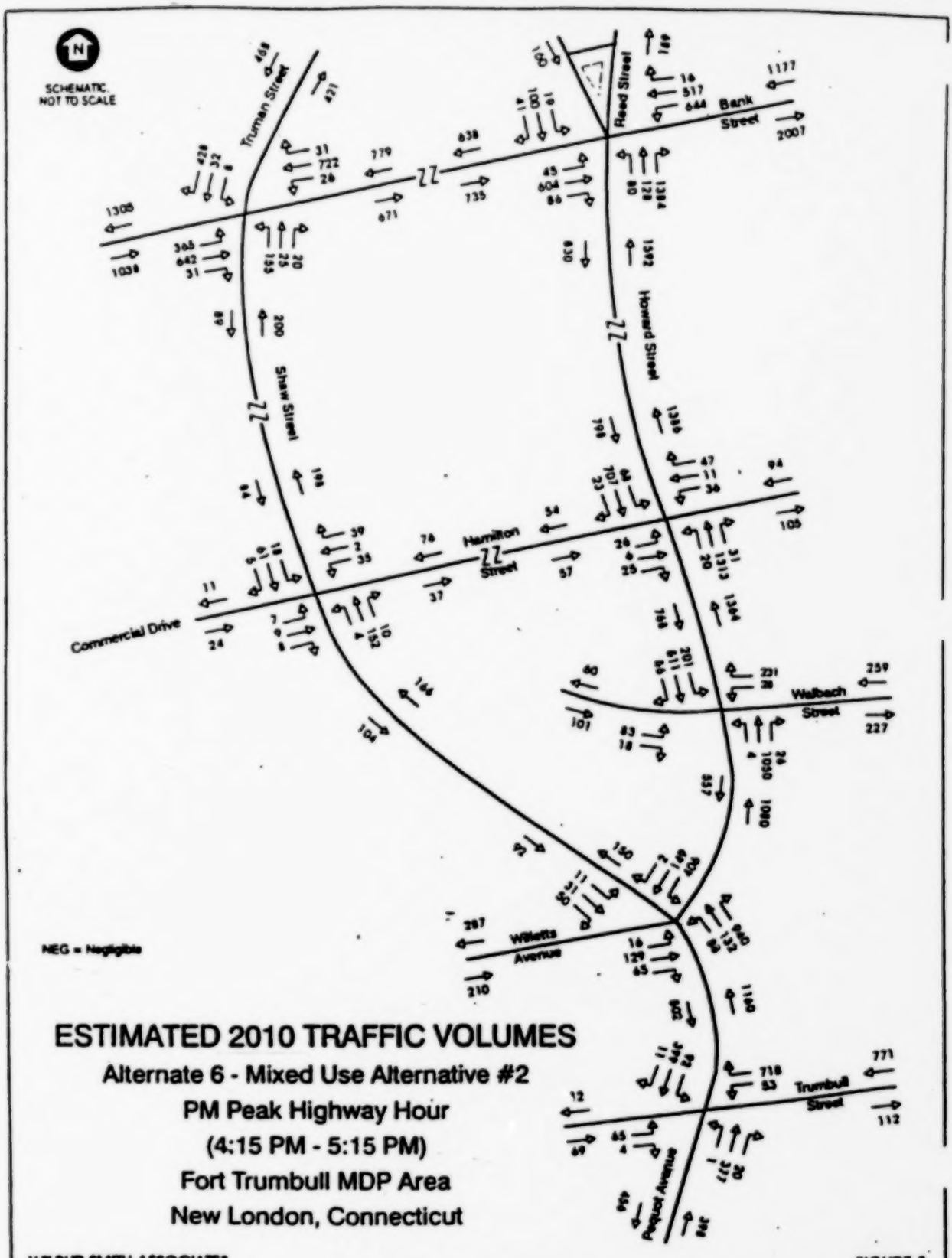
## (8:00 AM - 9:00 AM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 7




# ESTIMATED 2010 TRAFFIC VOLUMES

## Alternate 6 - Mixed Use Alternative #2

## PM Peak Highway Hour

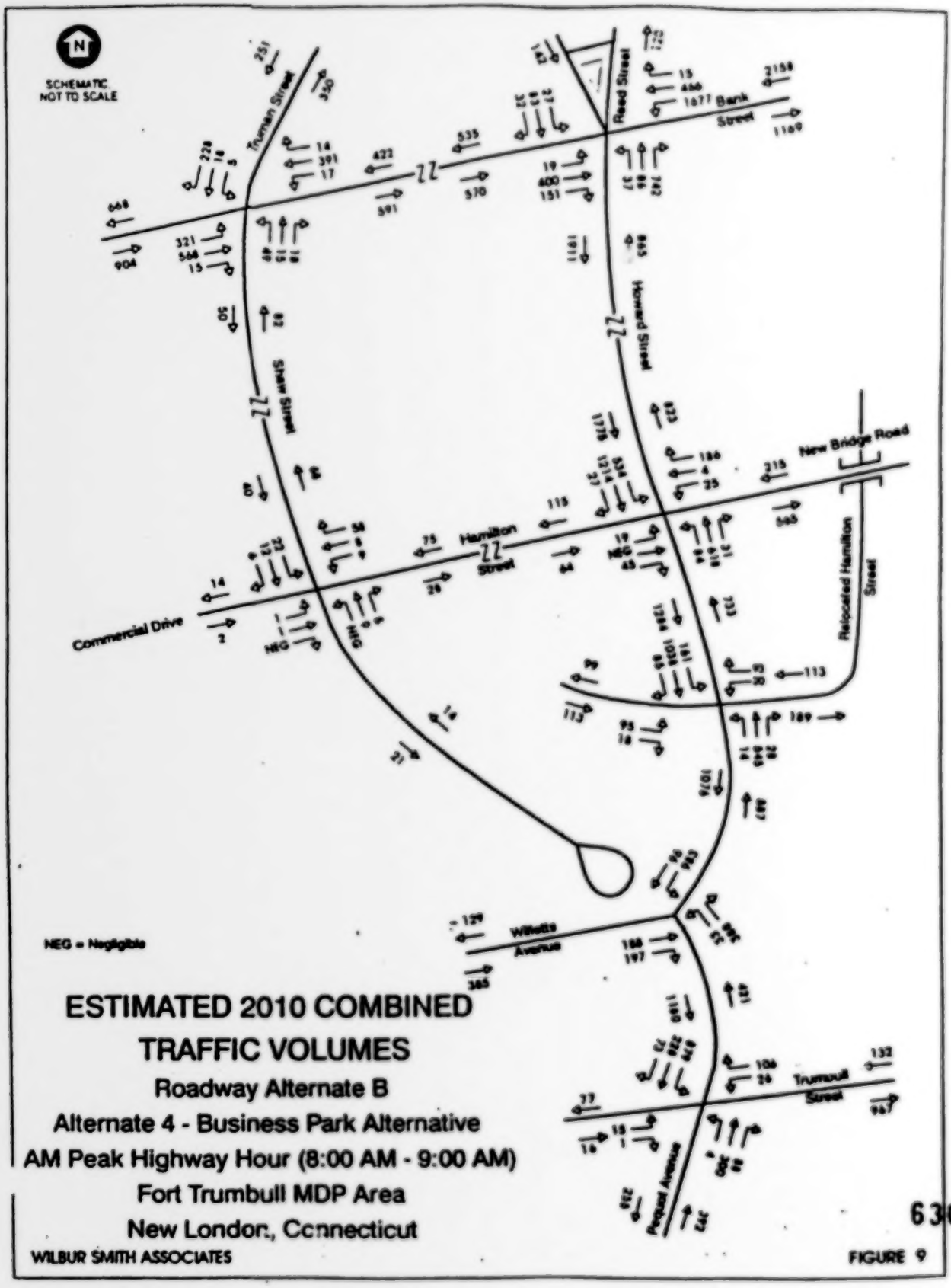
## (4:15 PM - 5:15 PM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 8




# ESTIMATED 2010 COMBINED TRAFFIC VOLUMES

## Roadway Alternate B

## Alternate 4 - Business Park Alternative

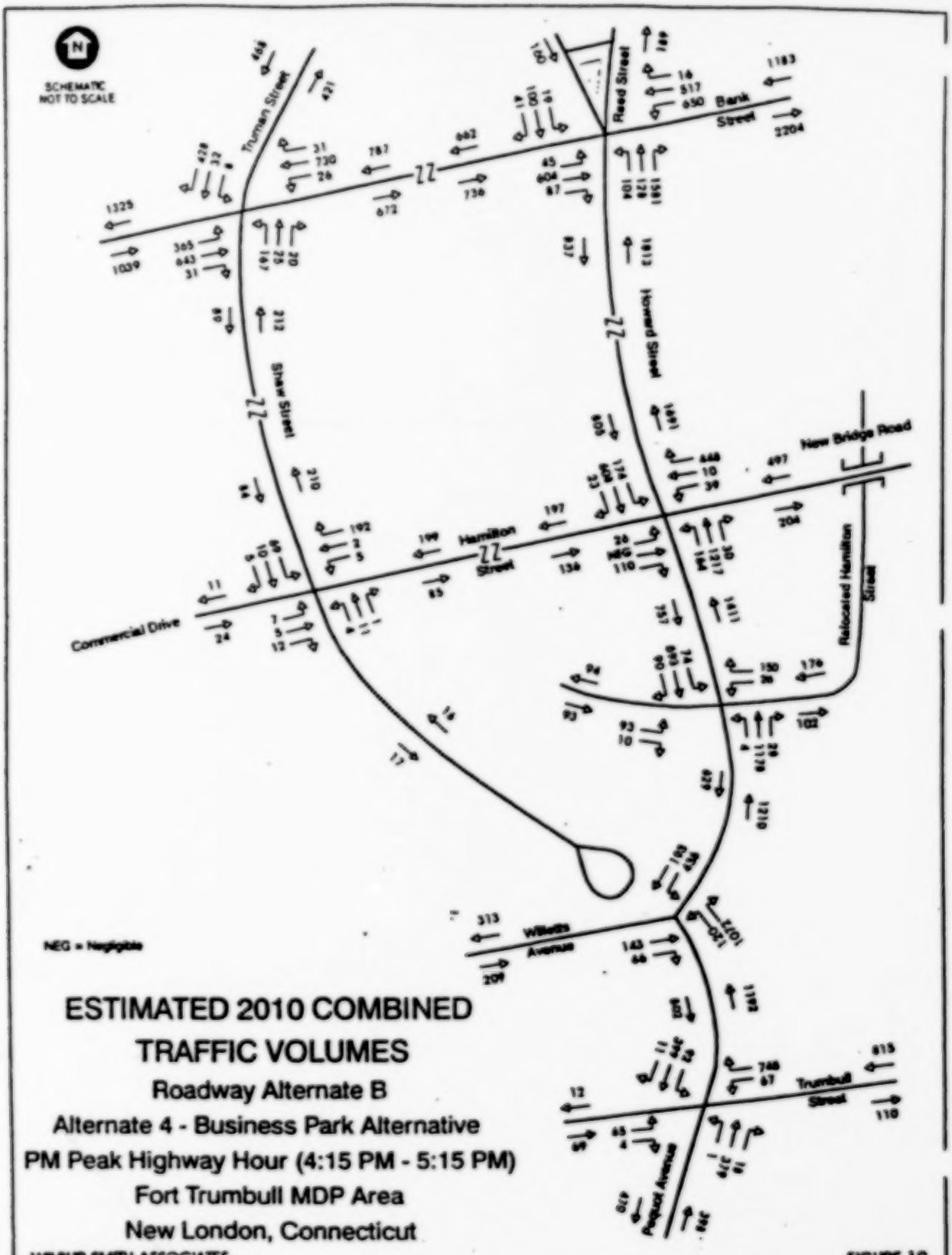
## AM Peak Highway Hour (8:00 AM - 9:00 AM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 9




# ESTIMATED 2010 COMBINED TRAFFIC VOLUMES

## Roadway Alternate B

## Alternate 4 - Business Park Alternative

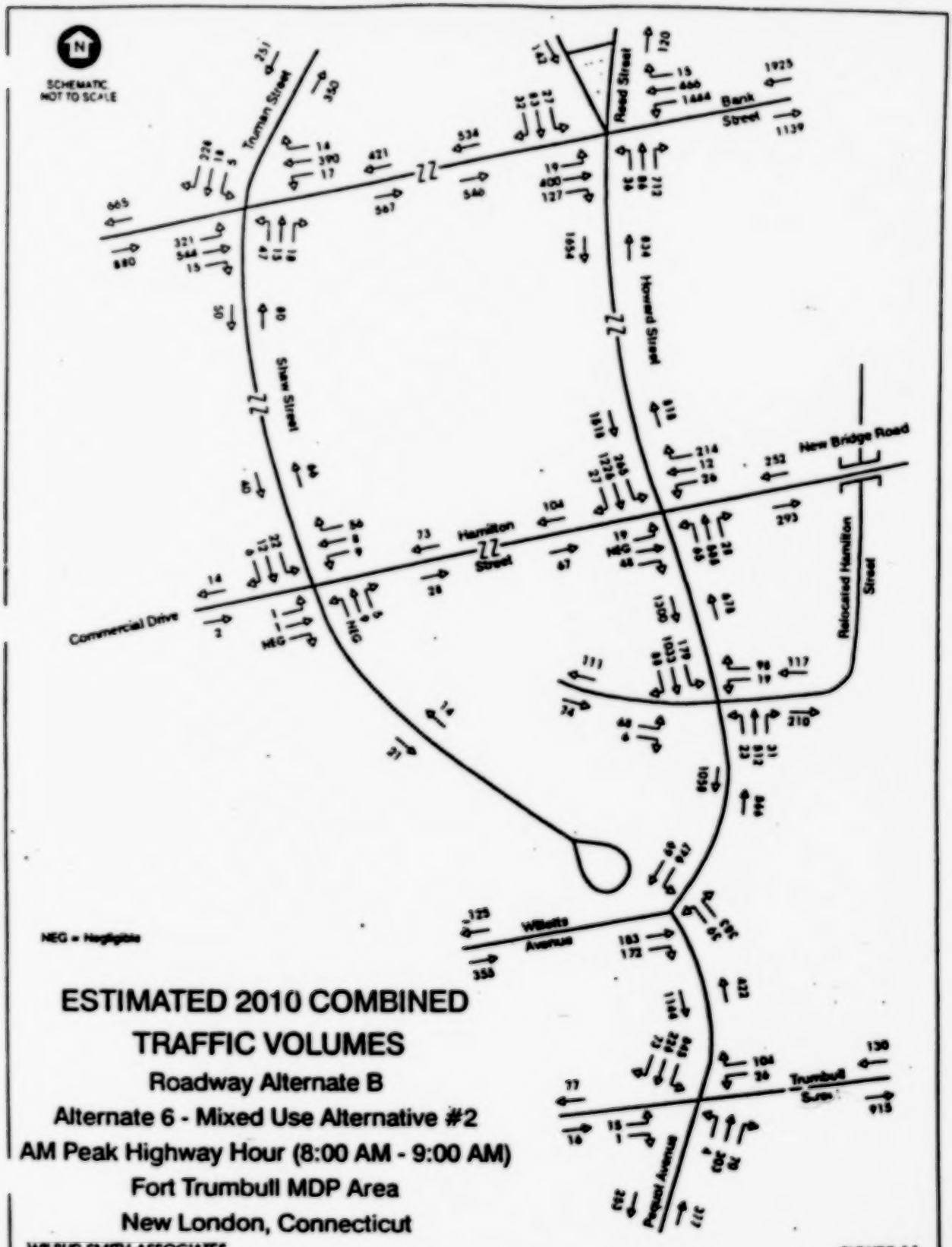
## PM Peak Highway Hour (4:15 PM - 5:15 PM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 10




# ESTIMATED 2010 COMBINED TRAFFIC VOLUMES

## Roadway Alternate B

## Alternate 6 - Mixed Use Alternative #2

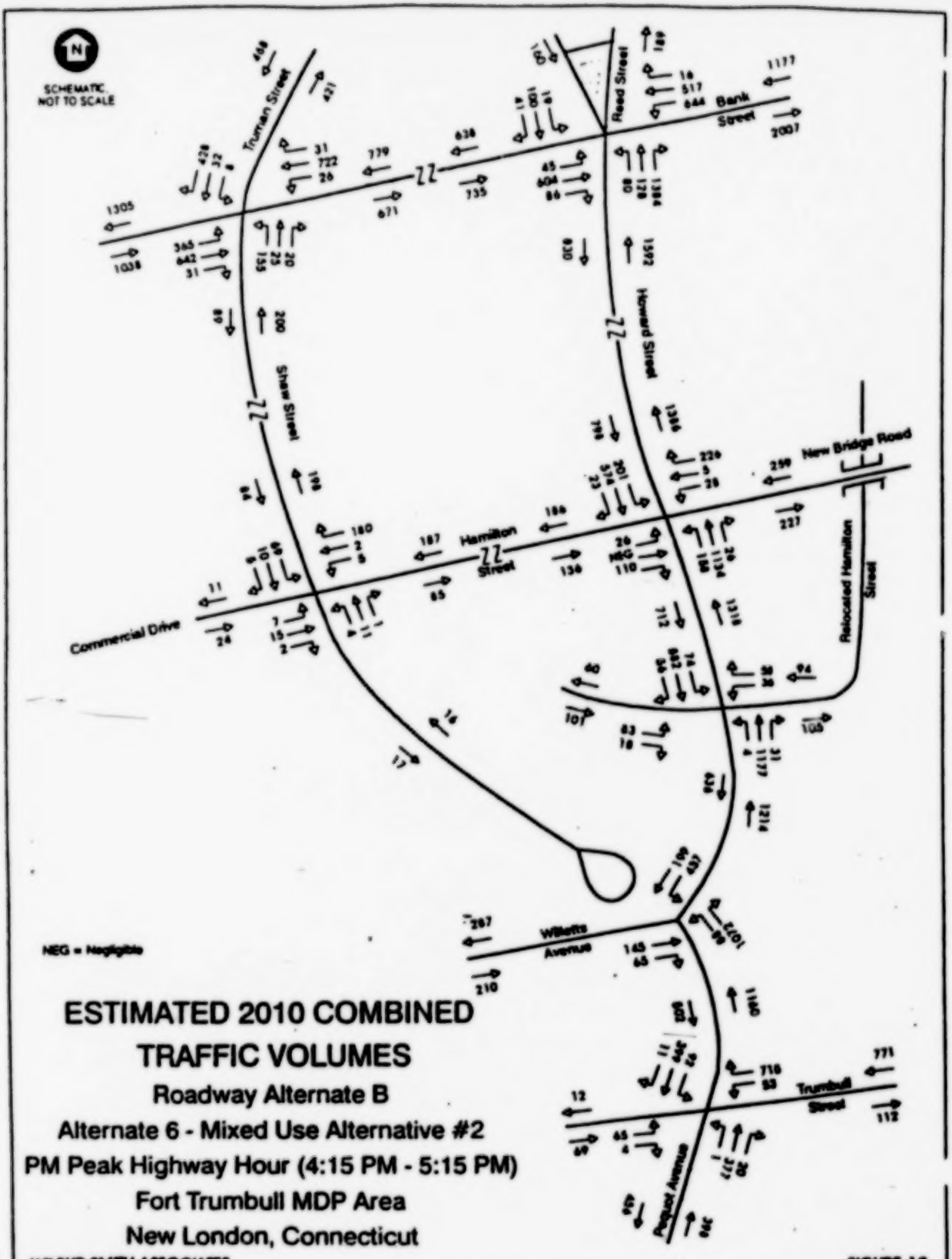
## AM Peak Highway Hour (8:00 AM - 9:00 AM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 11




# ESTIMATED 2010 COMBINED TRAFFIC VOLUMES

## Roadway Alternate B

## Alternate 6 - Mixed Use Alternative #2

## PM Peak Highway Hour (4:15 PM - 5:15 PM)

## Fort Trumbull MDP Area

## New London, Connecticut

WILBUR SMITH ASSOCIATES

FIGURE 12

## APPENDIX E
### Summary of Findings of Environmental Property Reviews

| ID | ADDRS | MAP | BLK | PAR | OWNER | PRPTY TYPE | AGE | RISK RATING | RATIONALE FOR MED OR HIGH RATING |
|---|---|---|---|---|---|---|---|---|---|
| 2 | 36 Walbach St. | 22 | 107 | 30 | Rogovin, Isodore | Rest/Club | 1957 | Low | |
| 3 | 77 Walbach St. | 21 | 105 | 1 | Richardson, Edward & Sylvia A | Three fam | 1890 | Low | |
| 4 | 79 Walbach St. | 21 | 105 | 3 | Ciavaglia, Rose | Single fam | 1870 | Low | |
| 7 | 95 Trumbull St. | 20 | 68 | 16 | Harbor Industrial Development Corp. | Industrial | 1853 | High | Sheet Metal Shop 1963-1977, paper mfg. 1938-1953, silk thread 1924-1933 paint shop Drywell/septic reported, UST reported |
| 8 | 93 Trumbull St. | 21 | 68 | 14 | Fort Trumball Marina, Inc. | Developed | | High | Boat Yard 1907-1972, machine shop, paint shop, gasoline spill 1996 |
| 9 | 90 Trumbull St. | 21 | 105 | 12 | Lawrence, Frederick, E. | Two fam | 1890 | Low | |
| 10 | 82 Trumbull St. | 21 | 105 | 13 | N.L. Trap & Bait | Commercial | 1918 | High | Former Tube Mfg 1951-1977, Textile Mill 1924-1933, Laundry 1919, Machine Shop 1921 |
| 11 | lot 12 Trumbull St. | 22 | 68 | 12 | Ocean World Learning, Inc. | Vac. Land | | High | Historic disposal from adjacent scrap yard |
| 12 | 4 Chelsea St. | 21 | 107 | 11 | Donihee, Bernard, J. | Two fam | 1900 | Low | |
| 13 | 12 Chelsea St. | 21 | 107 | 12 | Friedeberg, Donna | Two fam | 1890 | Low | |
| 14 | 6 Chelsea St. | 21 | 107 | 13 | Perkins, Maloyid & Elaine | Two fam | 1890 | Low | |
| 15 | 8 Chelsea St. | 21 | 107 | 14 | Perkins, Maloyid, J., III | Two fam | 1890 | Low | |
| 16 | 16 Chelsea St. | 21 | 107 | 16 | Wieczorek, Zigmond | vac Land | | Low | |
| 17 | 11-15 Smith St. | 21 | 105 | 14 | Johnson, Edward & Josephine | Two fam | 1890 | Low | |
| 19 | 87 Walbach St. | 21 | 105 | 3 | Ciavaglia, Rose | Single fam | 1890 | Low | |
| 20 | 15 Smith St. | 21 | 105 | 15 | Hohmann, Kurt H. | Single fam | 1890 | Low | |
| 21 | 17 Smith St. | 21 | 105 | 16 | Farrar, Richard & Rose | Single fam | 1890 | Low | |
| 22 | 19 Smith St. | 21 | 105 | 17 | Guretsky, James & Laura | Single fam | 1890 | Low | |
| 23 | 27 Smith St. | 21 | 105 | 18 | Von Winkle Karl, Trustee | Two fam | 1920 | Low | |
| 24 | 31 Smith St. | 21 | 105 | 19 | Von Winkle Karl, Trustee | Store/Shop | 1890 | Low | |
| 25 | 35 Smith St. | 21 | 105 | 20 | Von Winkle Karl, Trustee | Store/Shop | 1910 | Low | |
| 26 | 44 Smith St. | 21 | 106 | 7 | Weeks, Wendy | vac Land | | Low | |
| 27 | 50 Smith St. | 21 | 106 | 6 | Weeks, Wendy | Office build | 1890 | Low | |
| 28 | 54-56 Smith St. | 21 | 106 | 5 | Pasqualini, Walter & Nora | Two fam | 1870 | Low | |
| 29 | 66 Smith St. | 21 | 106 | 4 | Rakoshy & Dubicki | Apt. 4-8 | 1890 | Low | |
| 30 | 68 Smith St. | 21 | 106 | 3 | Iglesia Primeria Baptist Spanish Church | Church | 1930 | Low | |
| 31 | 72 Smith St. | 21 | 106 | 2 | Luzi, Carolyn, A. | Auto Repair | 1957 | High | Autobody shop 1985 to present, AGT for waste oil, oil/anti-freeze spill 1993 |
| 32 | 78 Smith St. | 21 | 106 | 1 | Brelesky, Thelma | Single fam | 1820 | Med | Norge Oil Company 1953-1968 |
| 33 | 86 Smith St. | 21 | 107 | 10 | Marley, Timothy & Marguerite | Single fam | 1890 | Low | |
| 34 | 90 Smith St. | 21 | 107 | 9 | Orr, John S., II & Amy L. | Three fam | 1890 | Low | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 35 | 96 Smith St. | 21 | 107 | 8 | Murphy, Diane & Pongetti, Rudolph | Single fam | 1876 | Low | |
| 36 | 37 Smith St. | 27 | 68 | 37 | Castle Realty, LLC | Public Tank | | High | Oil Company 1938-Present, 8 ASTs, Machine Shop, Foundry & Blacksmith, RST gasoline, 500 gal. oil spill 1992, 1891-1921 |
| 37 | 72 Goshen St. | 22 | 107 | 17, 18 | Sonalysis, Inc. | Office Build | 1900 | Med | Contractor's storage 1921 |
| 38 | 64 Goshen St. | 22 | 107 | 20 | O'Connell, Vilma & Benvenuil, Beatrice | Single fam | 1890 | Low | |
| 39 | 58 Goshen St. | 22 | 107 | 22 | Schlavone, S. & Engelman, Eruce | Two fam | 1900 | Low | |
| 40 | 54 Goshen St. | 22 | 107 | 24 | Anton, Albert P | Two fam | 1900 | Low | |
| 41 | 50 Goshen St. | 22 | 107 | 25 | Gonzalez, Jose & Mirina | Two fam | 1900 | Low | |
| 42 | 46 Goshen St. | 22 | 107 | 27 | Gonzalez, Evelyn Y. | Two fam | 1910 | Low | |
| 43 | 42 Goshen St. | 22 | 107 | 28 | Rogovin, Isadore | Two fam | 1912 | Low | |
| 44 | 59 Goshen St. | 21 | 106 | 12 | Desantis, John T. & Thomas P. | Two fam | 1920 | Low | |
| 45 | 59B Goshen St. | 21 | 106 | 13 | Desantis, John T. & Thomas P. | vac Land | | Low | |
| 46 | 53 Goshen St. | 21 | 106 | 10 | Cristofaro, Pasquale & Margaeri | Two fam | 1890 | Med | Motor oil spill 1993 |
| 47 | 49 Goshen St. | 21 | 106 | 9 | Palaya Construction Limited Partnership | Two fam | 1890 | Low | |
| 48 | 41 Goshen St. | 21 | 105 | 8 | Palaya Construction Limited Partnership | Single fam | 1890 | Low | |
| 49 | 28 East St. | 21 | 105 | 3 | Ciavaglia, Rose | Single fam | 1890 | Low | |
| 50 | 8 East St. | 21 | 105 | 11 | Gilbert, Emily, P. | Single fam | 1890 | Low | |
| 51 | 10 East St. | 21 | 105 | 10 | Gilbert, Emily, P. | Single fam | 1890 | Low | |
| 52 | 12-14 East St. | 21 | 105 | 9 | Voyles, Richard | Single fam | 1890 | Low | |
| 53 | 14 East St. | 21 | 105 | 8 | Ballestrini, Helen M. | Two fam | 1942 | Low | |
| 54 | 16 East St. | 21 | 105 | 8 | Ballestrini, Helen M. | Single fam | 1942 | Low | |
| 55 | 16 East St. R. | 21 | 105 | 8 | Ballestrini, Helen M. | Two fam | 1890 | Low | |
| 56 | 22 East St. | 21 | 105 | 5 | Blescus, Erika, M. | Two fam | 1890 | Low | |
| 57 | 26 East St. | 21 | 105 | 4 | Smith, Victor H., Sr. | Single fam | 1890 | Low | |
| 58 | 81-83 Walbach St. | 21 | 105 | 3 | Ciavaglia, Rose | Two fam | 1890 | Low | |
| 59 | 79 Goshen St. | 21 | 106 | 14 | Italian Dramatic Club, The | Club | 1922 | Low | |
| 60 | Lot 13 Trumbull St. | 21 | 68 | 13 | City of New London | vac land | | High | See Number 8 |
| 61 | Walbach St. | 22 | 107 | 26 | Penn Central Transportation Co. | excess land | 0 | Low | |
| 62 | Goshen St. | 22 | 107 | 21 | Penn Central Transportation Co. | excess land | 0 | Low | |
| 63 | 68 Goshen St. | 22 | 107 | 19 | Sonalysis Inc | Single fam | 1890 | Low | |
| 64 | 162 Hamilton St. | 22 | 107 | 3 | Howard-Hamilton Corporation | Comm Ware | 1900 | High | Foundry, machine shop, paint shop, linoleum paste, auto repair and sales, auto painter, woodworking, [1891-present] |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 65 | 216 Howard St. | 22 | 107 | 32 | Von Winkle, Karl R., Trustee | Office Build | 1955 | High | Cleaner and dyer 1953-1958 |
| 66 | 80 Hamilton St. | 26 | 109 | 13 | City of New London Redev. Agency | Municipal | 1940 | Low | |
| 67 | 150 Howard St. | 26 | 109 | 19 | Miner & Alexander Lumber Company | Warehouse | 1920 | High | FUST |
| 68 | 224 Shaw St. | 22 | 102 | 8 | Mel, Lebro | Two fam | 1900 | Low | |
| 69 | 230 Shaw St. | 11 | 102 | 7 | Renshaw, Murray | vac Land | 0 | Low | Former Montali's Bakery |
| 70 | 232 Shaw St. | 22 | 102 | 6 | Renshaw, Murray | Single fam | 1900 | Low | |
| 71 | 243 Howard St. | 22 | 102 | 5 | Oxford Realty | vac Land | 0 | Low | Former Restaurant |
| 72 | 239 Howard St. | 22 | 102 | 4 | Suplicki, Stanley E., Jr. | Three fam | 1900 | Low | |
| 73 | 229 Howard St. | 22 | 102 | 3 | Pottle, Bradford | Store/Shop | 1946 | Med | Chinese Laundry 1907-1921 |
| 74 | 237 Howard St. | 22 | 102 | 2 | Picinich, Thomas J. | Single fam | 1900 | Low | |
| 75 | Harris St. | 22 | 102 | 1 | Renshaw, Murray | Ware | 1970 | Med | Boat Builder (mostly storage) |
| 76 | 172 Howard St. | 22 | 107 | 36 | Costanza, Gregory, G. | Single fam | 1882 | Low | |
| 77 | 170 Howard St. | 22 | 107 | 36 | Tackling, Robert & Joan | Single fam | 1900 | Low | |
| 78 | 194 Howard St. | 22 | 107 | 34 | Howard Shoreline Associates | Office Build | 1985 | High | Machine Shop & Foundry 1891-1968, Numerous monitoring wells |
| 79 | 210 Howard St. | 22 | 107 | 33 | Parikh, Vinod & Jayendra, Chiman, Patel | Office Build | 1900 | Low | |
| 80 | 65 Hamilton St. | 22 | 107 | 2 | Gabrick, Ingrid | Comm Ware | 1950 | High | Autobody and painting shop 1950-1972 |
| 81 | 152 Howard St. | 22 | 107 | 1 | Wildes, Robert P., et al | Comm Ware | 1920 | High | Furniture Warehouse 1967-1972, Auto Repair 1951 |
| 82 | Hamilton St. | 22 | 101 | 4 | City of New London – HAM | Municipal | 0 | Low | |
| 83 | Shaw St. | 22 | 101 | 38 | Sandrew, Carol | Res Devel | 0 | Low | |
| 84 | 12 Harris St. | 22 | 101 | 30 | Pietras, Virginia | Two fam | 1900 | Low | |
| 85 | 16 Harris St. | 22 | 101 | 29 | Rolfe, Gladys, R. | Two fam | 1900 | Low | |
| 86 | 221 Howard St. | 22 | 101 | 27 | Traystman, Harry, Trustee | Rest/Club | 1950 | Low | |
| 87 | 215 Howard St. | 22 | 101 | 26 | Traystman, Harry c/o Sandrew, Carole | Single fam | 1900 | Med | Portions of property are filled areas of former Shaws Cove |
| 88 | 211 Howard St. | 22 | 101 | 25 | Traystman, Harry c/o Sandrew, Carole | Single fam | 1900 | Low | |
| 89 | 211R Howard St. | 22 | 101 | 25 | Traystman, Harry c/o Sandrew, Carole | Single fam | 1910 | Low | |
| 90 | 209 Howard St. | 22 | 101 | 24 | Kimball, Donald, H. | Two fam | 1900 | Low | |
| 91 | 203 Howard St. | 22 | 101 | 23 | Howard Shoreline Associates | Parking Lot | 0 | High | Existing monitoring wells |
| 92 | 197 Howard St. | 22 | 101 | 22 | Howard Shoreline Associates | Parking Lot | 0 | High | Junk yard, scrap yard 1928-1972, existing monitoring wells |
| 93 | 195 Howard St. | 22 | 101 | 21 | Delgrosso, Lillian c/o Farrell Antionett | vac Land | 0 | High | Used car dealer 1943-1977 |
| 94 | 189 Howard St. | 22 | 101 | 20 | Farrell, Antoinette | Single fam | 1900 | Med | Furniture repair 1921 |
| 95 | Shaw St. | 22 | 101 | 19 | City of New London – HAM | Municipal | 0 | Med | Portions of property are filled areas of former Shaws Cove |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 96 | 185 Howard St. | 22 | 101 | 18 | Bernard, John A & Nancy L | Two fam | 1900 | Low | |
| 97 | 175 Howard St. | 22 | 101 | 16 | Gaetano, Leonard, Jr. | Gas Station | 1950 | High | Gas Staton 1933-1998, 3 RUSTS, 3 FUSTS, Oil Spill 1991 |
| 98 | 175 Howard St. R | 22 | 101 | 15 | Darm, Nicholas, J., Sr. | Two fam | 1900 | High | Former Sheet metal shop |
| 99 | 175R Howard St. | 22 | 101 | 14 | Dahm, Nicholas, J., Sr. | Comm Ware | 1900 | Med | Portions of property are filled areas of former Shaw Cove |
| 100 | 163 Howard St. | 22 | 101 | 13 | City of New London | Two fam | 1900 | Low | |
| 101 | Howard St. R | 22 | 101 | 13 | City of New London | Comm Ware | 1900 | High | Barrell storage and repair 1943-1985, Bottling Works, 1915-1921, Used car dealer and radiator repair 1924-1938 |
| 102 | 161 Howard St. | 22 | 101 | 12 | Hodges, George & Roxie | Two fam | 1900 | Low | |
| 103 | 157 Howard St. | 22 | 101 | 11 | City of New London – HOW | Municipal | 0 | Low | |
| 104 | 39 Hamilton St. | 22 | 101 | 10 | City of New London | Three fam | 1900 | Low | |
| 105 | 37 Hamilton St. | 22 | 101 | 9 | Curtin, Catherine, H. | Single fam | 1900 | Low | |
| 106 | 33 Hamilton St. | 22 | 101 | 8 | City of New London | Developed | 0 | Med | Lumber and Construction Co. 1983-1988 |
| 107 | Hamilton St. | 22 | 101 | 7 | City of New London – HAM | Municipal | 0 | Low | |
| 108 | 23 Hamilton St. | 22 | 101 | 6 | City of New London | Comm Ware | 1870 | High | Bottling Works 1912-1972, portions of property are filled areas of former Shaws Cove |
| 109 | 30 Walbach | 22 | | | Amtrak | Railroad | | High | Railroad Freight Depot and Repair from 1896-present, Gasoline FUST |
| 110 | Walbach & Hamilton | 22 | 107 | 7 | Amtrak | Vacant | | Med | Antenna site |
| 111 | 5 Pequot Ave | 22 | 89 | 1 | Pfizer, Inc. | Two fam | 1900 | Low | |
| 112 | 11 Pequot Ave | 22 | 89 | 2 | Pfizer, Inc. | Two fam | 1900 | Low | |
| 113 | 15-17 Pequot Ave | 22 | 89 | 3 | Pfizer, Inc. | Two fam | 1900 | Low | |
| 114 | 21 Pequot Ave | 22 | 89 | 4 | Russell, Oscar | Industrial | 1921 | High | Machine shop 1921-1971, Kerosene UST |
| 115 | Lot 11 Trumbull St | 22 | 68 | 11 | Amtrak | Vacant Land | 0 | High | Railroad Tracks, Historical storage from nearby scrap yard |
| | | | | | | | | Abbreviations: | RUST = Registered Underground Storage Tank |
| | | | | | | | | | FUST = Former Underground Storage Tank |
| | | | | | | | | | UST = Underground Storage Tank |

## APPENDIX F

### Relevant Correspondence

[LOGO] [LOGO]

**STATE OF CONNECTICUT**
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

NATURAL RESOURCES CENTER
79 Elm Street, Store Level
Hartford, CT 06106
Natural Diversity Data Base

September 3, 1998

Mark Carabetta
Milone & MacBroom, Inc.
716 South Main Street
Cheshire, CT 06410

re: Fort Trumbull Area in
New London, Connecticut

Dear Mr. Carabetta:

I have reviewed Natural Diversity Data Base maps and files regarding the area delineated on the map you provided for the Fort Trumbull Area in New London, Connecticut. According to our information, there are State Threatened Atlantic sturgeon *(Acipenser oxyrhynchus)* in the vicinity of this project. Please contact Peter Aarrestad (DEP-Marine Fisheries) for further information on the sturgeon.

Natural Diversity Data Base information includes all information regarding critical biological resources available to us at the time of the request. This information is a compilation of data collected over the years by the Natural Resources Center's Geological and Natural History Survey and cooperating units of DEP, private conservation groups

and the scientific community. This information is not necessarily the result of comprehensive or site-specific field investigations. Consultations with the Data Base should not be substitutes for on-site surveys required for environmental assessments. Current research projects and new contributors continue to identify additional populations of species and locations of habitats of concern, as well as, enhance existing data. Such new information is incorporated into the Data Base as it becomes available.

Please contact me if you have further questions at 424-3592. Thank you for consulting the Natural Diversity Data Base. Also be advised that this is a preliminary review and not a final determination. A more detailed review may be conducted as part of any subsequent environmental permit applications submitted to DEP for the proposed site.

Sincerely,

/s/ Dawn M. McKay
Dawn M. McKay
Biologist/Environmental Analyst

CC: Peter Aarrestad

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[LOGO]

**STATE OF CONNECTICUT**
***CONNECTICUT HISTORICAL COMMISSION***

October 8, 1998

Ms. Pamela Aey Adams
State Parks Division
Department of Environmental Protection
79 Elm Street
Hartford, CT 06106

Subject: Fort Trumbull State Park
New London, CT

Dear Ms. Adams:

The State Historic Preservation Office has reviewed the Department of Environmental Protection's *Application to the Federal Lands to Parks Programs* concerning the above-named property. This office notes that Fort Trumbull is listed an the National Register of Historic Places. In addition, the Naval Facilities Engineering Command and this office have identified a significant portion of the former Naval Undersea Warfare Center, including Fort Trumbull, as being eligible for the National Register as a military-maritime historic district. Section 5.2.5 and Fig 6-1 of the Naval Facilities Engineering Command's *Cultural Resources Survey* describes all contributing structures and the boundaries for this historic area.

The State Historic Preservation Office is actively consulting with the Naval Facilities Engineering Command pursuant to its historic preservation responsibilities vis-a-vis the National Historic Preservation Act. This office expects that a programmatic memorandum of agreement will be forthcoming from these negotiations which will include pertinent preservation covenants and/or mitigative

measures with respect to the Department of the Navy's proposed disposal of this historic facility.

The State Historic Preservation Office supports the proposed acquisition and subsequent management of this important property as a state heritage park. Fort Trumbull represents a rare opportunity for educational and interpretative programming concerning Connecticut's extensive maritime-related military history from 19th-century coastal defense to Cold War research and development.

This office anticipates working with the State Parks Division with respect to proposed site development and interpretative activities in accordance with the Connecticut Environmental Policy Act and the forthcoming Programmatic Memorandum of Agreement with the Naval Facilities Engineering Command

In order to facilitate further coordination between our professional staff, we have requested that the Naval Facilities Engineering Command forward a final copy of its *Cultural Resource Survey* directly to your office.

For further information please contact Dr. David A. Poirier, Staff Archaeologist.

Sincerely,

/s/ Dawn Maddox
Dawn Maddox
Deputy State Historic
Preservation Officer

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[LOGO]

**STATE OF CONNECTICUT**
***CONNECTICUT HISTORICAL COMMISSION***

October 14, 1998

Ms. Jeanine Armstrong Bonin
Milone & Macbroom Inc.
716 South Main Street
Cheshire, CT 06410

Subject: Fort Trumbull MDP Area
New London, CT
MMI #1876-01

Dear Ms. Bonin:

The State Historic Preservation Office has reviewed the archaeological assessment survey prepared by Dr. Stuart A. Reeve and Keegans Associates concerning the above-named project. In the opinion of the State Historic Preservation Office, the research methodologies for the archaeological assessment are consistent with our *Environmental Review Primer for Connecticut's Archaeological Resources.*

The State Historic Preservation Office has also reviewed the *administrative draft* Environmental Impact Evaluation prepared by Milone & MacBroom Inc. for the Fort Trumbull MDP Area. This office concurs with the archaeological evaluation documented within the assessment survey report and the draft EIE. We further agree with the archaeological sensitivity determinations as detailed in Figure 19 (prehistoric) and Figure 20 (historic) of the archaeological assessment survey; Figures 2.7.3 and 2.7.4 are the respective EIE counterparts.

The State Historic Preservation Office recommends that a reconnaissance survey be undertaken with respect to those areas of moderate to high archaeological sensitivity

(Figures 2.7.3 and 2.714) in order to identify, evaluate, and professionally consider archaeological resources as an integral component of the CEPA planning process. In particular, the reconnaissance survey should specifically investigate the archaeological visibility and integrity of the former Fort Trumbull Glass Company factory and the A. Bragan Ship Yard. All archaeological studies must be undertaken in accordance with this office's *Primer.*

In addition, the State Historic Preservation Office recommends that additional historic and architectural evaluation be professionally undertaken with respect to the seven military-related structures that are identified on the 1919 map of Fort Trumbull, but which are located outside of the current NUWC property. This evaluation should consider the historic context established for the NUWC military-research facilities by the Naval Facilities Engineering Command's *Cultural Resources Survey* and the eligibility criteria for the National and State Registers of Historic laces.

This office looks ferward to working with Milone & MacBroom Inc., the Department of Economic and Community Development, the City of New London, and all interested parties with respect to the expeditious furtherance of the Fort Trumbull MDP project as well as the professional management of Connecticut's cultural heritage.

These comments are provided pursuant to the Connecticut Environmental Policy Act and Connecticut General Statutes Section 22a-90(I)(J).



For further information please contact Dr. David A. Poirier, Staff Archaeologist.

Sincerely,

/s/ Dawn Maddox
Dawn Maddox
Deputy State Historic
Preservation Officer

cc: Mr. Peter Simmons/DECD
Dr. Nicholas Bellatoni/OSA
Mr. Jeffrey Smith/OPM

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[LOGO]

**STATE OF CONNECTICUT**
***CONNECTICUT HISTORICAL COMMISSION***

October 13, 1998

Ms. Tina A. Deininger
Department of the Navy
Naval Facilities Engineering Command
10 Industrial Highway
Mail Stop #82
Lester, PA 19113-2090

Subject: Naval Undersea Warfare Center (Fort Trumball)
New London, CT

Dear Ms. Deininger:

The State Historic Preservation Office reaffirms its prior assessment that the proposed Naval Undersea Warfare Center (Fort Trumbull) historic district (*Cultural Resources Survey*, Figure 6-1) is eligible for the National Register of Historic Places. The NUWC historic district is uniquely significant with respect to Connecticut's military and maritime history.

The State Historic Preservation Office believes that the closure and subsequent disposition of this historic military facility will constitute an *adverse effect* upon the safe's cultural heritage. In particular, this office understands that the Connecticut Department of Environmental Protection and the New London Development Corporation, which are likely recipients of the property, have developed preliminary plans that include the proposed demolition of numerous structures which contribute to the historic significance of the Naval Undersea Warfare Center (Fort Trumbull) historic district.

The State Historic Preservation Office recommends that the Naval Facilities Engineering Command consult with the Advisory Council on Historic Preservation pursuant to the National Historic Preservation Act. In particular, this office encourages the Naval Facilities Engineering Command to develop a memorandum of agreement that would satisfactorily mitigate project-related impacts upon the historic, architectural, and archaeological components of the NUWC historic district.

The State Historic Preservation Office strongly recommends that the following mitigative measures be incorporated into the memorandum of agreement for the NUWC base closure project:

Documentation

- The Naval Facilities Engineering Command shall document Bowditch Hall (Building 34) to the professional written and photographic (interior and exterior) standards of the Historic American Buildings Survey. NFEC shall consult with the National Park Service to determine what level and land of documentation is required. NFEC shall



provide final copies of the documentation to the State Historic Preservation Office, the Department of Environmental Protection, State Parks Division, and the National Park Service.

- The Naval Facilities Engineering Command shall document the NUWC historic district and its individual components to the professional standards of the State Historic Preservation Office. Documentation shall consist of unmounted 35mm black and white photographs (exterior and interior), narrative text, an index to photographs, and a photographic site plan. NFEC shall provide final documentation to the State Historic Preservation Office and the Department of Environmental Protection State Parks Division.

- The Naval Facilities Engineering Command shall develop and implement a professional oral history program with current and former employees with respect to NUWC's Cold War-related research and development activities. NFEC shall provide a final report, including audio tapes and transcripts, to the State Historic Preservation Office and the Department of Environmental Protection State Parks Division.

- The Naval Facilities Engineering Command shall develop, in consultation with the Thomas I. Dodd Research Center at the University of Connecticut (Storrs), a comprehensive archival plan for historic photographs, construction plans, and other relevant written materials that pertain to the extensive military and research and development use of Fort Trumbull and the Naval Undersea Warfare Center.

Interpretation

- The Naval Facilities Engineering Command shall supplement the HABS and SHPO-level documentation with a popular report which incorporates the social, military, and research history of Fort Trumbull and the Naval Undersea Warfare Center. The popular report shall be consistent in overall content and design quality to *Scovill Brass: Buttons, Cameras, and Cartridge Cases* (Historical Perspectives Inc. 1997). NFEC shall provide 250 copies of the final report to the State Historic Preservation Office and the Department of Environmental Protection State Parks Division, respectively.

- The Naval Facilities Engineering Command shall research, develop, and construct, in consultation with the Department of Environmental Protection State Parks Division, high-quality, state-of-the-art interpretative exhibits concerning the social, military, and research history of Fort Trumbull and the Naval Undersea Warfare Center. NFEC shall transfer the final interpretative exhibits to the Department of Environmental Protection State Parks Division for use at Fort Trumbull State Park.

- The Naval Facilities Engineering Command shall develop an electronic version of the to-be-designed popular report and the interpretative exhibits which shall be established on the Internet in coordination with the Office of the State Archaeologist at the University of Connecticut (Storrs).

Preservation

- The Naval Facilities Engineering Command shall ensure that structures located within the NUWC



historic district are maintained pursuant to *NAVFAC MO-913 Historic Structures Preservation Manual* and the National Park Service's *Standards for Rehabilitation*. NFEC shall ensure that Bowditch Hall (Building 34) is closed and secured in accordance with *NAVFAC* caretaker maintenance standard level II.

- The Naval Facilities Engineering Command shall transfer, sell, or otherwise convey Fort Trumbull (Building 32), Bowditch Hall (Building 34), Buildings 13, 14, and 27, and the Rodman gun emplacements with preservation convenants that require consultation with the State Historic Preservation Office prior to any proposed alteration, including demolition, that would be inconsistent with the National Park Service's *Standards for Rehabilitation*.

- The Naval Facilities Engineering Command shall transfer, sell, or otherwise convey areas of the Naval Undersea Warfare Center which possess moderate to high archaeological sensitivity (*Cultural Resources Survey*, Figure 6-2) with preservation covenants that require consultation with the State Historic Preservation Office prior to any proposed ground disturbance.

The State Historic Preservation Office anticipates working with the Naval Facilities Engineering Command, the Advisory Council on Historic Preservation, the Department of Environmental Protection State Parks Division, and all interested parties to facilitate disposition of this historic military complex as well as the professional management of Connecticut's unique military-maritime cultural resources.

No physical alteration and/or demolition of any structure within the Naval Undersea Warfare Center should be undertaken until the Naval Facilities Engineering Command has resolved its historic preservation responsibilities pursuant to the National Historic Preservation Act

For further information please contact Dr. David A. Poirier, Staff Archaeologist.

Sincerely

/s/ Dawn Maddox
Dawn Maddox
Deputy State Historic
Preservation Officer

cc: Ms. Pamela Adams/DEP-Parks
Mr. Peter Simmons/DECD
Mr. Don Klima/ACHP
Dr. Nicholas Bellatoni/OSA

---

[LOGO]

**STATE OF CONNECTICUT**
***CONNECTICUT HISTORICAL COMMISSION***

October 8, 1998

Ms. Tina A. Deininger
Department of the Navy
Naval Facilities Engineering Command
10 Industrial Highway Mail Stop #82
Lester, PA 19113-2090

Subject: Naval Undersea Warfare Center (Fort Trumbull)
New London, CT

Dear Ms. Deininger:

The State Historic Preservation Office has reviewed the *draft Cultural Resources Survey: Naval Undersea Warfare*



*Center, New London, Connecticut,* prepared by TAMS Consultants Inc. and Historical Perspectives Inc. concerning the above-named property. This office commends the Naval Facilities Engineering Command, TAMS Consultants Inc., and Historical Perspectives Inc. on the comprehensiveness and high quality of the historic research and architectural analysis undertaken for the *Cultural Resources Survey.*

In the opinion of the State Historic Preservation Office, the proposed NUWC historic district (Section 5.2.4 and Figure 6-1) is eligible for the National Register of Historic Places. The historic district is uniquely significant with respect to Connecticut's military and maritime history. The NUWC historic district reflects the important transition from 19th-century coastal defense to Cold War research and development. Surviving structures from early Coast Guard and Merchant Marine training facilities further enhance the statewide significance of this historic property.

The State Historic Preservation Office believes that the archaeological assessment undertaken by Historical Perspectives Inc. is consistent with our *Environmental Review Primer for Connecticut's Archaeological Resources.* This office concurs with the respective areas of archaeological sensitivity identified in Figure 6-2. Evaluation of National Register eligibility, or lack thereof, for archaeological resources warrants additional archaeological investigations.

This office requests that 2 copies of the final *Cultural Resources Survey* be provided to our professional staff for statewide cultural resource management purposes. We also recommend that the *Cultural Resources Survey* be

provided to the Connecticut Department of Environmental Protection's State Parks Division in order to facilitate future state park development and cultural resource management.

The State Historic Preservation Office requests that the Naval Facilities Engineering Command coordinate with the Naval Undersea Warfare Center concerning the possible existence of data on historic shipwrecks located in the Thames River harbor or Long Island Sound that may have been compiled incidental to NUWCs extensive sonar research. Such data may have been compiled as navigational hazard information.

This office appreciates the opportunity to have reviewed and commented upon the *Cultural Resources* Survey.

For further information please contact Dr. David A. Poirier, Staff Archaeologist.

Sincerely

/s/ Dawn Maddox
Dawn Maddox
Deputy State Historic
Preservation Officer

cc: Ms. Pamela Adams/DEP-Parks
Mr. Peter Simmons/DECD

(54)

No. 04-108

Supreme Court, U.S.
FILED
DEC 3 - 2004
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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

## PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Susette Kelo; Thelma Brelesky; Pasquale Cristofaro; Wilhelmina and Charles Dery; James and Laura Guretsky; Pataya Construction Limited Partnership; and William Von Winkle.[1]

Respondents, who were defendants below, are the City of New London, Connecticut; and the New London Development Corporation.

[1] None of the Petitioners are corporations, and have no parent companies or subsidiaries.



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## OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Pet. App. 1-190)[1] is reported at 843 A.2d 500 (Conn. 2004). The opinion of the Superior Court of Connecticut, Judicial District of New London (Pet. App. 191-424), is unreported.

## JURISDICTION

The opinion and judgment of the Supreme Court of Connecticut was entered on March 9, 2004. The motion for reconsideration filed by Petitioners was denied on April 20, 2004. Pet. App. 427. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution. Pet. App. 428. The statute involved is Chapter 132, C.G.S. § 8-186, *et seq.*, Municipal Development Projects, of Connecticut General Statutes. Pet. App. 429-453.

## STATEMENT OF THE CASE

### A. Facts

Petitioner Wilhelmina Dery was born in her house in the Fort Trumbull neighborhood of New London, Connecticut in 1918.[2] Her family, the Ciavaglias, first moved to

---

[1] References to the Appendix to the Petition for a Writ of Certiorari are noted as "Pet. App." References to the Joint Appendix are noted as "J.A."

[2] The information concerning Petitioner Wilhelmina Dery and her family is drawn from the trial transcript in this matter, Vol. I.,

(Continued on following page)

Fort Trumbull from Italy in the early 1880s. Mrs. Dery still lives in her home on Walbach Street, which was purchased by her family in 1901, as she has for her entire life. Her husband, Charles, lives there as well, and moved into the house when the couple married fifty-nine years ago.

The Derys' son, Matthew, was born in Fort Trumbull and grew up there. He, his wife, and his son currently live right next door to Mr. and Mrs. Dery at 28 East Street in a home he received from his grandmother as a wedding present. The home has been in his family since 1903. Petitioner Susette Kelo, a registered nurse, lives down the block from the Derys at 8 East Street. Tr. Vol. I, p. 71, lns.1-10. She purchased the Victorian-era house in 1997 and since that time has made extensive improvements to it. *Id.* at pp. 71-72. She loves the water view from her home, the people in the area, and the fact that she can get in a boat and be out in the Long Island Sound in less than ten minutes. *Id.* at pp. 76, lns. 1-11.

Wilhelmina Dery, Susette Kelo, and their neighbors, the other Petitioners in this case, stand to lose their homes through eminent domain to make way for private business development in the hope that the new development projects will create more tax revenue and jobs than the homes that currently occupy this peninsula of land along the Thames River. Petitioners have poured their labor and love into the fifteen homes they own in total. Pet. App. 8-9. They are places where they have lived for years, have raised their families, and have grown old. Petitioners do not want money or damages. They only seek to stop the

pp. 40-53. (All future references to the trial transcript will be referred to as "Tr." followed by the volume, page number, and, where appropriate, the line numbers.)



use of eminent domain so that they may hold on to their most sacred and important of possessions: their homes.

In February 1998, Pfizer, Inc. announced that it was developing a global research facility on a site adjacent to the Fort Trumbull neighborhood where Petitioners live. Pet. App. 4. In April 1998, the city council of Respondent City of New London ("the City") gave initial approval to Respondent New London Development Corporation ("NLDC") to prepare a development plan for the Fort Trumbull area. *Id.* The NLDC is a private, non-profit corporation formed in 1978 to assist the City in planning economic development. Pet. App. 3-4, 211. Like any such entity, it is not elected by popular vote and has a privately-appointed Board of Directors and employees. Pet. App. 211.

The NLDC prepared the Fort Trumbull Municipal Development Plan ("development plan") that sought to create economic development complementing the facility that Pfizer was planning to build. Pet. App. 5. On January 18, 2000, the City adopted the development plan as prepared by the NLDC. Pet. App. 8. The development plan covers approximately 90 acres located on the Thames River and adjacent to both the Pfizer facility and the Fort Trumbull state park. Pet. App. 4. The development plan area is comprised of approximately 115 land parcels and includes the presently closed U.S. Naval Undersea Warfare Center, which consists of 32 acres currently available to Respondents for development. *Id.*

The 90-acre development plan is divided into seven "parcels" of land slated for different development projects. Pet. App. 5-6. Parcel 1 is slated for a waterfront hotel and conference center along with marinas and a public walkway along the water. Pet. App. 5; J.A. 109. Parcel 2 is to provide approximately 80 new residences and possibly a museum for the U.S. Coast Guard. Pet. App. 5; J.A. 109-110. The

development plan calls for Parcel 3 to contain 90,000 square feet of high technology and other private office space and parking.[3] Pet. App. 5-6; J.A. 110-11. Although originally slated for acquisition and demolition under the plan, Parcel 3 will retain the existing Italian Dramatic Club, a private social organization with its own building. Pet. App. 6.

Parcel 4 is subdivided into two smaller parcels, 4A and 4B. J.A. 111-12. Parcel 4A is designated as "Park Support." Pet. App. 6; J.A. 112. The development plan envisions several possible future uses for 4A, including a "state-of-the-art marina training center," which presumably would encompass both Parcel 4B and 4A, undefined "uses that support the state park," and parking or retail establishments. *Id.* During trial, no witness could explain what "Park Support" meant and all witnesses admitted that it could be a wide range of possible but undefined uses. Pet. App. 346 (summarizing trial testimony).[4] Parcel 4B is supposed to consist of a marina, the same as the current use for the parcel. Pet. App. 6; J.A. 111. Parcel 5 is also subdivided into three smaller parcels that will cumulatively include 140,000 square feet of office space. Pet. App. 6; J.A. 112. Parcel 6 is designated for development of a variety of water-dependent commercial uses while Parcel 7 is slated for additional office space or research and development use. Pet. App. 6; J.A. 112-13.

In discussions as to what would constitute the future uses in the development plan, Pfizer was the "10,000

[3] The parcel was also originally slated for a health club, but that use has been moved to Parcel 1.

[4] *See also* Tr. Vol. II, p. 185, lns. 1-4, p. 207, lns. 15-18 (testimony of NLDC real estate development director); Vol. II, p. 236, lns. 12-20 (testimony of NLDC president); Vol. II, p. 37, lns. 16-24 (testimony of Petitioners' expert); Vol. II, p. 371, lns. 17-18 ("We didn't have configuration of what would be there") (testimony of Respondents' expert).



pound gorilla," according to Respondents' expert. Tr. Vol. II, p. 428, lns. 1-3. Indeed, the development plan contains all of Pfizer's "requirements" that it set forth in agreeing to build its global research facility in New London: a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors (in existing buildings if no new ones are constructed) as well as the overall "redevelopment" of the Fort Trumbull neighborhood adjacent to Pfizer, in addition to other upgrades to the area that it demanded: renovation of the state park and sewage treatment plant upgrades.[5] The NDLC estimates that the development plan, which is a composite of six alternative development plans it considered, will produce a significant economic impact in a city that is struggling economically, including the creation of jobs and between $680,544 and $1,249,843 in property tax revenue. Pet. App. 7.

The instant case concerns homes located on only two parcels of the plan area: four properties owned by three Petitioners are situated on Parcel 3, which, as noted, is currently slated for development as private office space and parking, while eleven homes owned by four Petitioners are situated on Parcel 4A, designated in the development plan as the undefined "Park Support." Pet. App. 6; J.A. 3 (map showing Petitioners' homes); J.A. 4 (map showing development parcels in the development plan). In

[5] *Compare* J.A. 18 (listing commitments of NLDC to Pfizer); J.A. 21-25 (listing Pfizer requirements); Tr. Vol. II, p. 363, lns. 9-15; p. 387, lns. 6-17 (hotel); p. 163, lns. 19-21; p. 386, ln. 23 – p. 387 (conference center); Vol. II, p. 387, ln. 26 – p. 388, ln. 7 (upscale housing); Vol. II, p. 386, lns. 17-20 (office space); Vol. V(A), p. 71, lns. 19-24, p. 93, lns. 7-16, Vol. II, p. 104, lns. 22-27 (state park renovation); Vol. V(A), p. 70, lns. 26 – p. 71 lns. 1-3; Vol. II, p. 79, lns. 14-18 (sewage treatment upgrades) *with* J.A. 4 (showing planned uses in the development plan).

total, Petitioners' homes constitute 1.54 acres of the ninety-acre project area. Tr. Vol. II, p. 14, lns. 21-24, p. 37, lns 10-12. The remainder of the development parcels, including the entirety of Parcels 1, 2, 4B, 5, 6, and 7, are unaffected by the instant lawsuit and remain available to Respondents for new development projects. J.A. 4.

The NLDC will own the land located in the development area but lease it to private developers for $1 per year. Pet. App. 6, 7. At the time of the trial, the NLDC was negotiating with Corcoran Jennison, a private developer, to enter into a 99 year lease for development projects in parcels 1, 2, and 3 of the area although a development agreement had not been signed. *Id.* at 6-7. Corcoran Jennison would then develop the land and select tenants for the projects in its sole discretion. *Id.* However, the developer's own market study found new office construction on Parcel 3 to be "uncertain" (J.A. 47) and "not feasible at this time." J.A. 64. The study concluded that "market conditions do not justify construction of new commercial space at Fort Trumbull on a speculative basis." J.A. 64. At the time of the trial, there were no current plans for what projects would go in Parcel 4A apart from clearing the land of Petitioners' homes. Pet. App. 125 (majority opinion), 348 (trial court opinion).

When it adopted the development plan in January 2000, the City delegated to the NLDC the power of eminent domain to acquire properties within the development plan. Pet. App. 8. In October 2000, the NLDC voted to use eminent domain to acquire the remaining properties in the area from owners who would not sell voluntarily, including the homes owned by Petitioners. Pet. App. 8; J.A. 9-12 (resolution authorizing condemnations). Starting in November 2000, the NLDC began to file condemnation actions against Petitioners that gave rise to the present case. Pet. App. 8; J.A. 6-8 (representative statement of compensation accompanying condemnation action). The



NLDC brought all condemnation actions in this case not under Connecticut's urban renewal law (C.G.S. Chapter 130), which permits the use of eminent domain to clear slums or blighted areas, but rather under C.G.S. Chapter 132 governing Municipal Development Projects. Pet. App. 25-26, 246-247; J.A. 6 (property condemned pursuant to Chapter 132).

### B. Procedural History

Under Connecticut law, property owners in the context of an eminent domain action can challenge only the amount of compensation offered, not the right of the government to take their property. So, wishing to keep their homes, Petitioners brought the instant action on December 20, 2000 seeking declaratory and injunctive relief, and other relief under C.G.S. Chapter 916 and 42 U.S.C. § 1983. Pet. App. 8. Petitioners alleged that Respondents' exercise of eminent domain violated the U.S. and Connecticut Constitutions, C.G.S. Chapter 132, and the New London City Charter.

Following a seven-day bench trial in 2001, the New London Superior Court issued a Memorandum of Decision (Pet. App. 191-424), which granted permanent injunctive relief and dismissed the eminent domain actions against the four Petitioners who live on Parcel 4A while upholding the takings of the properties of the three Petitioners on Parcel 3. Pet. App. 9, 424. With regard to Parcel 4A, the trial court ruled that Respondents had not demonstrated reasonable necessity for the condemnations and that the condemnations lacked assurances of future public use, because the Respondents had not identified the future use. Pet. App. 343-350. The trial court ruled in favor of the Respondents on the remaining claims. Although the trial court ruled against the Parcel 3 property owners, it granted a temporary injunction, allowing the owners to

remain in their homes while the case was resolved in the appellate courts. Pet. App. 412-424.

An appeal by Petitioners and a cross-appeal by Respondents to the Connecticut Appellate Court followed. The Connecticut Supreme Court transferred the appeal and cross-appeal to itself pursuant to C.G.S. § 51-199. Pet. App. 2 n.3. On March 9, 2004, a four-justice majority of the Court affirmed in part and reversed in part, holding that none of the challenged condemnations violated the U.S. or Connecticut Constitutions or C.G.S. Chapter 132. Pet. App. 3. Three of the justices concurred in part with the majority on other constitutional and statutory issues but dissented on the "majority's conclusions . . . pertaining to private economic development as a public use under the Connecticut and federal constitutions and the taking of [Petitioners'] properties on parcels 3 and 4A." Pet. App. 135-36.

The majority opinion in this case held that the public use clause of the Fifth Amendment to the U.S. Constitution authorizes the use of eminent domain for economic development that is prognosticated to increase future tax revenue and improve the local economy. Pet. App. 25-79. The standard adopted by the majority focused on the intent and motives of the government in determining whether the government satisfied the public use requirement. Pet. App. 28, 39, 42. As the dissenting justices noted, "[t]he majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." Pet. App. 189.

In contrast, the dissenting opinion, while agreeing that economic development was validly declared a public purpose under Connecticut law, went on to establish a test that evaluated whether the primary intent of the economic development plan was to benefit public interests; whether a specific economic development will, in fact, result in public benefit; and whether the condemnation is reasonably necessary to implement the plan. Pet. App. 134-190. The dissenting justices found that the condemnations of all of Petitioners' homes failed that test.



The Connecticut Supreme Court denied Petitioners' motion for rehearing on April 20, 2004. Pet. App. 427. On the same day, the Court stayed its judgment pending resolution of a petition for certiorari to this Court or, if applicable, a decision on the merits. Pet. App. 425-426.

The homeowners filed a Petition for a Writ of Certiorari with this Court on July 19, 2004. Petitioners did not seek review by this Court of the other issues decided by the Connecticut Supreme Court but rather petitioned for review of the primary issue in this case: the limits under the public use requirement of the U.S. Constitution when government takes land for private economic development. On September 28, 2004, this Court granted certiorari on the question presented.

## SUMMARY OF ARGUMENT

To Petitioners, like most Americans, their homes are their castles. In this case, they face the loss of the homes and neighbors they cherish through the use of eminent domain not for a traditional public use, such as a road or public building, nor even for the removal of blight. Rather, Respondents – a local government and a private development corporation – seek to take Petitioners' 15 homes to turn them over to other private parties in the hope that the City may benefit from whatever trickle-down effects those new businesses produce.

This Court should reject the use of eminent domain purely for private business development because that is not a public use under the Fifth Amendment to the U.S.

Constitution. The majority opinion below incorrectly equated "public use" with the ordinary "public" benefits – taxes and jobs – that typically flow from private business enterprises. But if nothing more is required to constitute a public use than listing expected tax revenue and job growth that might result from private development, then there is scarcely any private use or business for which the power of eminent domain could not be used. No court would then be able to distinguish between public uses and private ones. Such a result would violate this Court's consistent holdings that eminent domain authority cannot be employed for private uses. A finding that economic development is a public use would also be contrary to this Court's previous decisions that authorize the transfer of condemned land to private parties in only limited and specific circumstances, none of which apply to economic development condemnations.

Petitioners advocate a bright-line rule that the possible increase in taxes and jobs does not qualify as a public use. If, however, this Court finds that economic development can qualify as a public use, it still should reject these condemnations. Respondents seek to take Petitioners' homes for an office building that will not be built in the foreseeable future, if ever, and for some other, unidentified use. With no reasonably foreseeable use and no standards to ensure that "economic development" will ever result from these condemnations, Respondents seek to remove Petitioners from their homes on the assumption that someone will figure out what to do with the property later. Economic development condemnations bring enormous social costs and significant constitutional risk. At the very least, there must be a reasonable certainty of realization of the "public" benefits used to justify the takings in the first place. Here, there is no such reasonable certainty. The taking of Petitioners' homes is not for public use.



This case is not about whether economic development is a valid public policy goal. Instead, it is about whether the government and private corporations can forcibly acquire property for the sole reason that someone else may be able to put the land to more "productive" use that will produce more tax revenue and jobs. Government may pursue tax revenue and economic development, and corporations may pursue profits, but not at the expense of constitutional rights.

## ARGUMENT

### I. THE CONDEMNATION OF PETITIONERS' HOMES FOR THE SOLE PURPOSE OF ECONOMIC DEVELOPMENT VIOLATES THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT.

The Connecticut Supreme Court held that the use of eminent domain in the hope that private development may generate taxes and jobs and improve the local economy did not violate the public use requirement of the Fifth Amendment. But this Court has never gone so far. Thus, this case presents an issue of first impression. The Court should take this opportunity to reject the use of eminent domain purely for private business development because that is not a public use.

The use of eminent domain for private development conflates the public use clause of the Fifth Amendment with any private taking that could be claimed to benefit the public. Moreover, while the majority of the Connecticut Supreme Court portrays the condemnations at issue here as merely an application of this Court's prior eminent domain decisions, the use of eminent domain for private development represents a dramatic departure from this Court's jurisprudence.

### A. The Use Of Eminent Domain For Private Economic Development Obliterates The Line Between Public And Private Takings.

While substantial deference must be given to legislative determinations of public use, this Court has consistently held that private takings cannot withstand the scrutiny of the public use requirement.[6] Accordingly, the definition of public use must allow for the identification of private uses. As set forth below, in upholding eminent domain for private economic development, the majority of the Connecticut Supreme Court effectively nullified the public use clause by making it virtually impossible to distinguish a public use from private takings. Additionally, the unfettered sweep of the majority's opinion places all home and small business owners at risk, especially property owners of more modest means.

In addition to making a profit for themselves and their shareholders, businesses, if they are successful, generate tax revenue, employ individuals, and contribute to the overall economic vitality of a community. Indeed, the incidental benefits that flow to the government and the community from private businesses are commonly recognized as virtues of a free enterprise system. Under the standard adopted by the majority below, however, private business development is transformed into a public

[6] *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid"); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another" violates the Constitution).



use simply because of the "secondary"[7] or "trickle-down"[8] benefits a business may produce.[9]

The majority opinion below declared that even though these incidental benefits of business development can now be considered a public use under the Fifth Amendment, "unreasonable" uses of the condemnation power for private business development would still not be permitted. Pet. App. 71. Despite this assurance, the only ground the court suggested could be sufficient to strike down the taking of homes or small businesses for the purported public benefits claimed by a city government and private developers was if "the taking specifically is intended to benefit a private party." *Id.* The standard for public use adopted by the majority opinion focuses on the intent and motive of the government decision-makers in determining whether the condemnations are for a "public use." Pet. App. 42 (placing "overwhelming emphasis on the legislative purpose and motive behind the taking"). According to the majority opinion, so long as the City declares in good faith that there are economic benefits to be realized from condemnations and there is no overwhelming evidence that the takings were intended only to benefit a private party, any lower-tax generating use, such as a home or small business, could be taken and given to a larger

[7] *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 464-65 & n.19 (7th Cir. 2002) ("secondary benefits" from business development cannot alone constitute a public use).

[8] *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1, 10-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) ("trickle-down" benefits from business development not a public use).

[9] *See also Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) ("[a]lthough the projected economic benefit to County is very attractive, it cannot justify condemnation"); *City v. Owensboro v. McCormick*, 581 S.W.2d 3, 7-8 (Ky. 1979) (same); *Opinion of the Justices*, 131 A.2d 904, 907 (Me. 1957) (same).

private business that might be able to put the land to more "productive" use.[10]

A fundamental flaw of the majority opinion's emphasis on whether a governmental body intended to benefit a private interest or the public is that once the spin-off benefits of large private businesses become per se public uses, there really is no difference between intending to benefit a private party and intending to promote economic development. For instance, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001), *appeal dismissed and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003), the City clearly intended to benefit a private party by condemning a rival discount store and giving the property to Costco. However, the City was motivated by a desire to reap the greater tax dollars Costco would possibly create.

Likewise, in this case, Respondents clearly intended to benefit Pfizer, the "10,000 pound gorilla" in discussions of the development plan, by meeting all of its "requirements" in developing the Fort Trumbull area. Tr. Vol. II, p. 428, lns. 1-3; *see also* footnote 5 of this brief. But the motivation in doing so was to reap the supposed trickle-down benefits Pfizer-related development would bring to the area. When the "public uses" of greater tax revenue and employment are achieved only through the success of private parties, a distinction between an intent to benefit a private party and an intent to benefit the public becomes meaningless. As a result, eminent domain for economic development has no limiting principle.

[10] As the dissenting opinion in this case notes: "The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." Pet. App. 189 (footnote omitted).



Economic development condemnations also do not have any geographic limitations. Unlike condemnations for blight, which are confined to certain areas that meet statutorily-defined criteria,[11] the eminent domain power for economic development under Chapter 132 applies to all areas throughout the state. Two or more parcels of property can be condemned for a "business purpose," which is defined under Chapter 132 as "any commercial, financial or retail enterprise. . . ." C.G.S. § 8-187(10). Thus, all of downtown Greenwich or New Haven, the suburbs of Hartford, the farms of the northwestern part of the state, or any other area in Connecticut, regardless of its condition, is subject to eminent domain for "commercial, financial or retail enterprise[s]."

By encouraging a vision of eminent domain where virtually any property can be taken for virtually any private business, the majority opinion invites abuse by governmental bodies and private parties. To give but two examples outside of the context of Connecticut, the District of Columbia meets the exact same criteria identified by New London and the majority of the Connecticut Supreme Court as justifying the use of eminent domain. The District needs more tax revenue, and it has high unemployment in comparison to the greater metropolitan area. *Compare* Pet. App. 7. The District is a small city with much of its land devoted to tax-free purposes. *Compare id.* Under the Connecticut court's reasoning, these factors suffice to justify condemnation *anywhere* in D.C. for *any* private business so long as the District government in good faith intends that the new development creates more taxes and jobs than the existing uses.

[11] For example, redevelopment areas in Connecticut must be "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." C.G.S. § 8-125(b).

While the District could use eminent domain in a blighted neighborhood, as noted, economic development condemnations are not tied to the condition of the area. If developers were more interested in Georgetown than Southwest, the City could condemn there. Georgetown's somewhat upscale shopping could be replaced by truly expensive designer shopping, more like that on Rodeo Drive in Beverly Hills. Georgetown's older townhomes could be replaced by taller condos and office buildings. Would successful businesses and viable homes be uprooted? It doesn't matter. The District intends the new development will produce more taxes and jobs, and that is enough.

Under another scenario, a tax-hungry city could want a Wal-Mart or another big-box retail store rather than a non-tax producing property like a church facility or a Moose lodge. Again, under the reasoning of the Connecticut Supreme Court, so long as there is no evidence that the government specifically intends to benefit *only* private interests through the condemnations, a governmental body would be completely justified in using eminent domain to take tax-exempt property to give to a profit-making entity that could possibly produce more tax dollars and jobs for the City.[12]

Although all property owners would be affected by a ruling affirming the decision below, property owners of

[12] The above examples are not mere hypotheticals. *See Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Ca. 2002) (City of Cypress, CA resolved to file eminent domain proceedings against owners of a piece of vacant land upon which a church sought to build, so that Costco, a major warehouse- style discount retail outlet, which the City hoped would produce more tax revenue, could build there instead); Sue Britt, "Authority votes to force out Moose Lodge," *Belleville News-Democrat*, March 22, 2002, at 3B (government authority authorized condemnation of local Moose Lodge to make way for a Home Depot in Swansea, IL).



more modest means – in particular, middle-class and working-class home and small business owners like Petitioners – would be most at risk.[13] Indeed, the whole idea behind economic development projects is replacing lower-income residents with higher-income ones and smaller, lower-tax stores and services with larger businesses.

> If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.[14]

The use of eminent domain for economic development collapses public use into private takings and must therefore be declared unconstitutional under the Fifth Amendment.

[13] *See* Brief of Amici Curiae NAACP, AARP, et al. at 7-15 (disproportionate effects of economic development eminent domain on minorities and elderly); Brief of Amica Curiae Jane Jacobs at Part I.C. (destruction of poor and politically weak communities).

[14] *Southwestern Illinois Development Authority v. National City Environmental*, 710 N.E.2d 896, 906 (Ill. App. 1999) (Kuehn, J., concurring), *aff'd*, 768 N.E.2d 1 (Ill. 2002).

### B. The Use Of Eminent Domain For Economic Development Purposes Is Not Supported By This Court's Eminent Domain Jurisprudence Concerning The Transfer Of Condemned Land To Private Parties.

In addition to conflating public and private use, eminent domain for economic development has no support in this Court's previous statements as to what constitutes a public use under the Fifth Amendment. Eminent domain can unquestionably be used for traditional public uses such as the construction of public buildings and the creation of national parks.[15] Moreover, this Court has noted that the public use clause of the Fifth Amendment does not absolutely prohibit the transfer of condemned land to private parties. But this Court has permitted the use of eminent domain to take private land and subsequently transfer it to other private parties only in specific and limited circumstances. Economic development is neither specific nor limited, and it falls under none of the categories this Court has previously approved.

The eminent domain cases decided by this Court that concerned subsequent transfers of property to private parties are similar to circumstances discussed in the recent decision of *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Hathcock*, the Michigan Supreme Court unanimously overturned its previous holding in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), which had upheld

[15] *See, e.g., Kohl v. United States*, 91 U.S. 367 (1876) (use of eminent domain to build federal courts, custom house, U.S. depository, post-office, and internal revenue and pension offices); *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896) (approving use of eminent domain for creation of Gettysburg Battlefield memorial).



economic development as a public use under the Michigan Constitution.[16] *Poletown* had been the emblematic case cited by courts and commentators alike for permitting the use of eminent domain to take non-blighted areas for private economic development.[17] Petitioners discuss the *Hathcock* case in some detail because it analyzes the exact same issue presented in this case and demonstrates a recent and reasoned explanation of why economic development alone is not a public use.

*Hathcock*, like *Poletown* and the instant matter, concerned the condemnation of property for the purpose of facilitating private economic development. The County of Wayne condemned 19 non-blighted parcels of property

[16] Even though *Hathcock* is based on interpretation of the "public use" clause of the Michigan Constitution, the language of that state's constitution and the Takings Clause of the U.S. Constitution are virtually identical: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Mich. Const. Art. X, § 2; "nor shall private property be taken for public use without just compensation." U.S. Const., Amend. 5.

[17] Indeed, the Connecticut majority opinion below declared *Poletown* a "landmark decision" and relied upon it in part to hold that economic development constitutes a valid public use for the exercise of eminent domain. Pet. App. 43, 43-45 n.39. *See also, e.g., City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 372 (N.D. 1996) (citing *Poletown* as part of a national trend to "sanction broad legislative discretion to use eminent domain for a variety of economic development purposes"); *City of Duluth v. Minnesota*, 390 N.W.2d 757, 763 n.2 (Minn. 1986) (using *Poletown* as a justification for private-to-private transfers of land "on the ground that the economic benefit that results is 'public' in nature"); *Nichols on Eminent Domain* § 7.07[2][a] (3rd ed. 2004) (describing *Poletown* as an "important precedent" that interpreted public use "quite broadly"); Mark A. Richardson, *The Role of Public Trust Doctrine in Eminent Domain Decisions*, 1995 DET. C.L. REV. 55, 58 ("*Poletown* stands for an extraordinarily broad interpretation of public use/public purpose in condemnation law.").

near an airport as part of a planned 1,300-acre business and technology park. *Hathcock*, 684 N.W.2d at 769. The park was to consist of such uses as a hotel, conference center, and a recreational facility. *Id.* at 769-70. The economic benefits the business park was predicted to generate were very significant, much more than in this case. The park was to raise $350 million in additional tax revenue for the county and create 30,000 new jobs. *Id.* at 770-71. Importantly, the court in *Hathcock* also noted that, like Connecticut's Chapter 132, Michigan law expressly authorized the county to engage in condemnation for economic development purposes and that the condemnations at issue fit within the purposes for which the statute was created. *Id.* at 775-76. But, as here, the question was whether the condemnations satisfied *constitutional* requirements.

*Hathcock* discarded the notion that a private entity's pursuit of profit could be a "public use" for constitutional purposes simply because that entity's profit maximization might contribute to the overall health of the general economy. In rejecting economic development as a public use, the Michigan Supreme Court surveyed its previous eminent domain jurisprudence and noted that before *Poletown*, its cases upholding the transfer of property from one private party to another fell under three general categories. Economic development did not fall into any of these categories, and it could not be justified by the same rationale. As set forth below, this Court's previous decisions authorizing the transfer of condemned property to private parties also fall into the same categories discussed in *Hathcock*. The use of eminent domain for private development is a radical departure from these conventional categories.

The first category concerns condemnations in which condemned land is constitutionally transferred to a private



entity because "public necessity of the extreme sort" requires collective action. *Hathcock*, 684 N.W.2d at 781-82. The primary example in this category is the construction of "instrumentalities of commerce," such as railroads, gas lines, and canals, all of which require coordination of land assembly. *Id.* at 781. In these cases, the land must be condemned because of the inherent nature of the instrumentalities. They typically require narrow, generally straight pieces of land and could be thwarted by hold-outs. *Id.* at 781-82.

The second category involves the private transferees that remain subject to strict operational controls in carrying out the public use. *Id.* at 782. These cases typically concern the instrumentalities of commerce mentioned above or other closely regulated entities such as water or power companies that might be privately-owned, but are nonetheless performing vital public services. *Id.* In these instances, a public body such as a utility commission must maintain sufficient control of the private company to ensure that the public services are provided. *Id.*

Most of this Court's condemnation decisions have permitted the taking of land and its subsequent transfer to private owners in situations described in these first two *Hathcock* categories. Like the state court decisions mentioned in *Hathcock*, the condemnations in this area most often involved construction of "instrumentalities of commerce," such as railroads, canals, and mine tramways.[18]

[18] *See, e.g., National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (approving condemnation of railroad track for the facilitation of rail service); *Albert Hanson Lumber Co., Ltd. v. U.S.*, 261 U.S. 581 (1923) (upholding condemnation by federal government for a canal and strips of land on the sides of the canal); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (property condemnation for purpose of an egress of water to power a hydroelectric dam and whose power would be made

(Continued on following page)

The uses to which the condemned land was put were also subject to public controls and were designed to address coordination problems that made the assembly of land for various networks or infrastructure often difficult to carry out if eminent domain were not available.[19]

Condemnations for economic development do not fall into either of these categories. As the *Hathcock* court noted, the nation is unquestionably "flecked" with "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." *Hathcock*, 684 N.W.2d at 783. Likewise, the planned uses in Fort Trumbull, such as a hotel, condominiums, private office space, and other unspecified development projects are ubiquitous across Connecticut and throughout the nation. They are most

available to the public); *Hairston v. Danville and Western Railroad Co*, 208 U.S. 598 (1908) (use of eminent domain for construction of railroad spur track that would be open to the public); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1906) (upholding construction of aerial bucket line for mining); *Clark v. Nash*, 198 U.S. 361 (1905) (use of eminent domain to create "absolutely necessary" irrigation ditch for one property owner as part of state-wide effort to provide networks for water distribution in arid Utah environment); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896) (acknowledging eminent domain authority to build railroads but striking down taking of railroad's property to build a private grain elevator); *Boom Co. v. Patterson*, 98 U.S. 403 (1879); *see also* Brief of Amicus Curiae the Reason Foundation at 10-13 (discussing condemnation for railroads, utilities and other common carriers).

[19] The Mill Acts discussed in *Head v. Amoskeag*, 113 U.S. 9 (1885), also fall into these two categories. Mills could only be built and operated in a very limited number of places, and their successful construction required coordination of riparian rights. *See* Brief of the Cato Institute as Amicus Curiae at 13-16; Brief Amicus Curiae of Property Rights Foundation of America, Inc. ("PRFA") at Part I.B. Moreover, the early mills were analogous to public utilities now and subject to common carrier regulations. *Amoskeag*, 113 U.S. at 19 ("[A] grist-mill which grinds for all comers, at tolls fixed by law, is for a public use."); *see also* PRFA Brief at Part I.B.



certainly not "instrumentalities of commerce" requiring government coordination or uses "whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Id.* at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). Indeed, there is nothing "public" about them.

Moreover, the private development project in Fort Trumbull is not subject to strict operating limitations so as to ensure that the property continues to be "used for the commonweal after being sold to private entities." *Hathcock*, *id.* at 784; *see also Poletown*, 304 N.W.2d at 479 (Ryan, J., dissenting) (noting such entities as railroads being "subject to a panoply of regulations"). Rather, Respondents here intend for private developers to pursue their own financial welfare like any other private enterprise. Whatever developments eventually go in this area will be controlled and operated by the private parties.[20]

To give but one example, the developer of the office space in Parcel 3 of the Fort Trumbull development plan, not the City or the NLDC, will on its own select the tenants if private offices are eventually built in the area. *See* Pltfs. Exh. HHH at 27, lns. 1-12 ("As a developer, we will seek tenants *and we will make selections of tenants.*") (testimony of Marty Jones, president of developer Corcoran Jennison) (emphasis added). Unlike private entities such as railroads or utilities, the developer in this case will be able to decide who is serviced by the new office buildings and who is not and will be able to set the rents for the

[20] As the court in *Hathcock* noted: "The public benefit arising from the Pinnacle Project [the project at issue in *Hathcock*] is an epiphenomenom of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy." *Id.* at 784.

tenants without being subject to a thorough regulatory regime like common carriers face. Accordingly, the development projects here are completely different than the use of eminent domain for such enterprises as railroads, utilities, and other closely-regulated companies.[21]

The third category discussed in *Hathcock* covers instances where the land transferred to a private party is selected on the basis of "facts of independent public significance." *Hathcock*, *id.* at 782-83. The condemnation of blighted property is the most common example that falls into this last category. In blight condemnations, the property is selected for condemnation for a public reason – the removal of blight – independent of the use to which the condemned property will eventually be put.

The two main public use cases decided by this Court in the past 50 years – *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) – were also based on "facts of independent public significance." *Berman* concerned the question of whether the government could condemn property necessary to clear "slums" and subsequently transfer the cleared or improved property to another private party. A slum was defined as "the existence of conditions injurious to the public health, safety, morals and welfare." *Berman*, 348 U.S. at 31 (internal quotation omitted). Likewise, other blight cases stress that the existence of blight is a harm, the removal of which serves the public and provides a justification for the taking.[22]

[21] The lack of minimum standards and requirements for the use of the property after condemnation in the instant matter is discussed in greater detail in Part II.D.4 of this brief.

[22] *See, e.g., Allydon Realty v. Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939) ("the analogy between a slum and a public nuisance cannot be overlooked . . . The abatement of a public nuisance may well be a public

(Continued on following page)



Thus, the land at issue in *Berman* was selected to clear slums and remedy urban blight.[23] Once that public use was accomplished and the blight removed, transfer of the cleared land to a private party was acceptable. In the instant matter, Respondents are not operating under Connecticut's urban renewal law nor claiming that the purpose of the condemnations is the removal of blight. The condemnations are therefore decidedly not based upon facts of independent public significance.

Likewise, in *Midkiff*, this Court upheld condemnations based upon Hawaii's oligopolistic pattern of landownership stemming from the state's early monarchical days of feudal land tenure. There, too, the public use was the elimination of the undesirable conditions, not the land's subsequent use. As noted in *Midkiff*, the state and federal governments owned almost 49 percent of Hawaii land while 47 percent of the land was in the hands of a mere 72 private landowners. *Midkiff*, 467 U.S. at 232. The

purpose"); *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 369-70 (Conn. 1954) ("the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums"); *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 482 (Del. 1958) (the "elimination of slums" is "the abatement of a public nuisance" and therefore a public use).

[23] It is important to note the conditions of the area in Southwest Washington, D.C. at issue in *Berman*. This Court cited surveys finding that "64.3% of the dwellings were beyond repair . . . 57.8% of the dwellings had outside toilets . . . 83.8% lacked central heating." *Berman*, 348 U.S. at 30. The district court's decision reveals even more about the conditions of the area. The death rate for the subject area was 50% higher than in the remainder of the District of Columbia. *Schneider v. District of Columbia*, 117 F.Supp. 705, 709 (D.D.C. 1953). Moreover, the death rate from tuberculosis was two and a half times greater and the death rate from syphilis infection was more than six times the general rate in the District of Columbia. *Id.* at 709. Of course, the properties and area at issue in this case display none of those characteristics.

use of eminent domain legislation in *Midkiff* was specifically targeted to address this oligopoly of land ownership. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242.[24] In contrast, there is nothing unique or significant about the land at issue in the instant case. It is simply a middle-class, mixed-use neighborhood that just happened to be at the right place (a desirable location) at the wrong time (when the City and private developers wanted it).

As noted by the dissent below, unlike in blight cases and in *Midkiff*, there is nothing in the *act* of condemning non-blighted properties that constitutes a public purpose. Pet. App. 141-47. Therefore, no public purpose will be accomplished simply by the taking of the existing properties, unlike the public purposes that are immediately fulfilled in the condemnation of blighted areas or the divestiture of oligopolies. *Id.* Rather, in economic development condemnations, the only public benefits that might arise, if they ever come about, are completely reliant upon the private transferees of the properties putting it to private use (and their subsequent ability to make profits in an uncertain and competitive real estate market). The use of eminent domain for economic development is therefore not in keeping with the purposes of the condemnations upheld in *Berman* and *Midkiff*.

In sum, the ordinary benefits that derive from private enterprise cannot constitute a public use under the Fifth Amendment. If all private business development is a "public use," it will be virtually impossible to distinguish between a public use and a private one. That result would violate this Court's repeated admonishments that private

[24] This Court also noted in *Midkiff*, 467 U.S. at 241 n.5, that there was an historical tradition in this country of breaking up "feudal incidents" of land ownership following the American Revolution.



takings are prohibited by the Constitution. The use of eminent domain for private business development also conflicts with this Court's prior jurisprudence that permits the transfer of property from one private owner to another in only limited and specific circumstances. This Court should reject private economic development as a public use.

## II. EVEN IF THIS COURT HOLDS THAT EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT IS NOT CATEGORICALLY UNCONSTITUTIONAL, THESE PARTICULAR CONDEMNATIONS STILL DO NOT CONSTITUTE A PUBLIC USE.

Petitioners endorse a clear, bright-line rule that the trickle-down benefits of successful business do not make private business a public use. *See* Part I, *supra*. Nonetheless, if this Court holds that economic development could constitute a public use, it still should find that *these* condemnations do not satisfy the constitutional requirement. Economic development condemnations are not like other uses of eminent domain. Because the public benefits occur, if ever, long after the condemnation and as a result of third-party activities, there must at least be a reasonable certainty that the condemnations will result in those public benefits. The condemnor must actually have a use for the property, and there must be contractual, statutory, or other minimum standards in place to ensure the likelihood of realization of the public benefits that justified the condemnation in the first place. This type of analysis does not require the courts to decide if a particular project is a good idea, but it does allow them to assess the connection between the goals of the project and the means used to achieve them. In this case, the condemnors have no reasonably foreseeable use for the property. That fact alone renders the condemnation of Petitioners' homes not

for "public use." In addition, the condemnations lack minimum standards to ensure realization of public benefit, and the actual use of the property would not result in the purported public benefits.

### A. "Public Use" Has Independent Significance In The Text Of The Fifth Amendment.

Constitutional interpretation begins with the text, and this case concerns the meaning of "public use" in the Takings Clause – "Nor shall private property be taken for public use without just compensation." U.S. Const., Amend. V.[25]

This Court presumes that every term in the Constitution has meaning and that nothing is superfluous. *See, e.g., Wright v. United States*, 302 U.S. 583, 588 (1938). As this Court has recognized in another context, the very act of enumeration of a particular power "presupposes something not enumerated." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (*quoting* Federalist No. 45). In the case of eminent domain, government is permitted to take property only for the enumerated purpose of "public use." Using the term "public use" presupposes the existence of something else – a private use; otherwise, "public use" would have no content at all. Accordingly, this Court consistently has held that the Takings Clause prohibits eminent domain for private use. *See e.g.*, footnote 6, *supra*.

To state the obvious, in the Takings Clause, "public use" is contrasted with "private property." Public use therefore meant something other than ordinary private

[25] The "public use" requirement applies to the states through the Fourteenth Amendment. *See Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).



property, used in an ordinary private manner. Living on one's property or operating an ordinary business upon it were accepted and commonplace private uses of private property, just as they are now. *See generally*, 1 William Blackstone, *Commentaries on the Laws of England* 134 (Stanley Katz, intro., 1979) (1765) (right to free use and enjoyment of property). *See* Brief Amicus Curiae of the Claremont Institute. They were not, however, public uses. Moreover, the use of the word "public" in other portions of the Constitution confirms that its meaning was either governmental[26] or the public at large.[27] Similarly, other instances of the word "use" confirm that the Framers used it to mean employment or utilization, not incidental benefit.[28]

The judicial interpretation of "public use" has, of course, expanded in the years since the Constitution was ratified, most notably to encompass the removal of slums and blight. *See Berman, supra*. But it is still an independent clause that retains an independent meaning. As the use of eminent domain moves further and further from the text, however, courts should take greater care to ensure that the exceptions are not allowed to swallow the rule.

[26] Art. I., § 9, cl. 7 (expenditures of "public" money); Art. II, § 2, cl. 2 ("public" ministers and consuls); Art. II, § 3, cl. 1 ("public" ministers); Art. III, § 2, cl. 1 & 2 (same); Art. IV, § 1, cl. 1 (recognition given to "public" Acts); Art. VI, cl. 3 (office of "public" trust).

[27] *See* Art. I, § 9, cl. 2a (protection of "public" safety against invasion); Art. V, § 1, cl. 1 (time of war or "public" danger); Art. VI, cl. 1 (right to a speedy and "public" trial).

[28] *See* Art. I, § 8, cl. 12 (appropriation of money to "use" of raising and supporting armies); Art. I, § 10, cl. 2 (money for "use" of the treasury); *see* also *Bailey v. United States*, 516 U.S. 137, 144-46 (1995) ("use" means active employment).

### B. Eminent Domain For Economic Development Should Not Receive The Same Deference As More Conventional Uses Of The Power.

The Connecticut court specifically rejected any kind of heightened scrutiny and declined to adopt even *Poletown*'s modest limitations on eminent domain for economic development. *See* Pet. App. 45 n.39, 73 n.62; *compare Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981) (public benefits in economic development condemnations must be "clear and significant"). Even if this Court finds that economic development as a general matter can be a public use, there is no doubt that economic development condemnation projects are much more "private" than those for privately owned transportation or utilities. Economic development condemnations are intimately tied to private interest, private benefit, and private economic success. Because such condemnations have unique risks, those risks must be countered by a stronger connection between the use of eminent domain and the benefits sought to be achieved. *See also* Brief of Amici Curiae Professor David Callies, et al. at 21-27.

In fact, this Court has in the past suggested the need for more careful scrutiny of condemnations for private ownership than those for public ownership. "[T]he presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to take the land itself." *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668, 680 (1896); *cf.* Pet. App. 137 (dissent) ("as the category of public use changes from one of direct public use to indirect public benefit in the form of private economic development, the level of judicial inquiry must increase in order to protect the legitimate interests of the condemnee").



Indeed, the standard that the Court has actually applied in cases where property has been taken for private ownership has generally been more searching and less deferential in examining the connection to the stated public use and the degree of necessity for the condemnation.[29]

In prior cases of eminent domain for private ownership, at least this Court was certain of the intended use of the property and its connection to the public interest. In contrast, in many economic development condemnations, and in these condemnations in particular, there is far less certainty about the use of the condemned property. With that uncertainty comes a far greater risk that property will be taken for private use or for no use at all.

### C. Economic Development Condemnations Carry Greater Constitutional Risk.

All eminent domain actions have the potential to expose condemnees to significant and uncompensable losses. In most condemnations, however, the public benefit

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[29] *See, e.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (taking of natural gas production did not substantially promote stated goal of limiting waste of natural gas); *Brown v. United States*, 263 U.S. 78, 84, 81 (1923) (dam would flood town so "removal of the town is a necessary step in the public improvement itself" and land chosen for relocation was "only practical and available place"); *Clark v. Nash*, 198 U.S. 361 (1905) (taking of drainage easement for private party absolutely necessary); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 166-67 (1896) (individual could not be compelled to participate in irrigation scheme unless benefit to individual was "substantial"); *cf. Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211, 221-22 (1914) (railroad spur would be open to the public and land for spur was "practically indispensable" to operation of lime company); *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 608 (1908) (spur track would be open to the public); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) (tramway carrying ore for all who seek to use it and necessary to transport ore down from mountain).

is both certain and obvious – public works, public utilities, and infrastructure are all acknowledged and unremarkable uses of eminent domain. Condemnations to eliminate slum and blight have the immediate effect of removing an area causing public harm. The public benefit from economic development projects, however, is far less certain. There are at least two major distinctions between economic development condemnations and more traditional uses of eminent domain: first, economic development condemnations often lack "an immediate or reasonably foreseeable public benefit" and second, any public benefit from economic development condemnations flows from the actions of a third party, rather than the condemnor. Pet. App. 142.

### 1. Eminent domain forces some people to bear a burden that should be, but cannot be, borne by all.

One of the core principles of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Eminent domain, however, imposes unique, sometimes devastating, burdens on condemnees. Some of these burdens simply cannot be "shared" by the act of compensation. The pain of losing one's cherished home, the separation from family members and community, and other intangible but profound personal losses are not and cannot be shared or compensated.[30] Indeed, the personal

[30] *See, e.g.*, Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); Frank

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value of property ownership was a vital part of our nation's founding.

A few courts, like New Hampshire, explicitly balance such "social loss" against public benefit. *See Merrill v. City of Manchester*, 499 A.2d 216, 217-19 (N.H. 1985). While this Court has never specifically looked at "social loss" as part of public use analysis, it is interesting to note that very few of the condemnations for private parties considered by this Court have involved the destruction of viable businesses, and none has approved the destruction of viable homes for private ownership.[31]

If Petitioners lose their homes, they will suffer just these types of personal and uncompensable losses. For example, there is no way to "justly" compensate Petitioner Wilhelmina Dery, a woman in her late 80s and in poor health, for being forced out of the only home she has ever known. Forced displacements can have serious health

I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1210-11 (1967) (owners suffer significant demoralization costs when their property is taken by government); *see also Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights."). Brief of Amicus Curiae of Better Government Association, et al. at 9-12, 16-18 (loss of community); Brief of Amici Curiae Mary Bugryn Dudko, et al. at 8-17 (havoc on family and society).

[31] *See, e.g., Clark v. Nash*, 198 U.S. 361 (1905) (noting that condemnation for widened ditch would have no negative effect on condemnee); *Brown v. United States*, 263 U.S. 78 (1923) (land); *Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211, 221-22 (1914) (easement over land); *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 608 (1908) (same); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) (same); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (same). *Berman v. Parker*, 348 U.S. 26, 31 (1954) and *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 150-51 (1906) (one mill rendered another unusable) appear to be two of the few cases to come before this Court that involved the destruction of viable businesses for ultimately private ownership.

consequences for elderly condemnees, and those consequences cannot be shared. *See* Brief of Amicus Curiae NAACP, AARP, et al. at 14-15. Nor is compensation possible for her son, Matt Dery, who will have to move his parents from their home a few steps away and watch them spend the last years of their lives uprooted and unhappy.

In light of these significant and often uncompensable losses it becomes even more important that the condemnation really will yield the benefits that justified the taking in the first place. *See* Pet. App. 163 (citing dissent "tremendous social cost" as important reason for requiring higher level of proof that condemnation will result in its intended benefits). Economic development condemnations have a much greater risk that the benefits that were used to justify the condemnation will never materialize.

**2. The public benefits of economic development condemnations are far less certain than the vast majority of other condemnations.**

There are at least two significant differences between many economic development condemnations and other, more conventional uses of eminent domain. First, economic development condemnations often lack an "immediate or reasonably foreseeable" achievement of the purposes justifying the condemnation. Pet. App. 141-142. Second, in economic development condemnations, public benefits, if they occur at all, depend on the actions of third parties rather than the condemnor. *Id.* Economic development projects are uncertain ventures that often do not live up to their original promises.[32] But if the benefits of economic

[32] *See, e.g.*, Brief Amici Curiae of the American Farm Bureau, et al., at 16-24; Brief Amicus Curiae of John Norquist at Part I.



prosperity never materialize, condemnees have suffered significant personal losses for no benefit at all. The condemnations at issue in this case vividly demonstrate those risks. There is no immediate or reasonably foreseeable use of any kind for the land where Petitioners' homes now sit. The City will not own the property or participate in any development contracts relating to the property. And the realization of the public benefit of economic development will occur only if private parties are able to generate successful development.

The Connecticut dissent described the majority's public use standard as a "Field of Dreams" – "if you build it, they will come" – approach. Pet. App. 189. Though the dissent's characterization is illuminating, the majority's standard is perhaps better described in this instance as "if you raze it, they will come." There was no planned use for the homes on Parcel 4A, and the chosen developer did not plan to build on Parcel 3 in the reasonably foreseeable future, if ever. According to the majority, however, the Constitution was satisfied if the Respondents believed in good faith in a strategy of clearing the land, hoping a market would develop once it was cleared, and hoping that the subsequent new construction would bring taxes and jobs. Petitioners, however, will lose their homes *now*. Then, much later, they will learn if they lost their homes for public use or for a high-stakes crapshoot on the possibility of a "public use" that never materialized.

Those risks are unusual in eminent domain actions. Conventional condemnations almost always have a reasonably foreseeable use. Although projects to rehabilitate slum or blighted neighborhoods may take time, the elimination of blight occurs almost immediately – with demolition – and such projects are subject to stricter statutory controls than economic development condemnations. *See* Pet. App. 134-190. Thus, in the cases considered by this Court in the past, the public benefits have been almost

immediate and effectuated by the condemnor, not third parties.[33]

### D. A Reasonable Certainty Test Counterbalances The Unique Risks Of Economic Development Condemnations.

The condemnation of property for economic development projects should only occur if and when the government can show that there is reasonable certainty that the project will proceed and yield the public benefits that are used to justify the condemnation. This level of certainty would bring economic development condemnations on par with more traditional condemnations, in which the public benefit is both more recognizable and more immediate.

The Connecticut dissent is by no means the first opinion or court to be concerned about the lack of immediate or reasonably foreseeable benefit in condemnations. Nor is it the first to object to a condemnation where the condemnor has no control over the future achievement of the goals of condemnation. There are few federal cases on this issue, but this Court can also look to standards developed in state caselaw. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994) (reviewing different state standards and selecting). There is a substantial body of state caselaw holding that property cannot be condemned when the use is unknown or will occur at an unknown time and that it cannot be condemned if there are insufficient binding standards or assurances that it will be used to achieve the purpose or benefit for which it

[33] *See, e.g.*, *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (act of transfer immediately achieves goal of greater diversity of ownership); *Berman v. Parker*, 348 U.S. 26 (1954) (removal of area of slum, high crime, disease, and infant mortality); *United States v. Carmack*, 329 U.S. 230 (1948) (post office).



is being condemned. These cases form a rough consensus that is an appropriate test for economic development condemnations in particular: There must be a planned, reasonably foreseeable use and sufficient contractual, statutory, or other minimum standards in place to make the realization of the promised economic benefits from the condemnation reasonably certain. While Petitioners do not think it is a necessary part of a reasonable certainty test, the Connecticut dissent also suggests a useful and slightly different analysis of whether the actual planned uses of the property will result in the purported public benefits.

A reasonable certainty test counters the unique risks of condemnation for economic development. If the benefits are not immediate, at least the use should be reasonably foreseeable. If the public benefit will arise from the actions of third parties, at least there are binding contractual or statutory standards to ensure the realization of the goals of the condemnation. A reasonable certainty test does not require courts to decide if a particular project is a good idea. Instead, it asks courts to look at plans and timelines to see if there is a reasonably foreseeable use of the property and to look at standards and restrictions in contracts, statutes, and other documents to see if they assure a substantial likelihood of the purported public benefits. While absolute certainty will never be possible, reasonable certainty at least ensures that there is a strong likelihood that the prognosticated public benefits will actually occur. Without that reasonable certainty, people's homes and businesses can and will be taken with no public use and no public benefit.

### 1. In economic development condemnations, a public use should be a known use.

The Constitution requires that property be taken only for public use. If the use is unknown, it is impossible to evaluate if it is being condemned for public use or not. It is therefore not surprising that courts have expressed grave discomfort with takings that lack a stated use or where there is no immediate or reasonably foreseeable use for the property.

In *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930), this Court refused to uphold a condemnation without knowing what the City would actually do with the property. The Court construed an excess condemnation statute to require a statement of the purpose of the condemnation, because construing the statute to permit condemnation for an "independent and undisclosed public use" would raise constitutional problems. *Id.* at 448. The original project was for the widening of a street, but the City sought to condemn additional property, possibly to recoup the costs of street construction, possibly to promote "harmonious development" along the street. This Court explained that the use could not be "to be determined only by such future action as the City may hereafter decide upon" and that "[i]t is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation." *Id.*; *see also Brown v. United States*, 263 U.S. 78, 83-84 (1923) (upholding condemnation and explaining that land was being condemned for actual use of relocating town and not for "speculation").

State courts also have expressed concern about "speculative" condemnations, often treating the issue as a problem of lack of necessity, in a temporal sense, or a



hybrid of public use and necessity.[34] In other words, if there is no immediate or reasonably foreseeable need for the property, the condemnation is premature. Notably, the state cases requiring an immediate or reasonably foreseeable use for condemned property almost all address takings for conventional, uncontroversial public uses. Here, where the property is being taken for unspecified economic development uses, the potential for abuse and the need for reasonable foreseeability are much greater.

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[34] *See, e.g.*, *City of Phoenix v. McCullough*, 536 P.2d 230, 232-37 (Ariz. App. 1975) ("if the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative, and remote as a matter of law and defeats the taking"); *San Diego Gas & Electric Co. v. Lux Land Co.*, 14 Cal. Rptr. 899, 904 (Cal. App. 4 Dist. 1961) (taking of easement for telephone, gas, and electrical use is speculative where utility has no present intention to install transmission lines); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170 (Colo. App. 2002) (condemnation premature when no reasonable likelihood project will proceed); *State v. 0.62033 Acres of Land*, 112 A.2d 857, 860 (Del. 1975) (taking of land for highway without plan and that may be needed "some time in the future" not sufficiently in the reasonably foreseeable future to necessitate taking); *Meyer v. Northern Indiana Public Service Co.*, 258 N.E.2d 57, 58-59 (Ind. 1970) (taking of right of way for "sometime in the future, maybe as much as six or ten years," considered a "purely speculative future need."), *superceded on unrelated grounds*, 287 N.E.2d 882 (Ind. 1972); *People ex Rel. Director of Finance v. YWCA*, 427 N.E.2d 70 (Ill. 1981) (finding condemnation unnecessary where contracts for construction and use of building not in place); *Regents of Univ. of Minnesota v. Chicago and North Western Transp. Co.*, 552 N.W.2d 578 (Minn. App. 1996) (where there were three potential uses for land but they were mutually exclusive and none had been approved and soil contamination precluded current development, taking not necessary); *City of Helena v. DeWolf*, 508 P.2d 122, 128 (Mont. 1973) (where parking would be needed only if other parts of the project succeeded, government could not seek property now "to await money, motivation, and the hopes of the planners"); *see also Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc.*, 543 S.E.2d 844, 847-48 (N.C. 2001) (construing statute to avoid constitutional problem and holding that condemnor could not take property in excess of that needed for stated public use).

This Court's decision in *Cincinnati v. Vester*, as well as the various state court cases, suggest a workable standard: When property is being condemned for economic development, there must be a planned use for the property that will be implemented in the immediate or reasonably foreseeable future.

### 2. The condemnations of Petitioners' homes lack immediate or reasonably foreseeable uses.

In this case, Respondents seek to take Petitioners' homes for (1) an office building that the developer has no plans to build and (2) some other, unknown use. Not only is there no reasonable certainty of public benefit, there is reasonable certainty that those benefits will *not* occur. These condemnations blatantly violate the principle that property should not be taken without a reasonably foreseeable use, and the Court can reject them solely on that narrow basis.

The homes lie in two nearby areas of the development plan. Four of the homes, those in "Parcel 3," are being taken for an office building that the developer admits that it does not plan to build in the foreseeable future, if ever. J.A. 47 (office development "uncertain"); J.A. 64 ("not feasible at this time"). Indeed, the developer's study described the construction of the building as "speculative." J.A. 64. If and when the developer began the project, it planned to develop other offices first and did not plan on constructing office space on Parcel 3 in the foreseeable future. J.A. 64 (existing office building will be developed first; other office space "not feasible"). The developer planned to build the office building that would occupy the land of the former homes dead last, if it built it at all. J.A. 33-34; 46-48, 73 (development descriptions and timeline).



The developer would not put in office space on Parcel 3 without known tenants. There were, however, no contracts with future tenants and indeed little interest from potential tenants of any office space. Pet. App. 180-81 (dissent); *see also* Pet. App. 330 (trial court opinion).

The other eleven homes are in an area known as "Parcel 4A," which is labeled "Park Support" in the development plan and appears as a blank space on the current site plan. *See* Pet. App. 6; J.A. 5. No witness knew what "Park Support" meant and all witnesses admitted it could be a wide range of possible uses. *See* Pet. App. 125 (majority opinion); 348 (trial court opinion); *see also* footnote 4, *supra*. Thus, at the time of the condemnation, there was no identified use for the area and certainly no "immediate" or "reasonably foreseeable" use of any kind.

The Connecticut Supreme Court was unfazed by the speculativeness of these condemnations. Regarding Parcel 3, it thought that a 1999 study stating that there was a "potential" demand by 2010 for an additional 8,400 to 245,100 square feet of office space somewhere in the Fort Trumbull area made the use foreseeable enough. To translate, a 1999 study said that there was "potential" demand in 11 years for as much as one additional office building or as little as one medium-sized office. By 2001, and before the condemnations took place, the chosen developer had concluded that construction of offices on Parcel 3 – the specific location of four of Petitioners' homes – would be "speculative," that the developer would try to develop other office space not on Parcel 3, and that it would reconsider Parcel 3 only if the market changed sometime in the future. Pet. App. 102-103; J.A. 47, 64. The majority's additional reasoning is even more disturbing. The majority took comfort in the fact that once Pfizer opened, more demand for office space might develop. "[A]t

the time of trial, the Pfizer facility had just opened; it therefore did not have the opportunity to create demand." Pet. App. 107-08. In other words, there was no reasonable foreseeable use for the property when Respondents condemned it, but perhaps some use might develop *after* the condemnations were complete. This analysis is exactly backwards and makes the condemnations, at best, premature. Petitioners' response is simple: There must be a reasonably foreseeable use for the property at the time that condemnation is sought, not a hope that a use will become reasonably forseeable at some unknown point in the future.

Regarding Parcel 4A, the majority pointed out that although no witness could define Park Support, the witnesses were able to name some possible uses that "Park Support" could include. Pet. App. 346. Indeed, the witnesses were able to hypothesize some possible, mutually incompatible uses for Parcel 4A. Perhaps Respondents would settle on one of these or come up with something else to do with the property once it was condemned, and perhaps not. But saying that property could perhaps be used as parking, retail, a museum, warehouses, storage, or something else does nothing to establish that any particular use of the property is reasonably foreseeable. Indeed, the complete lack of any planned use for the 11 homes on Parcel 4A was what led the trial court to hold that those takings were improper. According to the trial court, it was impossible to say that a use was public without knowing what the use would be, and it was similarly impossible to find that the condemnation of the property was necessary for the unknown use. Pet. App. 348-350. These condemnations are utterly speculative and for this reason alone, they must be declared unconstitutional.



### 3. Economic development condemnations should require minimum standards and controls over future use and benefit.

Courts also have been uncomfortable with condemnations transferring property to private parties without significant assurances of future use or benefit. This Court does not appear to have considered a case such as this one, where the future use of condemned property was unknown and would be determined by third parties. Most of the condemnations considered by this Court were for very specific purposes. *See, e.g.*, footnotes 15, 18, 29, *supra*.

Examination of constraints upon future use of condemned property is not unusual. This examination typically takes the form of examining the development agreement to see if there are contractual obligations ensuring that the intended public benefits actually occur, rather than vague and general promises.[35] The Connecticut dissent also notes

[35] *See, e.g.*, *United States v. Agee*, 322 F.2d 139, 143 (6th Cir. 1963) (condemnation had sufficient assurances because title to property retained by Tennessee Valley Authority and lease with Girl Scouts permitted termination at will of TVA and flooding by the TVA); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (In Bank) (holding that agreement lacked controls over the use of the property and "[s]uch controls are designed to assure that use of the property condemned will be in the public interest"); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 108-11 (N.J. Super. Ct. 1998) (noting importance of having "restrictions in the agreement between the public agency and the private developer" and finding contract lacked sufficient binding obligations); *City of Virginia Beach v. Christopoulos Family*, 54 Va. Cir. 95, 108 (Va. Cir. 2000) (contract gave developer complete control over future use of property); *see also Condemnation of 110 Washington Street*, 767 A.2d 1154, 1160 (Pa. Commw. 2001), *app. denied*, 767 A.2d 379 (2001) (contract gave private party authority to decide whether or not to condemn each piece of property); *cf. Hathcock*, 684 N.W.2d at 784

(Continued on following page)

many types of minimum standards or requirements that could be relevant in evaluating reasonable certainty (Pet. App. 183, 188 n.28) and notes that statutory constraints would also be important to ensure the realization of the purported public benefits especially when a public body is not carrying out the project. Pet. App. 143-45.

Again, the state caselaw suggests a workable judicial approach: There must be binding contractual, statutory, or other minimum standards or requirements in place that ensure the private party uses the property in the manner approved by the condemnor and that make the realization of the tax revenue and job benefits reasonably certain.

**4. These condemnations lack binding contractual or statutory minimum standards to make realization of the public benefit reasonably certain.**

Although the lack of a reasonably foreseeable use for the property alone renders these condemnations unconstitutional, they also lack minimum standards and mechanisms for ensuring the public benefits that were used to justify the takings in the first place. At the time of the condemnation, there was no development agreement for Parcel 3, although negotiations with the developer indicated it would receive the property on a lease for $1 per year for 99 years.[36] Pet. App. 177-79. As there was no contract, there also was no contractual timeline or other requirement to ensure the development of Petitioners' land

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(noting importance of existing "mechanisms" that "ensure" future public use).

[36] There will be no financial benefit to the City from the lease, and the dissent notes that since the terms of the contract (other than the $1 lease price) were unknown, it is possible that tax revenues would not increase even if the businesses did succeed. Pet. App. 182-184.



or any public benefits that are supposed to flow from that development. Pet. App. 183-84. For the homes in Parcel 4A, there was no planned use at all and thus no means of ensuring the planned use would lead to economic development.

There are no statutory assurances or requirements for the course of an economic development plan. Pet. App. 174 n.21. In fact, the statutes allow the abandonment of the plan after a minimum of three years. Pet. App. 142. If it is not abandoned, the plan, under its own terms, will stay in effect for as long as 30 years. During those three to 30 years, the achievement of tax or job growth – the public use for which Petitioners may lose their homes – is completely out of the City's hands. The achievement of economic growth, should it occur, will be wholly contingent on the economic success of private businesses. If they do well, the City may see the "trickle-down" benefits of additional tax revenue and jobs. *See SWIDA*, 768 N.E.2d at 10-11. If they do not, Petitioners' homes will be long gone.

The Connecticut majority pointed to two factors in ruling against Petitioners: first, that the development plan stated that future contracts with developers should include a commitment that property would be developed pursuant to the development plan and that a state agency would have some continuing involvement in the development. Pet. App. 74-76. The difficulty, however, is that none of that creates any assurance that Petitioners' land will be developed at all, much less that it will produce economic development. As the dissent explained, "[s]uch minimum standards might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value." Pet.

App. 188 n.28. Instead, there is "no development agreement, no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives . . . , and no indication of possible penalties if developers do not perform as required." Pet. App. 183. Accordingly, there are insufficient contractual or statutory minimum standards to ensure a reasonable certainty of public benefit.

The lack of such standards leads to yet a further danger – that of undue private benefit or purpose. When all of the crucial determinations that will give rise to public benefit or private advantage can be made *after* the condemnations take place, then the possibilities for abuse multiply exponentially. Many condemnation projects have significant benefits for private parties. A rule allowing condemnation in advance positively encourages speculation, because the easiest way to withstand a public use challenge will be to say that there is insufficient evidence (yet) of undue private benefit. Once the condemnation has taken place, the condemnee will have no legal recourse. Minimum standards are essential to ensure that such abuses do not occur.

### 5. The Kelo dissent's test of examining if the actual use of the property will produce public benefit could also be a factor in determining public use in economic development condemnations.

The dissent also used a reasonable certainty standard but had an additional and slightly different focus, asking whether the actual, currently planned use of the property was reasonably certain to bring the prophesied economic



development.[37] In other words, the dissent asked if, at the time of the taking, there was a reasonable certainty that if the stated improvements were constructed as planned, they would indeed promote economic development. This approach is one that also has been suggested by this Court and used by some other courts. *See, e.g., Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 78 (1937) (finding actual "necessary operation and effect" of natural gas regulation to transfer benefits from one person to another); *Brown v. United States*, 263 U.S. 78, 83-84 (1923) (explaining that land was being condemned for actual use of relocating town and not for speculative purposes).[38] Petitioners believe this could be another factor for courts to look at in evaluating economic development condemnations. The condemnations of Petitioners' homes would fail such a standard. As explained by the dissent, an office building with no market and an area for which there are

[37] The dissent below proposed a four-step test in which the court evaluates: (1) whether the statutory scheme is facially constitutional; (2) whether "the primary intent of the particular economic development plan is to benefit . . . public [] interests;" (3) whether "the specific economic development contemplated by the plan will, in fact, result in public benefit;" and (4) whether the condemnation is reasonably necessary to implement the plan. Pet. App. 159-70. The third step is the one that differs significantly from the majority opinion, and thus it is the one Petitioners discuss in this brief.

[38] *See also Patel v. Southern California Water Co.*, 119 Cal. Rptr. 2d 119 (Cal. App. 2002) (land condemned by water company would actually be used for cell phone tower); *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 857 (S.C. 2003) (noting that actual use would be "gated facility with no general right of public access"). Many of the cases examining whether the public use is "primary" or "incidental" also look to the actual use in making that determination. *See, e.g., Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 456-58 (Fla. 1975) (examining planned use to determine if private benefits were primary or incidental and discussing other cases also looking at actual use); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (examining planned actual use of property to determine primary benefit).

no plans do not have a reasonable certainty of producing economic development. Pet. App. 177-86. This test responds to the majority's holding that a mere *claim* that a project will lead to economic development constitutes a sufficient connection between the condemnation and economic development. The dissent suggested, in effect, that "public use" means more than a wish list of benefits that the City hopes, after condemnation, someone else will bring about. Petitioners believe, however, that these condemnations may be rejected by looking at whether the use is reasonably foreseeable and binding minimum standards for ensuring public benefit are in place, without needing to project the actual use and whether public benefits would result from that use.

## III. THE SKY WILL NOT FALL IF THIS COURT RULES IN FAVOR OF PETITIONERS, WHILE A RULING AFFIRMING THE CONNECTICUT SUPREME COURT WILL OPEN THE FLOODGATES.

It is important to note the limited nature of Petitioners' challenge. Petitioners challenge the condemnation of their homes for economic development alone. They do not challenge other government methods of trying to promote economic development. They do not challenge condemnations to eliminate blighted and harmful conditions. Connecticut and the five other states that have ruled that government may condemn for economic development all have urban renewal statutes that will remain in place.

A ruling in favor of Petitioners would not even prevent Respondents from pursuing this particular development project. Petitioners' homes comprise a miniscule portion of the land in the Fort Trumbull development plan and are situated only on Parcels 3 and 4A. Tr. Vol. II, p. 14, lns. 21-24, p. 37, lns 10-12; J.A. 3 (map showing Petitioners'



homes); J.A. 4 (map showing development parcels in the development plan). Respondents will be able to develop the hotel (Parcel 1), upscale condominiums (Parcel 2), and currently planned office space (on Parcel 2) and other unplanned uses on Parcels 4B, 5, 6, and 7, if they so choose. J.A. 4.

In contrast, a ruling upholding the decision below will indicate to lower courts throughout the country that have not ruled on this issue that there is no bar under the U.S. Constitution against the use of eminent domain to raise more tax revenue or to improve the local economy, thus placing at risk all home and small business owners outside of the limited number of states that prohibit these takings. Henceforth, private business development will itself be a public use, and property may be forcibly acquired for private business, as long as the government claims that the project will lead to an increase in tax revenues or jobs. Such a claim will not be difficult to make. Every city desires more tax dollars, and a more "productive" use can be imagined for almost every property in the country. Only an utterly unimaginative and incompetent condemnor could fail to come up with a justification, and the public use requirement will be reduced to the question of whether the government body has a "stupid staff." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

## CONCLUSION

If the "public use" requirement means anything, it means that the government may not take A's home and give it to B, because B is likely to employ more people and produce more tax revenue. Condemnation for economic development goes far beyond anything this Court has previously considered. Such a radical leap is unwarranted, and unsupported by our Constitution or caselaw.

Petitioners respectfully ask this Court to reverse the decision of the Connecticut Supreme Court.

Respectfully submitted,

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No. 04-108

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# In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

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## QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment forbid an economically distressed city from employing its eminent domain power to condemn, and pay just compensation for, private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, and to realize immediate structural and environmental benefits for the city and its residents?

## LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners, who were the plaintiffs below, are: Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Wilhelmina and Charles Dery, James and Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle.

The respondents, who were the defendants below are: the City of New London, Connecticut, and the New London Development Corporation.



## RULE 29.6 DISCLOSURE STATEMENT

The New London Development Corporation is a non-stock, non-profit development corporation designated by the City of New London, pursuant to Conn. Gen. Stat. §8-188, as the official development agency for the Fort Trumbull Municipal Development Project.

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## STATEMENT OF THE CASE

### A. The Facts of the Case

The respondent City of New London occupies 5.79 square miles at the junction of the Thames River and Long Island Sound in southeastern Connecticut. (Joint Appendix, ("J.A.") 91, 93). New London, which is geographically the second smallest of the 169 municipalities in Connecticut, was once a center of the whaling industry and later a manufacturing hub. (J.A. 91, 93, 303). However, New London has suffered through decades of economic decline. (Appendix to Petition for Certiorari, ("Pet. App.") 196, 272-73). Staggering economic woes – which include an unemployment rate close to double that of the rest of the state, a shrinking population, a dearth of new home and business construction and the departure of one of the region's principal employers – caused the State of Connecticut Office of Planning and Management (OPM) to designate New London a "distressed municipality". (J.A. 239, 253, 298, 303-04; Pet. App. 70-71, 272-73). In addition, local property taxes are the main source of municipal funding in Connecticut, but 54 percent of New London's land is tax-exempt. (J.A. 91).

Faced with this untenable economic situation, the respondent New London Development Corporation (NLDC) planned a development project for the city's Fort Trumbull section, which is located on a peninsula that juts out into the Thames River. (J.A. 4, 36, 212). The NLDC is a statutory, non-stock, non-profit development corporation with a volunteer board and no independent power of eminent domain. Under Connecticut law, a city may designate such a corporation to act as its development agent for an economic development project. See Conn. Gen. Stat. §8-188. A city may then authorize the development corporation to acquire real property through eminent domain in the project area in the city's name. See Conn. Gen. Stat. §8-193. Pursuant to this statutory authority, the New London City Council designated the NLDC as its development agent for the Fort Trumbull Municipal Development Plan (MDP), and authorized the use of eminent domain on New London's

behalf. (J.A. 26-29). The MDP was designed, in the words of the trial court, to "provide an economic and social uplift for [the] city. . . . " (Pet. App. 197). Maps of the MDP area are at pages 3-4 and 212 of the Joint Appendix.

The *undisputed* facts regarding the steady deterioration of New London's economy from the 1970's onwards demonstrate the dire need for such a project. These facts include:

- The 1990 designation of New London as a "distressed municipality" by OPM, pursuant to Conn. Gen. Stat. §32-9p. (Pet. App. 272).
- The steady decline of New London's population from a high of 34,182 in 1960 to 23,860 in 1998, its lowest since 1930. (J.A. 298; Pet. App. 272).
- An unemployment rate, 7.6 percent, almost twice as high as the overall figure for the state and three percent higher than the neighboring town of Groton. (J.A. 239; Pet. App. 272).
- The 1996 closure of the Naval Undersea Warfare Center (NUWC), located on the Fort Trumbull peninsula, which employed as many as 1500 people in the late 1980's.[1] (J.A. 253).
- A sluggish labor market that has been outperformed by a wide margin by both the state as a whole and the surrounding region. (Pet. App. 272).
- Sixty-one percent of the city's housing was built before 1950, with a high percentage of vacant housing. (Pet. App. 273).

In addition to these city-wide problems, the Fort Trumbull area itself suffers from numerous ills:

[1] As a part of the MDP, New London acquired the 32 acres formerly occupied by NUWC from the federal government via an economic development conveyance pursuant to the Base Closure and Realignment Act, 10 U.S.C. §2687. Eighteen of those acres are now Fort Trumbull State Park. (Pet. App. 4-5).



- An 82 percent vacancy rate for non-residential buildings and a 20 percent rate for non-commercial property. (J.A. 191; Pet. App. 273).
- Very low tax revenue for the MDP area ($325,000). (J.A. 191; Pet. App. 273).
- 55 percent of the buildings in the MDP area were built prior to 1950. (J.A. 322).
- Sixty-six percent of the non-residential buildings are in fair to poor condition and less than twelve percent of the residential buildings are in average or better condition. (J.A. 323; Pet. App. 273).
- Since 1990, existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect. (Pet. App. 273).

It is little wonder, then, that the trial court found New London to be a "city buffeted for decades by hard times and until recently declining prospects." (Pet. App. 196).

The record is clear that New London was a city desperate for economic rejuvenation. The NLDC, which originally was established in 1978, was re-formed in 1997 following the closure of NUWC to assist the city in planning that economic rebirth at the site of the closed base. (J.A. 264; Pet. App. 3). In January 1998, the first step in that rebirth occurred when Connecticut's State Bond Commission authorized $5.35 million in bonds to support planning activities and limited property acquisition and a further $10 million in bonds towards the creation of Fort Trumbull State Park. (J.A. 4, 264). The following month Pfizer, Inc., a world leader in pharmaceutical development, announced its plan to build a global research facility in New London, on a site adjacent to the Fort Trumbull peninsula. (J.A. 264; Pet. App. 4). Construction of the $300 million Pfizer facility began in April 1999. By the time the petitioners' properties were condemned in November 2000, the facility was almost completed. Pfizer staff began moving in early in 2001. (Trial Tr., 8/13/01, 69-70).

In April 1998, the New London City Council gave its initial approval for the NLDC to prepare an economic development plan for a 90-acre section of Fort Trumbull. (J.A. 264-65; Pet. App. 4). Fort Trumbull was selected as the best site for a planned development because of the availability of the NUWC site and because the majority of Fort Trumbull is a "regional center"[2], for which the Connecticut legislature has set the following goal:

> Revitalization of the economic base of urban areas by rebuilding older commercial and industrial areas, and encouraging new industries to locate in the central cities in order to protect existing jobs and create new job opportunities needed to provide meaningful economic opportunity for inner city residents. . . .

Conn. Gen. Stat. §4-66b. This goal has special applicability here, as most of the 90 acres – including the areas in which the petitioners own properties – have been zoned for commercial and light industrial use since 1928.[3] (J.A. 113-16, 288-91).

Upon initial approval by the city council, the NLDC began a series of neighborhood meetings to educate the residents about the development process. (J.A. 264; Pet. App. 4). The NLDC utilized a combination of notice techniques to encourage resident attendance and participation at these meetings – e.g., newspaper advertisements, direct mail, and public announcements at city council meetings. In addition, the meetings received extensive newspaper coverage. (J.A. 654-55). The NLDC held six such meetings between April and October 1998, with speakers from the NLDC, the City of New London and the State of Connecticut Department of Economic and Community Development (DECD). (J.A. 655).

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[2] Pursuant to state planning guidelines, regional centers "encompass land areas containing traditional core area commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance." (J.A. 276).

[3] All of the residential properties in Fort Trumbull – including those owned by the petitioners – were built before 1940, and most predate zoning in New London. (J.A. 322; Def. City Exh. 6).



In May 1998, the city formally authorized the NLDC to begin the development process. (J.A. 89; Pet. App. 4). In June 1998, DECD found that the Fort Trumbull project could have a significant environmental impact. (J.A. 90, 265). Under Connecticut law, see Conn. Gen. Stat. §22a-1, et seq., this finding mandated a full-scale Environmental Impact Evaluation. The Evaluation involved extensive investigation of the effect of any development at Fort Trumbull on the water supply, traffic patterns, noise and air pollution levels, historically important buildings, flood prevention, and a host of other concerns.[4] (J.A. 90, 239-41). The Evaluation also included the neighborhood meetings, the solicitation of comments from members of the community, and review of proposed findings by the community. (J.A. 90, 239-41).

In addition, Conn. Gen. Stat. §8-189 requires a finding that any economic development plan be

> in accordance with the plan of development for the municipality adopted by its planning commission and the plan of development of the regional planning agency, if any, for the region within which the municipality is located [and] that the plan is not inimical to any state-wide planning program objectives of the state or state agencies as coordinated by the Secretary of the Office of Policy and Management. . . .

§8-189. In accordance with this directive, the Evaluation carefully considered a number of state and regional planning documents detailing the already-existing policies for economic development in the region and the state. (J.A. 272-73).[5]

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[4] The entire Environmental Impact Evaluation is at pages 213-735 of the J.A. (Volumes II & III).

[5] Section 8-189 contains a number of other requirements for economic development projects relevant to the question of public use. See Section II of the Respondents' Brief, *infra*.

The Evaluation, started in June 1998, was completed in November 1998. (J.A. 213, 241). After a mandatory 45-day public comment period, the Evaluation was formally approved and forwarded to OPM. (J.A. 90-91). In April 1999, OPM made the findings required by §8-189 and determined that the Fort Trumbull project met all relevant regulatory requirements. (J.A. 91). As required by Connecticut law; see Conn. Gen. Stat. §8-191; DECD, the Connecticut Department of Environmental Protection and the Southeastern Connecticut Council of Governments also approved the development plan. (Pet. App. 8 n.8).

The NLDC then began formulating the specifics of the MDP. As part of that process, the NLDC considered six possible plans of action for the Fort Trumbull area previously set out in the EIE.[6] (Pet. App. 7). The draft plan, (J.A. 83-212), completed in August 1999 and thereafter adopted by the NLDC, is a composite of the positive elements of alternatives 2, 4, 5, and 6. The plan carefully balances the many environmental and developmental concerns expressed during the Evaluation process and contains the fewest negative impacts for Fort Trumbull. (J.A. 195-97).

The plan divides the 90 acres into seven parcels:

- Parcel 1: A waterfront hotel and conference center, marinas for tourist boats and commercial vessels, and the Riverwalk (a public walkway along the waterfront).
- Parcel 2: Eighty new residential properties organized in a planned urban-style neighborhood

[6] The alternate plans considered and rejected by the NLDC were: "(1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements." (Pet. App. 7 n.6). These alternatives are described in more detail at pages 193-95 of the J.A., and in a chart on page 248 of the J.A.



and linked by a public walkway to the rest of the plan area; this parcel also includes space reserved for the new site of the United States Coast Guard Museum.

- Parcel 3: 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.
- Parcel 4: Divided into two subparcels – 4A, which will provide park support and marina support, including parking and retail services; and 4B, which will include a renovated marina for both recreational and commercial boating. In addition, the Riverwalk will continue through Parcel 4B.
- Parcel 5: 140,000 square feet of office space, parking and retail space.
- Parcel 6: Development of water-dependent commercial uses.
- Parcel 7: Additional office space and/or research and development space.

(J.A. 109-113; Pet. App. 5-6). Although divided into parcels for ease of administration, the MDP does not consist of seven independent development plans. Rather, it is one plan to be considered as an integrated whole. (J.A. 139-40).

The petitioners own fifteen properties located in the middle of the Fort Trumbull peninsula. (J.A. 3, 4). Four properties owned by three of the petitioners are located in Parcel 3. Eleven properties owned by the remaining petitioners are located in Parcel 4A and comprise 0.76 acres. (Pet. App. 6, 125). The properties owned by petitioners Kelo, Brelesky, Cristofaro and Dery are either owner-occupied or occupied by a family member. However, the lots owned by petitioners Pataya Construction Ltd. Partnership and Von Winkle, which constitute almost half the total, are investment or commercial properties for which the petitioners are absentee landlords. (J.A. 10-11, 702-703; Trial Tr., 7/23/01, 97, 111).

The potential economic benefits of this plan as a whole to the people of New London are enormous. The record below demonstrates that the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in [annual] property tax revenues for the city. . . .

(Pet. App. 7; J.A. 203). As found by the trial court, this influx of jobs and revenue will be critical in continuing the economic revitalization of the city. (Pet. App. 196, 282, 327).

In addition to the jobs and tax revenues, the MDP will have a number of immediate benefits for the people of New London. Areas within the 100-year floodplain will be filled to be made suitable for development. (Pet. App. 356 n.20). There will be extensive improvements to the streets, sewers and utilities in the MDP area, as well as much-needed environmental remediation.[7] (J.A. 143-47, 159-60, 180-81, 442-43, 718-21). The Riverwalk will provide public access to, and use of, the waterfront, which was previously unavailable due to the presence of the NUWC facility. (J.A. 140-41). Nor are the needs of those residents displaced by the MDP ignored. To the contrary, the MDP complies with the Uniform Relocation Assistance Act; Conn. Gen. Stat. §8-266, et seq.; and earmarks *over $10 million* in relocation assistance funds for displaced home and business owners, over and above the amounts for just compensation. (J.A. 206-207).

[7] The MDP earmarks $20 million in public funds for the creation of the Fort Trumbull State Park on the former NUWC site; $7 million to upgrade the regional sewage treatment facility located in Fort Trumbull; $9 million for environmental remediation; and $24 million for plan preparation, property acquisition and infrastructure development, $2 million of which came from the United States Commerce Department in the form of a Financial Assistance Award. (J.A. 258; Trial Tr., 7/24/01, 109; see also J.A. 186).



On January 18, 2000, the NLDC board adopted the development plan. (J.A. 12). On the same day, the New London City Council approved it and authorized the NLDC to acquire the properties located in the plan area, by eminent domain if necessary, in the name of the City of New London. (J.A. 26). Thereafter, DECD also approved the plan. (J.A. 12). The 90 acres contained approximately 115 parcels, (J.A. 91), the vast majority of which the NLDC acquired voluntarily. (Trial Tr., 7/25/01, 224-25).

In October 2000, after months of unsuccessful negotiations with the petitioners, the NLDC voted to acquire their properties by eminent domain. In November 2000, the NLDC, acting as the statutorily-designated development agent for the city, brought condemnation actions for the petitioners' properties pursuant to Chapter 132 of the Connecticut General Statutes (Conn. Gen. Stat. §§8-186 to 8-200b). (Pet. App. 8). The statements of compensation describe the city, acting by the NLDC, as the official condemnor. (J.A. 6). In keeping with those statements of compensation, and pursuant to Connecticut law, over $1.6 million has been placed in escrow with the clerk of the Connecticut trial court as compensation for the petitioners' properties. The NLDC will own all 90 acres in the project area and will lease portions of that property to private developers. (Pet. App. 6).

### B. The State Court Proceedings

The respondents agree with the petitioners' statement of the proceedings in the trial court.[8] After the trial court's decision, the petitioners appealed and the respondents cross

[8] The trial court put the issue most eloquently: "On the other side of this controversy [from the petitioners] are what may be considered abstract entities – the City of New London, the New London Redevelopment Agency. *But the people behind these abstractions have a dream also . . . Their dream is for their city buffeted for decades by hard times and until recently declining prospects.*" (Pet. App. 196) (emphasis added).

appealed the trial court's decision. (Pet. App. 2). The Connecticut Supreme Court held that

> the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

(Pet. App. 2). The majority upheld the trial court's ruling with respect to Parcel 3. The majority further held that the trial court's findings with respect to the necessity of the takings on Parcel 4A were clearly erroneous and remanded the case to the trial court with direction to render judgment for the defendants with respect to the eleven properties located in Parcel 4A. (Pet. App. 133).

The majority based its decision on *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and employed a "broad purposive approach to the interpretation of the federal public use clause." (Pet. App. 39). This approach, in keeping with *Berman* and *Midkiff*, emphasizes "the legislative purpose and motive behind the taking, and give[s] substantial deference to the legislative determination of purpose." (Pet. App. 42).

Three justices concurred in part and dissented in part in one opinion. The three dissenters "agree[d] with the conclusion of the majority" that "private economic development projects ... which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions." (Pet. App. 171). With respect to this specific case, the dissent also agreed with the majority that

> [t]he record *clearly demonstrates* that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue,



> encouraging spin-off economic activities and maximizing public access to the waterfront. Furthermore, the proposed project is being undertaken in an economically 'distressed' municipality in need of a stimulus to invigorate the local economy.

(Pet. App. 176) (emphasis added); (Pet. App. 70-71) (majority opinion).

The dissent took issue only with the analytical process employed by the majority, which it viewed as too deferential. In place of the majority's "purposive" test, the dissent called for a heightened degree of judicial scrutiny to ensure that a taking for economic development will, in fact, result in a public benefit. (Pet. App. 134-90).

## SUMMARY OF ARGUMENT

At the heart of this case are a series of decisions made by the Connecticut legislature and the elected officials of the City of New London as to what will best serve the economic, social, structural and environmental interests of New London's citizens. In the exercise of its traditional police power, the Connecticut legislature has declared that economic development, and the acquisition of private property to further such development "are public uses and purposes for which public moneys may be expended. . . . " Conn. Gen. Stat. §8-186. In accordance with this statutory directive and after a painstaking deliberative process, the respondents determined that the economic revitalization of New London, as well as its environmental, social and structural health, would best be served by enacting the MDP – and, as a necessary consequence thereof, taking the petitioners' properties through eminent domain.

This Court has a long history of deference to legislative and municipal wisdom in exercising the power of eminent domain. See *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992); *Midkiff*, *supra*; *Berman*, *supra*. This deference is premised on two well-settled principles: (1) that courts are "unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them[,]"

*General Motors v. Tracy*, 519 U.S. 278, 308 (1997); and (2) that the primary purpose of the Takings Clause is not to act as a substantive restraint on government behavior, but to assure compensation for any affected property owners should the government choose to exercise its eminent domain power; see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring). In keeping with these principles, only once in its over two hundred years of existence has the Court held a *compensated* physical taking of property to be unconstitutional. Such jurisprudential caution is in keeping with this Court's longstanding policy – aside from the ill-starred era of *Lochner v. New York*, 198 U.S. 45 (1905) – of showing great deference to economic decisions made by legislative and municipal officials.

This Court should adhere to these precedents and affirm the judgment of the Connecticut Supreme Court. This Court first should hold that economic development constitutes a public use within the meaning of the Fifth Amendment. It is undisputed that maintaining the economic health of a city falls within the police powers traditionally reserved to the states, and this Court has held that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Therefore, employing the power of eminent domain to revitalize a municipality's economy satisfies the public use requirement. This is especially true in urban settings, in which the problem of land assembly often acts as a barrier to economic revitalization.

Such holding is no less valid merely because the economic improvements in question will be achieved by allowing private entities to lease the property taken through eminent domain. The principal focus of the public use equation has always been whether the taking will produce a significant benefit to the public and not the means by which that benefit comes into being. Moreover, such a holding would not only preserve the appropriate balance between the legislative and judicial branches, but it would be in keeping with the division between federal and state authority that is at the core of our federalist system of government.



This Court should then hold that the particular condemnations at issue in the present case satisfy the Public Use Clause. As it has in the past, this Court should eschew a lot-by-lot, building-by-building inquiry into whether each individual piece of property is essential for the project as a whole because such scrutiny interferes with the legislature's role as "the main guardian of the public needs to be served by social legislation. . . . " *Berman*, 348 U.S. at 32. However, even under the intrusive and unwieldy level of scrutiny for compensated takings proposed by the petitioners, the particular condemnations at issue are constitutional because they are reasonably certain to achieve significant public benefits – e.g., the creation of thousands of jobs, significant increases to New London's annual revenues, environmental remediation and improvements to Fort Trumbull's decaying infrastructure. Some of these benefits – environmental remediation and infrastructure improvements – already have taken place. With respect to the economic benefits, the reasonable assurances and enforcement mechanisms that are in place here are sufficient to satisfy the Takings Clause.

## ARGUMENT

### I. THIS COURT SHOULD ADHERE TO ITS DEFERENTIAL STANDARD OF REVIEW FOR LEGISLATIVE OR MUNICIPAL DETERMINATIONS OF PUBLIC USE AND HOLD THAT ECONOMIC REVITALIZATION CONSTITUTES A PUBLIC USE WITHIN THE MEANING OF THE TAKINGS CLAUSE.

In his dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), Chief Justice Rehnquist summed up the guiding principle of this Court's Takings Clause jurisprudence:

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may

> not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'"

*Id.* at 511 n.3 (quoting *Midkiff*, 467 U.S. at 242) (emphasis and ellipses in original).

This settled wisdom, agreed with by the majority in *Keystone* – that an exercise of eminent domain authority passes constitutional muster so long as the legislative or municipal authority *"rationally could have believed"* in its potential effectiveness – has long guided this Court's consideration of Takings Clause cases. It is wisdom born out of this Court's recognition of the necessary primacy of legislative judgment in the realm of public welfare and the Court's self-admitted inadequacy at making predictive judgments about society's economic or social future. It is wisdom that acknowledges that the proper role of unelected, federal judges in a democracy is to act with restraint when reviewing economic or social policy choices made by a state's elected representatives. And, in spite of the frenzied heat of the petitioners' arguments, it is wisdom that remains as valid in the twenty-first century as it was in the nineteenth and twentieth, and as valid for economic revitalization as it was for the myriad of other public purposes upheld by this Court.

### A. The deferential standard employed by this Court since *Berman v. Parker* remains the appropriate standard by which to judge legislative or municipal claims of public use.

It long has been recognized by this Court that the primary responsibility for addressing society's economic and social ills belongs to the legislative branch. As this Court noted in *Schweiker v. Wilson*, 450 U.S. 221 (1981), the legislature is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Id.* at 230.



Such an approach is no less warranted simply because the democratic choice in question involves the legislative or municipal decision to spend public money in order to acquire property through eminent domain. In either case, for the judicial branch, deference is the better part of valor. Indeed, a half-century ago this Court spoke clearly as to the limits of judicial authority in takings cases:

> Subject to specific constitutional limitations, when the legislature has spoken, *the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. *The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.*

*Berman*, 348 U.S. at 32 (emphasis added).

Thirty years later, in *Midkiff*, this Court reiterated and refined the holding of *Berman*. Although the courts have a role to play in reviewing the determination of a public use, that role is "an extremely narrow" one. *Midkiff*, 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Because "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers[,]" *Midkiff*, 467 U.S. at 240, the standard of review for Takings Clause cases is extremely deferential: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. A court should be unwilling to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

Eight years after *Midkiff*, this Court again emphasized its extremely limited role in reviewing questions of public use. In *National Railroad Passenger Corp.*, *supra*, which, involved re-transfer of ownership of the condemned property

to another private entity, this Court repeated its earlier holding that "the public use requirement of the Takings Clause is coterminous with the regulatory power, and that [we] will not strike down a condemnation on the basis that it lacks a public use so long as the taking is 'rationally related to a conceivable public purpose.'" *National Railroad*, 503 U.S. at 422 (quoting *Midkiff*, 467 U.S. at 240-41).

One of the primary lessons of *Berman*, *Midkiff* and *National Railroad* is that the need for such deference does not depend on the nature of the public use at issue. After all, deference was the guiding principle in *Berman*, *Midkiff* and *National Railroad* even though those three cases concerned three widely divergent government endeavors: the elimination of blighted slums[9] (*Berman*); the dissolution of an oligarchic property ownership structure (*Midkiff*); and the facilitation of interstate rail service (*National Railroad*). What matters about those three cases is their recognition that unelected judges are ill-suited to the task of determining what is an appropriate public use.

The historical, legal and logical bases for *Berman*, *Midkiff* and *National Railroad* remain unaltered in this case. A review of those principles makes it clear that economic revitalization constitutes a public use pursuant to the Takings Clause.

### 1. The text and history of the Takings Clause demonstrates that its principal focus is to provide compensation and not to act as a substantive restraint on government behavior.

The text of a constitutional provision is the starting point for its construction. See *Crawford v. Washington*, 541 U.S. 36, ___, 124 S. Ct. 1354, 1359 (2004). In this case, that

[9] As the trial court observed, "[t]he bleak economic conditions that earned [New London's designation as a distressed municipality] are conditions just as worthy of attention and dangerous to the economic and moral health of the state as slum or blighted areas. . . . " (Pet. App. 255 n.10).



text – "nor shall private property be taken for public use without just compensation" – contains a clear syntactic signal that its primary purpose is not to regulate legislative determinations of public use. That signal is the placement of the word "without," which announces the emphasized prepositional phrase in the Clause, i.e., "without just compensation". In contrast, "public use" appears in the Clause without any exclusionary word to complement "nor". Indeed, in its phrasing the Clause almost assumes that any private property taken by eminent domain would *ipso facto* be for a public use, otherwise one would expect "for public use" to be preceded by "except," or some other exclusionary preposition. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 589-90 & 590 n.10 (2nd Ed. 1988) (compensation is surrogate assurance of public use).

This construction is borne out by the history of the Clause. In an earlier draft of the Fifth Amendment, James Madison proposed that the Clause should read, "[n]o person shall be . . . obliged to relinquish his property, *where it may be necessary for public use*, without just compensation." 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES 10 (Charlene B. Bickford & Helen E. Veit eds., 1986) (emphasis added). Madison's draft – which was amended without comment by the House to its present form – arguably places more emphasis on the public use question. See Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002). Madison's draft seems to call for an inquiry akin to that proposed by the petitioners; i.e., whether a particular taking is, in fact, "necessary" for public use. However, our founding fathers chose, by their alteration of Madison's proposal, not to endorse such an intrusion into what was thought to be a legislative area (although they did reject purely private takings). See *id.* at 1248.

The notion that the Takings Clause was not primarily meant to act as a restraint on government action in the realm of *compensated* takings is a familiar one to the Court. Indeed, Justice Scalia's majority opinion in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), concludes with this telling comment:

> The Commission may well be right that [beach access] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its comprehensive program, if it wishes, by using its power of eminent domain for this public purpose . . . but if it wants an easement across the Nollans' property, *it must pay for it*.

*Id.* at 841-42 (emphasis added; internal citation and quotation marks omitted); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[t]he rights of the public in a street purchased . . . by eminent domain are those that it has paid for").

Finally, in *Eastern Enterprises v. Apfel*, *supra*, Justice Kennedy wrote that the Takings Clause "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises*, 524 U.S. at 545 (Kennedy, J., concurring). His concurrence, quoting this Court's earlier decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987), pointed out that the language of the Takings Clause "makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Eastern Enterprises*, 524 U.S. at 545. Justice Breyer, writing for himself and the three other dissenting Justices, agreed with Justice Kennedy – and numerous earlier decisions of this Court – that "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554 (Breyer, J., dissenting) (emphasis in original). The plurality opinion in *Eastern Enterprises* did not quarrel with these observations by Justices Kennedy and Breyer. *Eastern Enterprises*, 524 U.S. at 522-23.



**2. The courts are ill suited to determining whether a taking is for a legitimate public use.**

In our constitutional system, the judiciary appropriately has a very limited role in reviewing the wisdom of economic decisions made by the legislature. See *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946) ("[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision"). Since the demise of the *Lochner* era, this Court no longer strikes down economic choices made by the legislature "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

It would be a mistake similar in scope to the improvident jurisprudence of *Lochner* and its progeny for this Court once again to substitute its judgment as to the wisdom of an economic choice made by legislative and municipal officials. It would be ironic if the economic choice to declare a public use and spend the public's money for that use were subjected to stricter judicial review under the Takings Clause than the economic choice to regulate an employer's relationship with its employees under the Due Process Clause, given that even the *Lochner* era saw great deference to legislative determinations of public use; see *Gettysburg*, 160 U.S. at 680; *Clark v. Nash*, 198 U.S. 361 (1905); no doubt because legislation with compensation is more palatable than legislation without.

As this Court recently noted in support of the decision to uphold Washington's IOLTA program against a Takings Clause challenge, "[i]f the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, *there would be no question as to the legitimacy of the use of the public's money*." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232 (2003) (emphasis added). But while

due process and equal protections challenges to economic legislation receive the tender mercies of rational basis review, the petitioners would have this Court eviscerate the power of a state or municipality to use eminent domain in order to achieve precisely the same end – economic health – by barring the use of eminent domain for economic revitalization.[10]

This Court should not sanction such an illogical dichotomy. The very same institutional concerns that historically have motivated judicial deference to economic regulation apply with equal force to economic action through eminent domain. First, reviewing courts simply are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." *General Motors*, 519 U.S. at 308. As a result, this Court "customarily ... declin[es] to engage in elaborate analysis of real-world economic effects. ... " *Id.* at 309. Answering such questions, fraught as they are with the "complexities of factual economic proof," is a task with which courts generally have little familiarity and even less expertise. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 342 (1996). The answers are better left to state and municipal governments, which have the freedom and expert ability to conduct "novel social and economic experiments." *New State*

[10] The dissent in *Brown* raises the question whether an analogy to taxation would reduce the public use requirement to a "negligible impediment" because taxation is not subject to that requirement. *Brown*, 538 U.S. at 242 n.2 (Scalia, J., dissenting). But taxation, in most states, is subject to the well-recognized bounds of the police power. A classic case is from Connecticut, *State v. Travelers Ins. Co.*, 47 A. 299, 302-03 (Conn. 1900). This traditional police power informs the limits of the public use requirement. *Berman*, 348 U.S. at 31-32. To say that courts must give great deference to legislative findings of public use is not to say that public use is a negligible impediment. No one suggests, for example, that rational basis review under the Fourteenth Amendment is a negligible impediment. See, e.g., *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City*, 488 U.S. 336 (1989) (applying rational basis review and overturning West Virginia property tax ruling on Equal Protection grounds).



*Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The second institutional concern arises out of the insularity of courts from the democratic process. When state and municipal officials make economic or social policy decisions, the people whom those officials represent have the opportunity to voice their opinions on those decisions at the next election. So if the choice is disagreeable to enough people, the consequences of that disagreement will become evident through the political process. See *Printz v. United States*, 521 U.S. 898, 957 n.18 (1997) (Stevens, J., dissenting) ("to the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies"). The same cannot be said for economic choices made by unelected judges, for whom the will of the people does not act as a brake on their power. It is for this reason that, in a democracy, judicial deference to economic decisions is the appropriate course. See *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones").

Finally, federal court deference to the economic and other policy decisions of state legislatures and municipalities helps retain the appropriate balance between state and federal power that is a hallmark of our federalist system. Abandoning such deference in the name of the Takings Clause by requiring the courts to engage in close scrutiny of proposed takings would result in the undue concentration of power in federal hands at the expense of the states. See Brief of the National League of Cities, et al., as *Amici Curiae* ("NLC Brief"), at 12-17; Brief of the Connecticut Conference of Municipalities, et al., as *Amici Curiae* ("CCM Brief"), at 3-4 & n.2-3. The federal courts – perhaps through the medium of actions under 42 U.S.C. §1983 (which was asserted here, although the petitioners chose to file in state court) – would become the *de facto* arbiters in areas such as economic health that traditionally are within the police

powers reserved to the states; areas in which this Court historically has given state and local governments a great deal of leeway to explore policy solutions. This result would threaten not merely state and local authority, but individual liberty as well. See *New York v. United States*, 505 U.S. 144, 181 (1992) ("the Constitution divides authority between federal and state governments for the protection of individuals").

In sum, the reasons behind this Court's traditional deference to legislative or municipal determinations of public use are valid ones which this Court should not abandon. To the contrary, that deference should be the lens through which the Court views the issues and facts of this case.

### B. Economic development constitutes a public use as this Court traditionally has understood that term because it is rationally related to a conceivable public purpose.

The appropriate starting point for this Court's inquiry is the clear statement by the Connecticut legislature that economic development, and the acquisition of private property necessary to further such development, is a public use:

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Conn. Gen. Stat. §8-186.

As discussed *supra* in Section IA, this statement of public use is entitled to great deference. *Midkiff*, 467 U.S. at 241. Moreover, it is beyond dispute that the police power – with which the concept of public use is "coterminous" – encompasses the maintenance of a state's economic well-being through the promotion of private business and industry.[11] See *id.* at 239-40. As this Court pointed out 168 years ago, the police power is

> not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends.

*Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837); see also *Berman*, 348 U.S. at 32. Under this expansive definition, promoting the economic health of a state by encouraging the development of business and industry – and thereby ensuring jobs for that state's citizens and tax revenues for its coffers – certainly qualifies as a valid exercise of the police power.

Indeed, the Connecticut Supreme Court was unanimous on this point. (Pet. App., 42, 172). Although the dissent was not convinced that the petitioners' properties

[11] Even the petitioners concede the importance of encouraging such development to the lifeblood of a community. See Pet. Brief at 12 ("businesses, if they are successful, generate tax revenue, employ individuals, and contribute to the overall vitality of a community").

"actually will be developed to achieve a public purpose"; (Pet. App. 170); the dissent agreed that the legislative determination of public use in §8-186 is constitutional, and that "the primary purpose of the takings is to benefit the public." (Pet. App. 176).

The petitioners, on the other hand, dispute the validity of economic development as a public purpose and – in spite of clear findings to the contrary by the trial court and the emphatic rejection of their claim by the Connecticut Supreme Court – continue to insinuate that the primary purpose of such takings generally, and these takings in particular, is to benefit a specific private party, in this case, Pfizer. The petitioners would have the Court lay down a bright-line rule barring the use of eminent domain for economic development simply because the very real public benefits achieved by that development will come to pass, in part, through the activity of private entities. Such a rule has no basis in this Court's jurisprudence or the history of the Takings Clause; nor will a holding that economic development constitutes a public use result in the parade of horribles that the petitioners posit. This Court therefore should reject the petitioners' attempt to circumscribe the power of eminent domain in such a dangerous fashion.

### 1. This Court consistently has upheld the constitutional validity of using eminent domain to create public benefits through the re-transfer of private property.

On five occasions in the past half-century, this Court has upheld the re-transfer of private property to another private party against Takings Clause challenges because of the public benefits created by the re-transfer. This clear line of precedent – which receives scant attention in the petitioners' brief – should be controlling on the general question of whether economic development is permitted under the Takings Clause.



The seminal case in this Court's modern[12] Takings Clause jurisprudence is *Berman v. Parker*, *supra*. In *Berman*, owners of property condemned pursuant to the District of Columbia Redevelopment Act challenged the Act's constitutionality. *Berman*, 348 U.S. at 28. One of the specific challenges was that the Act authorized the resale of the condemned properties to other private entities; in fact, §7(g) of the Act specifically gave "[p]reference . . . to private enterprise over public agencies in executing the redevelopment plan." *Id.* at 30. The owners argued that "this makes the project a taking from one businessman for the benefit of another businessman." *Id.* at 33.

The Court unanimously rejected this claim. In keeping with the deference to legislative wisdom discussed in Section IA, *supra*, the Court held that "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.* The Court then recognized that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. *We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.*" *Id.* at 33-34 (emphasis added).

The petitioners attempt to minimize the significance of *Berman* by arguing that the public purpose in that case was the removal of blighted slums, and that "[o]nce that public use was accomplished and the blight removed, transfer of the cleared land to a private party was acceptable." (Pet. Brief at 25). But the petitioners never offer any authority for their novel proposition that re-transfer to a

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[12] Even prior to *Berman*, this Court "long ago rejected any literal requirement that condemned property be put into use for the general public." *Midkiff*, 467 U.S. at 244; see *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923) ("[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use").

private party for economic development – which the D.C. Act specifically envisioned – suddenly becomes constitutionally "acceptable" merely because of an intervening event. Moreover, the petitioners' exclusive focus on blight elimination ignores §6 of the D.C. Act, which, like the Fort Trumbull MDP, mandated the creation of "'a comprehensive or general plan' of the District, including 'a land-use plan' which designates land for use for 'housing, business, industry, recreation, education, public buildings, public reservations, and other . . . public and private uses of the land.'" *Berman*, 348 U.S. at 29. This part of the Act, with its requirement of a plan for Washington's rejuvenation, employs the tool of re-transfer in order to do far more than merely eliminate blight.

This Court reached a similar conclusion in *Hawaii Housing Authority v. Midkiff*, *supra*, in which the Court unanimously upheld the constitutionality of Hawaii's Land Reform Act, which authorized the condemnation of large tracts of leased residential property and the subsequent transfer of ownership of the condemned parcels to their respective lessees, who provided the funds for the just compensation payments. *Id.* at 233. Although it is true that the principal public use in that case was the dismantling of Hawaii's feudal property system, that public use has an ironic analogy in the present case. In *Midkiff*, the *concentration* of the land ownership led to a failure of the market economy necessitating government intervention; here the wide *dispersal* of land ownership (into tenths of an acre) also leads to a failure of the market economy due to the inability to assemble commercially viable parcels for development, as Connecticut's statutory scheme clearly anticipates.

In any event, *Midkiff* is not solely about oligopoly. The Hawaii Act also contains requirements governing the future use of the condemned land – e.g., that a lessee, in order to be eligible, must have "a bona fide intent to live on the lot or be a resident of the State. . . . " *Id.* at 233 n.1. Such a requirement is an expression of public purpose



beyond the mere elimination of an oligarchy. Finally, *Midkiff* reaffirms the broad language of *Berman* about the extremely limited judicial role in determining public use.

This Court issued yet another clear statement regarding the constitutionality of re-transfer to a private party in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, *supra*. In *National Railroad*, the Interstate Commerce Commission – at the behest of the petitioner National Railroad (AMTRAK) – condemned 48.8 miles of railroad track owned by Boston & Maine (BM). *National Railroad*, 503 U.S. at 409-10. Prior to the condemnation, AMTRAK had entered into an agreement with the Central Vermont Railroad (CV), BM's chief competitor, "to at once reconvey the track to CV, and to provide up to $3.1 million to upgrade and rehabilitate the segment." *Id.* at 412.

In spite of this obvious boon to a specific private party (CV), this Court soundly rejected Boston & Maine's claim that the taking was not for a public use because the re-transfer to CV was intended to effect significant *long-term* public benefits (i.e., improving passenger rail service). *Id.* at 422. According to Justice Kennedy's majority[13] opinion:

> In both *Midkiff* and *Berman*, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged. The Court held these exercises of the condemnation power to be constitutional, *as long as the condemning authorities were rational in their positions that some public purpose was served*. . . . That suffices to satisfy the Constitution, *and we need not make a specific factual determination whether the condemnation will accomplish its objectives*.

[13] Justices White, Blackmun and Thomas dissented on an issue unrelated to the public use question. *National Railroad*, 503 U.S. at 424-28.

*Id.* at 422-23 (emphasis added).[14] See also *Brown*, 538 U.S. at 232 (taking of interest on clients' funds to fund legal services for indigent litigants valid public use); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-16 (1984) (public disclosure of pesticide data pursuant to FIFRA, which made data available to other manufacturers and effected taking, valid public use).

At the end of the day, the petitioners advance no cogent reason for this Court to reverse this long line of decisions upholding the re-transfer of condemned property to a private party, so long as the re-transfer will result in a substantial public benefit. While the *Berman-Midkiff-National Railroad* line of cases is, by itself, reason enough to uphold the validity of a taking for economic development, both the history of takings in our country and considerations of public policy also support such a holding.

### 2. There is a long history of using the power of eminent domain to achieve a public good through re-transfer of condemned property to a private entity.

This Court's Takings Clause jurisprudence has, for more than a century, taken a "broad" view of public use. Moreover, the narrow reading urged by the petitioners is more wishful thinking than historical fact. The history of eminent domain authority demonstrates that a taking could be for a public use even if a private entity benefited from

[14] The petitioners' assessment of *National Railroad* as merely another common carrier case ignores the crucial distinctions between *National Railroad* and those cases. See *infra*, Section IB(2). In *National Railroad*, unlike this Court's railroad decisions from the late nineteenth and early twentieth centuries, the condemnation was not necessary to allow the construction of a straight line of track because the track had already been built and was in operation. The government was therefore taking a functioning segment of railway track from one operator and giving it to another. What is more, in *National Railroad*, the beneficiary of the government's use of eminent domain was a specific, known private company in competition with the condemnee – a situation not found in earlier railroad cases, *nor in this case*.



the taking or if a private entity was the condemnor. Indeed, the common thread running through this entire history, from colonial times until the present, is that the public often benefits greatly from takings that result in use of the condemned property by another private entity – and that the only relevant constitutional inquiry is whether the public benefits from the condemnation.

The framers of our Constitution drafted the Takings Clause against the background of "a concept of property which permitted extensive regulation of the use of that property for the public benefit. . . . " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting) (citation omitted). Proscribing limits on this power via a restrictive view of public use apparently "was not high among the concerns of those debating the Bill of Rights . . . [as] the framers may well have assumed *that representative government would adequately protect against abuses of eminent domain* . . . ." Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 17-18 (1980) (emphasis added). This is not surprising, given the Lockean premise that the consent necessary for the expropriation of property could be implied from the decision of Parliament to take the property. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 378, 380 (Peter Laslett ed., 1967).

This deferential attitude necessarily informs any understanding of colonial land use policy. During the colonial era, the government often exercised its eminent domain authority, or permitted private individuals to do so on its behalf, in ways which specifically benefited private parties. For example, a number of colonies imposed affirmative use requirements on landowners – so that if a property owner failed to make proper use of his land, he would forfeit title and the land might be sold to another private owner. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1260 (1996). This process occurred in urban settings as well. During the period of Dutch ownership of New York (then New Amsterdam), owners of unimproved lots often forfeited title to the government, which then conveyed those lots to

new purchasers, in return for a "reasonable indemnity at the discretion of the Street Surveyors". *Id.* at 1277-78 (citation omitted).

Nor was unused land the only context in which colonial era state governments exercised the power of eminent domain for the benefit of private entities. Legislatures often redirected private property towards some other private use thought to be more advantageous for the common good – e.g., land thought to be suitable for mills or ironworks, or land being farmed individually that legislators thought better suited for a common field. Hart, *supra* at 1282-83. In addition, eminent domain sometimes was used to take land for private rights-of-way. While these roads often were built to allow landlocked owners access to public highways, many of the roads thus created remained private even though eminent domain had been used to acquire the land for them. Meidinger, *supra* at 14; Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OREGON L. REV. 201, 207 (1978). Finally, a number of states enacted legislation during the colonial era that compelled owners of wetlands to engage in compulsory drainage projects and share the costs of drainage projects for the financial benefit of neighbors who could farm the drained areas. Hart, *supra* at 1270.

Although colonial governments generally were scrupulous about providing compensation for outright takings, their aggressive land use policy speaks volumes with respect to any original understanding of the Takings Clause. As Professor Hart summarizes it, in colonial times

> [t]he preferences of landowners were regularly subordinated to a vision of the public good that embraced many objectives beyond protecting health and safety. In regulating land use, the government sought benefits for the public, not just avoidance of harm. The government often acted simply to encourage a publicly preferred use of private land – to rationalize or optimize private land use.

*Id.* at 1291.



The notion of using eminent domain authority to achieve a public good – even if the method includes re-transfer to another private owner – did not end with the enactment of the Fifth Amendment. In the late eighteenth and nineteenth centuries, numerous states passed so-called Mill Acts, pursuant to which the owner of downstream land could build a dam to power a mill even if that dam caused the flooding of an upstream owner's land. Berger, *supra* at 206. By 1884, twenty-nine states had such Acts. *Id.*

These mills were not always "analogous to public utilities now and subject to common carrier regulations." (Pet. Brief at 22). In one of the seminal mill cases, *Olmstead v. Camp*, 33 Conn. 532 (1866), the Connecticut Supreme Court permitted a mill owner to flood his neighbor's land, in exchange for compensation, even though the owner was under no legal obligation to grant public access to his mill, or to mill grain himself for the public at-large.[18] *Id.* at 537, 552. In language that would be echoed by this Court more than a century later, the *Olmstead* Court justified its decision by noting that "any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use." *Id.* at 546. That the public had no right of access to, or right to use, the mill itself, did not alter the *Olmstead* Court's conclusion. *Id.* at 551. *Olmstead* was cited favorably by this Court in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 26 (1885).

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[18] *Olmstead* is not alone in this conclusion. See *Harding v. Funk*, 8 Kan. 315, 1871 WL 785 at *7 (1871) ("[i]t has never been deemed essential that the entire community, or considerable portion of it, should directly enjoy or participate in an improvement or enterprise in order to constitute a public use"); *Miller v. Troost*, 14 Minn. 365, 1869 WL 2322 at *2 (1869); *Scudder v. Trenton Delaware Falls Co.*, 1832 WL 2274 at *21 (N.J. Ch. 1832) (mill was for public use even though owners were "under no obligation to let the public participate in the immediate profits of their undertaking"); see also Brief of the American Planning Association, et al., as *Amici Curiae* ("APA Brief") at 9.

The development of our nation's railroads continued this trend of permitting a private company to benefit directly from the taking of private property, so long as the main beneficiary was the public. Indeed, in many of the railroad cases, the power of eminent domain was delegated to the railroad companies themselves, to use as the companies deemed necessary. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S. 386, 393 (1892). Although part of the justification for this was the status of railroads as common carriers and the regulation of the railroad industry by the federal government, that is hardly the end of the story. Indeed, this Court and other courts have permitted railroad condemnations that were not necessary for the assembly of narrow, straight tracts of land, but which were useful to the railway companies' fiscal health. See *Hairston v. Dansville & Western Railroad Co.*, 208 U.S. 598 (1908) (railroad permitted to condemn land for spur track to reach factory of large tobacco shipper); *Wilson v. Pittsburgh & L.E. Railroad Co.*, 72 A. 235 (Pa. 1909) (railroad permitted to condemn private property for water tanks).

Moreover, even those condemnations that involved only the acquisition of land necessary for straight lines of track also involved direct and immediate benefits to the railroad companies – i.e., the massive profits generated by a virtual monopoly on interstate commerce and travel. Although very real, the public goods created by the railroads arose as a by-product of that monopoly. This is not unlike the public benefits from economic development, which, although very real and often substantial, come into being as a result of private profit and private benefit due to an earlier taking.

In sum, the history of land use policy in this country demonstrates a willingness to allow the re-transfer of private property to another private owner to ensure that the property was being put to the most economically beneficial use. Any original understanding of the Takings Clause must take that history into account.



### 3. The power of eminent domain is a necessary tool in urban development for overcoming barriers to land assembly.

There is another significant similarity between the use of eminent domain for railroads and the use of eminent domain for economic development – a similarity that belies the petitioners' attempt to distinguish the railroad cases. Relying on *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the petitioners assert that railroad cases are unusual because they require "coordination of land assembly . . . and could be thwarted by hold-outs." (Pet. Brief at 21). The petitioners then quote the *Hathcock* Court's distinction of economic development from uses "whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Hathcock*, 684 N.W.2d at 781 (emphasis in original).[16]

What the petitioners refuse to acknowledge is that this very same problem exists to just as great a degree in urban economic development as it does in railroad building. It has long been recognized that eminent domain authority serves the valuable function in our society of providing the means for the government to overcome market barriers that might otherwise halt economic and social progress. See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW §§3.6-3.7 (3rd Ed. 1986); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1175-76 (1967). In this fashion, eminent domain acts as a lubricant for the market machinery, overcoming "barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer." Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986).

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[16] *Hathcock* also holds, solely under the Michigan Constitution, that "public use" is narrower than "public purpose". *Hathcock*, 684 N.W.2d at 775-76. It thus follows a different path than has this Court – a path without sound logical or jurisprudential federal underpinnings. See APA Brief, at 14-19.

In his seminal study of the purpose of the power of eminent domain in a free market, Professor Merrill notes the danger to necessary economic and social development of so-called hold-outs. In a "thin market," where the seller owns property uniquely suitable for the buyer's needs, it "can lead to monopoly pricing by the seller, to unacceptably high transaction costs, or to both." *Id.* Such market barriers often are found in the assembly of the numerous contiguous pieces of land needed for major public or private developments. *Id.* at 75-76. In such a scenario, "each owner is a monopolist, effectively dominating a resource needed to complete the project. Each owner can thereby engage in monopoly pricing, that is, can set his price well above the opportunity cost of the needed resource." *Id.* at 75. This danger is even greater when subjective factors – such as sentimental attachment to the property – enter into the equation. *Id.* at 83. In such a scenario, no amount of money would persuade these sentimental hold-outs to sell, creating a high obstacle to a project for the greater good.

In the urban setting, this assembly problem often is the biggest barrier to development, a fact expressly recognized by the Connecticut legislature. See Conn. Gen. Stat. §§4-66b & 8-186. While the land necessary for economic revitalization in suburban or rural areas often can be acquired from a handful of landowners, in a city assembling a parcel large enough to be of use in improving the city's economy necessitates dealing with dozens of landowners.[17] Indeed, this Court recognized that very dilemma in *Berman*, noting that "[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly." *Berman*, 348 U.S. at 35; see also *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-62 (1896). If a few hold-outs may block a development project designed to renew the

[17] New London is a classic example of the urban assembly problem: a geographically minuscule city composed of hundreds of small properties. See Part II of Respondents' Brief, *infra*.



economic prosperity of a city, opportunities for urban economic development in the near future will be few and far between. Having the tools necessary to overcome these obstacles – including, if necessary, the power of eminent domain – is therefore vital to the economic health of every city in this country. See NLC Brief, at 20-30; CCM Brief, at 3-4 & n.2-3.

**4. The inherent transaction costs of eminent domain, and the inherent checks on the abuse of eminent domain that exist in a democracy, provide sufficient assurance that economic development will not render the public use requirement a nullity.**

In lieu of a coherent constitutional theory grounded in this Court's prior decisions, the petitioners devote the first half of their brief to an exercise in Chicken Littleism. According to the petitioners, "the unfettered sweep of the [Connecticut Supreme Court's] opinion places all home and small business owners at risk, especially property owners of more modest means." (Pet. Brief at 12). However, the petitioners ignore several important brakes along their slippery slope.

First, there are inherent transaction costs that often make eminent domain an unattractive or even unfeasible alternative for municipalities and would-be developers. According to Professor Merrill:

> First, and most important, legislatures must authorize the exercise of eminent domain. It is thus necessary to persuade a legislature to grant the power of eminent domain, or, if a general grant of the power already exists, to persuade officials to exercise it. Second, the due process clauses of the fifth and fourteenth amendments, as well as local statutes and rules, impose various procedural requirements upon the exercise of eminent domain. At a minimum, these include drafting and filing a formal judicial complaint and service of process on the owner. Third, nearly all jurisdictions require

> at least one professional appraisal of the condemned property, something generally not done (or not done as formally) in a private sale. Finally, both court-made and statutory law guarantee a person whose property is subject to condemnation some sort of hearing on the condemnation's legality and the amount of compensation due.

Merrill, *supra* at 77. These inherent transaction costs were incurred in this case – as well as the more obvious costs of millions of dollars in just compensation and millions more in relocation assistance, none of which will be paid by a private party.[18]

Given these transaction costs, which often make eminent domain a much more expensive method of acquiring property than market exchange, "the decision whether to use eminent domain should be, from an economic perspective, self-regulating." *Id.* at 78. In other words, because it requires the expenditure of significant sums of public money – to plan an economic development project, to acquire the property and to litigate – eminent domain is likely to remain a tool of last resort for municipalities.

Economic self-interest is hardly the only built-in check on eminent domain; political self-interest will have that effect as well. As with the abuse of any form of government power, popular dissatisfaction with the abuse of eminent domain, especially if used for the benefit of private industry, will eventually make itself felt at the ballot box. Indeed, the threat of such electoral consequences likely will act as a deterrent to most questionable uses of the power of eminent domain. Although the petitioners prophesy a world in which

[18] Under Connecticut law, the taking authority must pay the condemnee the full and fair market value of his property and deposit that sum in escrow with the Connecticut Superior Court at the time of the condemnation. See Conn. Gen. Stat. §8-193 (incorporating Conn. Gen. Stat. §§8-129 & 8-130).



churches are replaced by Walmarts, that cynical forecast does not account for the democratic process.[19]

In fact, the petitioners' dire predictions notwithstanding, their brief actually identifies yet another potential check on the abuse of eminent domain – the state courts. The petitioners cite several recent state court decisions striking down an exercise of eminent domain to further economic development as not being for a valid public use. See *Hathcock*, *supra*; *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Southwest Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2002) (*SWIDA*). These cases – which invalidated takings either solely or principally under their respective state constitutions – serve as examples of the healthy balance between state and federal judicial authority necessary in a federalist system of government. Nor is it mere wishful thinking to regard the state courts as the principal bulwarks against the abuse of eminent domain. See Merrill, *supra* at 96-97 (between 1954 and 1985, over 16 percent of state court decisions on public use question invalidated takings as not being for public use); Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 R. PROP., PROBATE & TRUST J. 251, 258 (2004) (over 17 percent between 1986 and 2003).

Finally, to the extent that the petitioners raise the specter of the arbitrary or capricious exercise of the power of eminent domain by municipalities without any judicial check, the Connecticut Supreme Court has demonstrated several times in the past few years that it will not tolerate such nefarious behavior. See *Aposporos*

[19] Eminent domain presents a situation far different from one in which the constitutional rights of a small minority of the population are threatened by the tyranny of the majority because of unpopularity or bigotry. Because the exercise of eminent domain does not single out a particular group, property rights therefore are not subject to attack in the same fashion as the right to free speech or the rights of religious, racial or ethnic minorities.

*v. Urban Redevelopment Commission*, 790 A.2d 1167 (Conn. 2002) (reversing condemnation due to inadequate findings of blight); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002) (affirming injunction against condemnation due to failure of defendants to consider integration of plaintiff's property); *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of plan adopted in bad faith as pretext to thwart affordable housing).

The Connecticut Supreme Court's opinion in the present case only reinforces that intolerance of municipal misbehavior. First, although it generally adhered to the deference mandated by *Berman* and *Midkiff*, the "primary purpose" standard enunciated in *Kelo* actually is more stringent than either *Berman* or *Midkiff*. This standard presupposes at least some inquiry into the reasons for the legislative or municipal takings decision beyond whether it is "rationally related to a conceivable public purpose". This is buttressed by the Court's detailed discussion of the "particularly egregious set of facts" that led the Illinois Supreme Court to declare a taking unconstitutional in *SWIDA*. The Connecticut Supreme Court's express acknowledgement that it may be appropriate to invalidate a taking when, as in the *SWIDA* case, an agency clearly has exercised its eminent domain authority for the primary benefit of another, specific private entity, belies the petitioners' contention that the *Kelo* decision drains the meaning and substance out of the public use requirement.

## II. THE EXERCISE OF EMINENT DOMAIN AUTHORITY BY THE RESPONDENTS IN THIS CASE SATISFIES THE PUBLIC USE REQUIREMENT.

In keeping with this Court's oft-stated rule of great deference to legislative statements of public use, "it is only the taking's purpose, *and not its mechanics*, that must pass scrutiny under the Public Use Clause." *Midkiff*, 467 U.S. at 244. For the reasons that follow, this Court should decline the petitioners' invitation to impose a new and



more rigorous standard of review for compensated takings. However, even under the intrusive system of means-ends scrutiny proposed in the petitioners' brief, the specific benefits that are the likely result of the MDP are more than sufficient for the plan to pass constitutional muster.

### A. This Court should adhere to the level of scrutiny traditionally employed for compensated takings.

For the reasons discussed in more detail *supra*, this Court has been loath to scrutinize a legislative determination as to whether an economic decision serves a public purpose. Courts are not only institutionally unsuited to making such predictive judgments, but also are unbound by the restraints of the democratic process that limit elected officials. As such, great deference to legislative decision-making in this area is the proper judicial role. See *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928).

This Court employs precisely the same deference in the Takings Clause context. In fact, the Court has never imposed any form of heightened scrutiny with respect to a compensated taking, even though several of this Court's cases involved takings for the benefit of a private party. See NLC Brief at 8-11. To the contrary, in *National Railroad*, after concluding that the condemnation and re-transfer to a private party was a proper public use, this Court declined to "make a specific factual determination whether the condemnation will accomplish its objectives." *National Railroad*, 503 U.S. at 422-23. The Court has required greater scrutiny only with respect to uncompensated exactions; i.e., when the government conditions the grant of a building permit on the permittee's willingness to allow a public right-of-way across his property. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, *supra*.

The *Nollan/Dolan* rule – which requires a "nexus" between some substantial public purpose and the means chosen to achieve that interest and, if such a nexus exists, "rough proportionality" between the government-imposed

condition and the anticipated impacts of the permitted construction – makes sense only in the narrow realm of uncompensated exactions. See *Dolan*, 512 U.S. at 385, 391; *Nollan*, 483 U.S. at 836 n.3, 837. Indeed, this Court expressly held as much in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999).

The need for heightened scrutiny in the *Nollan/Dolan* scenario was born out of the concern that the government might use a property owner's desire for a permit to compel the owner's acquiescence to a permanent physical occupation of his property – an occupation that otherwise would constitute a *per se* taking requiring compensation. See *Nollan*, 483 U.S. at 834. In other words, the concern was that the government would use the permitting process as an end-run around the just compensation requirement. This concern obviously does not apply to the *compensated* takings in this case. See *First English*, 482 U.S. at 314-15.

The "reasonable certainty" test proposed by the petitioners for takings involving a re-transfer of the condemned property lacks any foundation in either logic or this Court's jurisprudence. The petitioners cite only one decision of this Court as even arguably supporting heightened scrutiny: *United States v. Gettysburg Electric R. Co.*, 160 U.S. at 680. However, the quoted *dicta* in *Gettysburg* must be read in light of its actual holding:

> [W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

*Id.* Indeed, *Midkiff* expressly relies on *Gettysburg* in its formulation of the deferential standard of review on public use.[20] *Midkiff*, 467 U.S. at 241.

[20] The petitioners also cite *Cincinnati v. Vester*, 281 U.S. 439 (1930), for the proposition that a public use must be "a known use" in order to pass constitutional muster. The petitioners simply ignore the fact that this Court expressly refused to decide the constitutional issue presented

(Continued on following page)



The petitioners' other arguments are equally meritless. Their (somewhat mutually contradictory) assertions that the benefits of the MDP are too speculative, and that it is not necessary to take the petitioners' properties in order to achieve those benefits, are discussed *infra* in Section IIB. Their claim that heightened scrutiny is warranted because "[e]minent domain forces some people to bear a burden that should be, but cannot be, borne by all[,]" (Pet. Brief at 32), says nothing unique about either eminent domain for economic development or about re-transfer cases. After all, in *every instance that it is used*, the power of eminent domain places a greater burden on certain individuals than society at large – this is true for roads, schools, prisons, all of the "traditional" public uses lauded by the petitioners. The constitutional remedy for that (however little the petitioners wish to acknowledge it) is just compensation.

In sum, there simply is no principled reason to impose – for the first time with respect to compensated takings – a heightened degree of scrutiny. This Court has never countenanced such an interference with the legislative and municipal prerogative and it should not do so here. So long as a taking is related to a rational public purpose, this Court should do what it did in *National Railroad* and uphold the taking.

### B. Under any standard of review, the takings in this case satisfy the public use requirement.

It is clear that, as a general matter, economic development satisfies the public use requirement, even when that development takes place through the medium of re-transfer to a private entity. In the present case, the need for such development is undisputed – the petitioners quibble only with the efficacy and necessity of the methods chosen by the respondents and set forth in the MDP to achieve the asserted public purpose. However, those quibbles are not

in *Vester* because the case could be resolved on a point of Ohio statutory law. *Id.* at 448-49.

supported by the factual record. To the contrary, the facts demonstrate that there is more than a reasonable likelihood that the projected benefits of the MDP will come to pass and that the proposed takings are therefore necessary to the economic rejuvenation of New London.[21]

New London's severe economic distress, discussed in detail *supra*, makes the need for economic revitalization much more compelling than would be the case in a city that was thriving. In any takings situation, a municipal exercise of eminent domain power must bear some rational relationship to a problem of which the correction is within the sphere of the police power. *Midkiff*, 467 U.S. at 240. Therefore, the more severe the problem, the more necessary is a municipal response to it, if municipal authorities are to fulfill their role to adjust "the burdens and benefits of economic life. . . . " *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, the MDP already has resulted in significant non-economic benefits for the people of New London. These immediate benefits include large-scale environmental remediation; creation of public access to the Thames River via the Riverwalk; improvements to the city's roads, sewers, water and power lines; and the filling of flood plain areas. (J.A. 140-41, 143-47, 159-60, 180-81, 442-43, 718-21).

It is equally as important that the MDP was not a hastily cobbled-together midnight deal. It was the product

[21] For the reasons set forth in Sections IA and IIA, the respondents believe that it would be inappropriate for this Court to adopt a heightened standard of proof for economic development takings. However, it is noteworthy that the Connecticut Supreme Court, in considering whether the claimed public benefits of the MDP would come to pass, required a finding of "reasonable assurances of future public use. . . . " (Pet. App. 73). If the petitioners are attempting to impose an even stricter standard of proof with their "reasonable certainty" test, they simply are trying to halt most economic development condemnations through the back door of an unreasonable standard of proof. To paraphrase the Connecticut Supreme Court, it would be hard to see how predictions of future economic events *ever* can be proved with the high level of certainty proposed by the petitioners. (Pet. App. 74 n.62).



of a comprehensive and public process designed to alleviate many of New London's problems by creating thousands of jobs, greatly increasing the city's tax revenues and modernizing its building stock, streets and sewers. This process included a detailed analysis of six possible options for the MDP. See note 10, *supra*. Thereafter, a detailed marketing study was conducted by a potential developer, Corcoran Jennison, which ultimately was selected from a group of applicants to be the developer for much of the MDP. (J.A. 30-82; Pet. App. 66). Moreover, contrary to the suggestion in the petitioners' brief, the NLDC, and any private developers to whom property is leased, will not simply be left to run things as they see fit while the city and its residents hope that these benefits materialize. In fact, the MDP is subject to numerous statutory and contractual controls.

Chief among these is Conn. Gen. Stat. §8-189, which requires multiple and specific details in any development plan regarding the need for development and the benefits of the proposed plan – e.g., a statement of the number of jobs to be created; a marketability plan; a financing plan; an administrative plan; and a finding that the plan will contribute to the economic welfare of the municipality and the state. *Id.* Section 8-189 also requires oversight of the development by the state to ensure that any development plan conforms to state regulations and other statewide and regional plans of development. *Id.* Furthermore, in Connecticut, no municipality can use eminent domain for economic development without the approval of the Executive Branch and continued state oversight. All of those requirements were met in this case.

A number of other statutes provide control over economic development plans as well. See Conn. Gen. Stat. §8-190 (state may make planning grants and advise development agency); Conn. Gen. Stat. §8-191 (state must approve final development plan if state grants have been made); Conn. Gen. Stat. §8-193(a) (if state grants have been made, department and city must approve land transfers by sale or lease in accordance with plan); and Conn. Gen. Stat. §8-200(a) ("substantial" changes to development plan require approval in same manner as original plan). In fact, the

state itself is a "signatory to the development agreement; it 'provides the funding without which nothing goes forward.'" (Pet. App. 74). The MDP, and any modifications thereto, is in effect for 30 years, and any parcel in the plan area must be devoted principally to the uses contemplated by the MDP. (Pet. App. 75 & n.64).

In accordance with these statutory controls, both the trial court and the Connecticut Supreme Court concluded that state and city would have sufficient control over the NLDC to ensure that neither it nor any private developer leasing any part of the property would be "able to act according to its own 'will and caprice'. . . . " (Pet. App. 75 n.63). This conclusion is buttressed by the MDP's requirement that any redeveloper

> [agree] for itself and its successors and assigns as successors in interest to the parcel, or any part thereof, that the deed conveying the Parcel shall contain language covenanting on the part of Redeveloper and its successors and assigns that:
>
> The Parcel shall be devoted principally to the uses contemplated by the Plan, and shall not be used or devoted for any other purpose, or contrary to any of the limitations or requirements of said Plan. *All improvements made pursuant to the Plan and this Agreement shall be used in accordance with the Plan unless prior written consent is given by the [development corporation] and [department] for a different use;*
>
> The Parcel shall not be sold, leased, or otherwise disposed of for the purposes of speculation.

(Pet. App. 75 n.64) (emphasis added). These contractual obligations act as a bar to any future redeveloper that might lease property in the MDP area from the NLDC from making use of the property in a way not in accordance with the MDP. Moreover, these obligations are buttressed by the fact that the redeveloper will not own the property, but will lease it from the NLDC. There is also no evidence that any non-governmental entity will pay any portion of the just compensation to the petitioners.



Taken together, these statutory and contractual controls give reasonable assurance that it is the State of Connecticut and the City of New London, and not either the NLDC or those developers to whom space is leased, which will exercise final control over the future of the MDP. Indeed, although the city has designated the NLDC as its agent for economic development pursuant to §8-188, nothing in that statute, or Connecticut law in general, prevents that designation from being withdrawn. In that sense, the city always has the ultimate form of control over the NLDC because the city can take away all of the NLDC's power by simply un-designating it. (Pet. App. 219).

The same reasonable assurance exists that the proposed benefits to New London's economy and infrastructure are likely to take place. With respect to Parcel 3, the petitioners have taken a few isolated comments from a marketing study performed in 2000 by Corcoran Jennison (the company designated to lease the office space in Parcel 3) and simply ignored the many other parts of the record that demonstrate the viability of the use of Parcel 3. For example, that very same marketing study found that "rental rate and occupancy trends [in New London] have been generally positive over the past few years. . . . " (J.A. 38). The study characterizes the market for Class A office space in New London as "quite healthy," and notes that "there has been a positive demand for Class A & B office space over the past four years. Between October 1996 and October 1999, *approximately 185,000 square feet were absorbed in New London*." (J.A. 41-42) (emphasis added). It is telling that the petitioners' brief never addresses this fact.[22] In addition,

[22] The petitioners' assertion that the office space will only be built at some unknown, and likely far-off, time in the future also is belied by the facts. According to the record, Corcoran Jennison "intend[ed] to select a brokerage firm no later [than] March 31, 2001 and to commence the marketing of the commercial space as soon as possible thereafter." (J.A. 75-76). Indeed, a careful examination of the very time-line trumpeted by the petitioners in their brief shows that – were it not for the current litigation – much of the office space slated for Parcel 3 could have been either completed or under construction. (J.A. 46-48, 73).

there was ample testimony that the presence of Pfizer in New London would act as a spur in the commercial real estate market in keeping with the demand for office and research space envisioned by Parcel 3.[23]

The proposed uses for Parcel 4A also are sufficiently well-defined. As the Connecticut Supreme Court opinion notes, the MDP envisions two uses for Parcel 4A: park support and marina support.[24] (Pet. App. 125-26; J.A. 111-12). Understood in their proper context – the size of Parcel 4A, and its placement within the overall plan for Fort Trumbull – these proposed uses are not speculative. Parcel 4A is 2.4 acres in size and is situated in the middle of the plan area, sandwiched between a waste water treatment facility and Fort Trumbull State Park. (J.A. 4). It is the only parcel which can possibly be used to connect the rest of the project to the marina and Fort Trumbull State Park. It certainly is not irrational to designate a small parcel of land adjoining a 16-acre state park for park support, especially when that parcel's other principal neighbor, a waste water treatment facility, makes it less suitable for other functions. The same thing is true regarding use of Parcel 4A for marina support because immediately to the south of Parcel 4A is Parcel 4B, which is slated to contain a marina. Viewed in light of its location, the proposed uses of Parcel 4A make a great deal of sense.

That the 90-acre plan area itself is surrounded on three sides by water has an obvious impact on the uses of Parcel

[23] The petitioners' assertion that the clear intent of the MDP was to benefit Pfizer, rather than merely to take advantage of its presence in the city, is not only contradicted by the findings of the trial court and the majority opinion of the Connecticut Supreme Court, but by the *dissent* as well. (Pet. App. 70-71, 176). Moreover, as the majority opinion notes, Pfizer's supposed "requirements," which is the only evidence proffered by the petitioners of any intent to benefit Pfizer, do not impact Parcels 3 and 4A. (Pet. App. 65, 69). Furthermore, Pfizer will have no ownership or management interest in any of the facilities in the plan area. (Pet. App. 63).

[24] Another possible use of Parcel 4A is for a United States Coast Guard Museum. (Pet. App. 126-27).



4A. (J.A. 4). It means that parking, and most other park or marina support facilities, cannot go in those directions. This supports the reasonableness of the taking of Parcel 4A for those uses. Not to take Parcel 4A also would leave 11 tiny plots – totaling 0.76 acres – completely surrounded by a 90-acre development project that cannot expand in three directions due to its peninsular nature.

Furthermore, to the extent that the petitioners argue that these proposed uses are too speculative, that argument is actually no more than a thinly-disguised attempt to trap the city between a constitutional Scylla and Charibdis. On the one hand, the petitioners note the constitutional bar against takings designed solely to benefit a private party. See *Midkiff*, 467 U.S. at 245. So, if an economic development plan were to contain very specific details as to specific private companies that were going to be given the use of properties taken through eminent domain, that in the petitioners' view would run afoul of the public use requirement because those private companies, and not the public, would be the true beneficiaries of the takings. On the other hand, the petitioners want this Court to bar any plan unless it states who will develop the condemned land and for what specific uses. Of course, it is precisely economically-distressed cities that have the most difficulty in enticing private developers to commit themselves to urban revitalization – and it is these same cities (and their millions of residents) that will be the losers if they must prove to a high degree of certainty that their plans will succeed. This sort of gamesmanship – which ignores the clear distinction between judicial review of the overarching public use and judicial review of the means by which that use is implemented – cannot be what the constitution intended. As this Court said in *Rindge*, *supra*, 262 U.S. at 707, a public use may be a use "fairly anticipated in the future."

Finally, the petitioners contend that, because their properties "comprise a miniscule portion of the land" in the MDP, it is not necessary to take their properties in order to advance the public good. (Pet. Brief at 48). In *Berman*, this Court rejected an identical argument by the owners of a

non-blighted department store situated in the part of Washington designated for redevelopment. *Berman*, 348 U.S. at 31, 34. The store owners claimed that, because "their building [did] not imperil health or safety nor contribute to the making of a slum or a blighted area," *id.* at 34, it should have been exempted from the dictates of the District redevelopment. In response, this Court emphatically rejected such a piecemeal approach. The Court deferred to the expertise of the legislators and administrators who formulated the redevelopment and held:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, *the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

*Id.* at 35-36 (emphasis added).

A property-by-property approach to the question of constitutionality would pose just as grave a threat to the integrated plan in this case as it did in *Berman*. First, as *Berman* intimates, it would be incongruous, to say the least, to have the federal courts micromanage state and local development projects. Not only are judges professionally ill-suited to such a role, but that sort of heavy-handed intrusion into state and local affairs does not comport with our federalist system of government.

Second, there is the "spotted leopard" problem.[25] This occurs when there are small parcels of untouchable land scattered within an area set for development. It is an enormous hindrance for the project as a whole to have to build around these so-called spots. For example, much of the MDP area will be raised above the flood plain. Obviously, this cannot take place if there are little exempted

[25] According to the record, the residential properties are "scattered throughout the MDP area contributing to a sawtooth visual impression in the various blocks." (J.A. 323); see also (Pet. App. 301-305).



islands of property within the area to be raised. For this and other reasons, building around the petitioners is not a feasible alternative. Moreover, even if development of the property could go forward, the spotted leopard problem would be just as great a hindrance once the development was complete. It is important to remember that the land in Parcels 3 & 4A has been zoned for commercial and light industrial use for decades and, under the MDP, will be zoned for "water dependent and water related industrial and major commercial use. . . . " (J.A. 114, 116, 126). The properties, which cannot be renovated for commercial use, therefore will simply be incompatible with all of the uses going on around them.

Indeed, this is another important facet of the assembly problem faced by cities. See *supra*, Section IB3. In suburban and rural areas, there generally is no spotted leopard problem because the land needed for development often can be acquired through the marketplace from a few owners. In cities, however, properties are generally much smaller in size and owned by many more individuals. As such, a city that wants to improve a downtrodden economy and revamp its infrastructure must contend with the spotted leopard. Too often, the result is the exodus of businesses and developers to the suburbs and the creation of still more suburban sprawl.

The condemnation of the petitioners' properties is clearly rational. If the Court believes that a higher standard should be imposed for compensated takings, this case falls on the constitutional side of any reasonable line. New London is economically downtrodden and has given all of the assurances of successful development that reasonably can be expected of a city. The respondents have provided a carefully thought-out and publicly-vetted plan with state and local oversight; a plan that is subject to detailed statutory and contractual requirements; and an economic revitalization area designed to capture the maximum benefit from being located next door to a $300,000,000 global research facility that was almost completed by the time the NLDC condemned the petitioners' properties. To ask for any more would be asking for an absolute guarantee of the future – and that is a standard too harsh for any city to satisfy.

For most of this century, our courts have followed the time-honored "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The power of eminent domain, although formidable, is merely one of the many tools that the Constitution grants to the legislative branch in order to fulfill its role as the progenitors of economic and social policy. Contrary to the petitioners' assertion that a ruling in their favor would have only a limited impact, such a ruling would result in a seismic shift in our constitutional landscape that would upset not only the careful balance between judicial and legislative authority, but would also result in the intrusion of federal courts into state and local affairs.

## CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be affirmed.

Respectfully submitted,

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**Connecticut Statutes**

**Sec. 4-66b. Capital development impact statements.** The Secretary of the Office of Policy and Management shall develop a form for capital development impact statements on which state agencies shall indicate the manner in which a planned or requested capital project or program addresses the following goals: (1) Revitalization of the economic base of urban areas by rebuilding older commercial and industrial areas, and encouraging new industries to locate in the central cities in order to protect existing jobs and create new job opportunities needed to provide meaningful economic opportunity for inner city residents; (2) revitalization of urban neighborhoods to reduce the isolation of various income, age and minority groups through the promotion of fair and balanced housing opportunities for low and moderate income residents; (3) revitalization of the quality of life for the residents of urban areas by insuring quality education, comprehensive health care, access to balanced transportation, adequate recreation facilities, responsive public safety, coordinated effective human service programs, decent housing and employment and clean water and by insuring full and equal rights and opportunities for all people to reap the economic and social benefits of society; (4) coordination of the conservation and growth of all areas of the state to insure that each area preserves its unique character and sense of community and further insure a balanced growth and prudent use of the state's resources.

CHAPTER 135

## DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT: UNIFORM RELOCATION ASSISTANCE ACT

**Sec. 8-266. Short title: Uniform Relocation Assistance Act. Purpose. Policy.** This chapter shall be known as the "Uniform Relocation Assistance Act". The purpose of this chapter is to establish a uniform policy for the fair and equitable treatment of persons displaced by the acquisition of real property by state and local land acquisition programs, by building code enforcement activities, or by a program of voluntary rehabilitation of buildings or other improvements conducted pursuant to governmental supervision. Such policy shall be uniform as to (1) relocation payments, (2) advisory assistance, (3) assurance of availability of standard housing, and (4) state reimbursement for local relocation payments under state assisted and local programs.

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**Sec. 8-267. Definitions.** As used in this chapter:

(1) "State agency" means any department, agency or instrumentality of the state or of a political subdivision of the state, or local housing authorities, or any department, agency or instrumentality of two or more political subdivisions of the state, but shall not include community housing development corporations authorized under section 8-217;

(2) "Person" means any individual, partnership, corporation, limited liability company or association;

(3) "Displaced person" means (a) any person who, on or after July 6, 1971, moves from real property, or moves



his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by or supervised by a state agency or unit of local government and solely for the purposes of subsections (a) and (b) of section 8-268 and section 8-271 as a result of the acquisition of or as a result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project; or (b) any person who so moves as the direct result of code enforcement activities or a program of rehabilitation of buildings pursuant to such governmental program or under such governmental supervision, except a business which moves from real property or which moves its personal property from real property acquired by a state agency when such move occurs at the end of a lease term or as a result of eviction for nonpayment of rent, provided the state agency acquired the property at least ten years before the move;

(4) "Nonprofit organization" means associations incorporated under chapters 598 and 600;

(5) "Business" means any lawful activity, excepting a farm operation, conducted primarily (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing or marketing of products, commodities or any other personal property; (B) for the sale of services to the public; (C) by a nonprofit organization; or (D) solely for the purposes of subsection (a) of section 8-268, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays,

whether or not such display or displays are located on the premises on which any of the above activities are conducted;

(6) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support;

(7) "Mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of this state, together with the credit instruments, if any, secured thereby.

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**Sec. 8-267a. Compliance with federal Uniform Relocation Assistance and Real Property Acquisition Policies Act.** All state agencies, as defined in section 8-267, are authorized to comply with the applicable provisions of 42 USC Sections 4601-4655 and any subsequent amendments, for the purpose of participating in a federal or federally assisted project or program.

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**Sec. 8-268. Payment for displacement expenses and losses. Moving expenses and dislocation allowances. Fixed payments. Landlord's responsibility in certain cases.** (a) Whenever a program or project undertaken by a state agency or under the supervision of a state agency will result in the displacement of any person on or after July 6, 1971, the head of such state agency shall make payment to any displaced person, upon proper



application as approved by such agency head, for (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the state agency, and (3) actual reasonable expenses in searching for a replacement business or farm, provided, whenever any tenant in any dwelling unit is displaced as the result of the enforcement of any code to which this section is applicable by any town, city or borough or agency thereof, the landlord of such dwelling unit shall be liable for any payments made by such town, city or borough pursuant to this section or by the state pursuant to subsection (b) of section 8-280, and the town, city or borough or the state may place a lien on any real property owned by such landlord to secure repayment to the town, city or borough or the state of such payments, which lien shall have the same priority as and shall be filed, enforced and discharged in the same manner as a lien for municipal taxes under chapter 205.

(b) Any displaced person eligible for payments under subsection (a) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive a moving expense allowance, determined according to a schedule established by the state agency, not to exceed three hundred dollars and a dislocation allowance of two hundred dollars.

(c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who

elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall not be less than two thousand five hundred dollars nor more than ten thousand dollars. In the case of a business no payment shall be made under this subsection unless the state agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the state, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one half of any net earnings of the business or farm operation, before federal, state and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse or his dependents during such period.

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**Sec. 8-269. Additional payment to owner displaced from dwelling.** (a) In addition to payments otherwise authorized by this chapter, the state agency shall make an additional payment not in excess of fifteen thousand dollars to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty



days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements: (1) The amount, if any, which when added to the acquisition cost of the dwelling acquired, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private market. All determinations required to carry out this subparagraph shall be made by the applicable regulations issued pursuant to section 8-273; (2) the amount, if any, which will compensate such displaced person for any increased interest cost which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount shall be paid only if the dwelling acquired was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of such dwelling. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate on savings deposits by commercial banks in the general area in which the replacement dwelling is located; (3) reasonable expenses incurred by such displaced person for evidence of title, recording fees and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(b) The additional payment authorized by this section shall be made only to such a displaced person who purchases and occupies a replacement dwelling which is decent, safe and sanitary not later than the end of the one year period beginning on the date on which he receives final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date.

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**Sec. 8-270. Additional payment for persons displaced from dwelling. Landlord's responsibility in certain cases.** In addition to amounts otherwise authorized by this chapter, a state agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 8-269 which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling under the program or project which results in such person being displaced. Such payment shall be either (1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed four thousand dollars, or (2) the amount necessary to enable such person to make a downpayment, including reasonable expenses incurred by such displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not



generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed four thousand dollars, except that if such amount exceeds two thousand dollars, such person must equally match any such amount in excess of two thousand dollars in making the downpayment, and provided, whenever any tenant in any dwelling unit is displaced as the result of the enforcement of any code to which this section is applicable by any town, city or borough or agency thereof, the landlord of such dwelling unit shall be liable for any payments made by such town, city or borough pursuant to this section or by the state pursuant to subsection (b) of section 8-280, and the town, city or borough or the state may place a lien on any real property owned by such landlord to secure repayment to the town, city or borough or the state of such payments, which lien shall have the same priority as and shall be filed, enforced and discharged in the same manner as a lien for municipal taxes under chapter 205.

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**Sec. 8-270a. Actions against landlords by towns, cities and boroughs and the state.** If any landlord fails to reimburse any town, city or borough for any payments which the town, city or borough has made to any displaced tenant and for which the landlord is liable pursuant to section 8-268 or 8-270, such town, city or borough or the state pursuant to subsection (b) of section 8-280 may bring a civil action against such landlord in the superior court for the judicial district in which the town, city or borough is located or for the judicial district in which such landlord resides for the recovery of such payments, and for the costs, together with reasonable attorney's fees, of the town, city or borough or the state in bringing such action. In any such action, it shall be an

affirmative defense for the landlord that the displacement was not the result of the landlord's violation of section 47a-7.

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**Sec. 8-271. Relocation assistance advisory program.** (a) Whenever a program or project undertaken by a state agency or under the supervision of a state agency will result in the displacement of any person on or after July 6, 1971, such agency shall provide a relocation assistance advisory program for displaced persons which shall offer the services described herein. If the state agency determines that any person occupying property immediately adjacent to any real property acquired is caused substantial economic injury because of such acquisition, it may offer such person relocation advisory services under such program.

(b) Each relocation advisory assistance program required by subsection (a) shall include such measures, facilities, or services as may be necessary or appropriate in order (1) to determine the needs, if any, of displaced persons for relocation assistance; (2) to provide current and continuing information on the availability, prices and rentals, of comparable decent, safe and sanitary sales and rental housing, and of comparable commercial properties and locations for displaced businesses; (3) to assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe and sanitary dwellings, as defined by the Commissioner of Transportation for transportation projects and by the



Commissioner of Economic and Community Development for all other state agency programs and projects, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment, except that the Commissioner of Transportation for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects may prescribe by regulation situations when such assurances may be waived; (4) to assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location; (5) to supply information concerning federal and state housing programs, disaster loan programs and other federal and state programs offering assistance to displaced persons; (6) to provide other advisory assistance services to displaced persons in order to minimize hardship to such persons in adjusting to relocation.

(c) The heads of state agencies shall coordinate relocation activities with project work, and other planned or proposed governmental actions in the community or nearby areas which may affect the carrying out of the relocation assistance programs.

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**Sec. 8-272. Necessity of provision of housing.** (a) If a project or program cannot proceed to actual construction because comparable replacement sale or rental housing is not available, and the Commissioner of Transportation for transportation projects or the Commissioner of Economic and Community Development for any other state agency program or project determines that such

housing cannot otherwise be made available after consultation with the chief executive officer of the municipality within which such project or program occurs, he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project or program, the provisions of any other state statute to the contrary notwithstanding.

(b) No person shall be required to move from his dwelling on or after July 6, 1971, on account of any state agency project or program unless the Commissioner of Transportation for transportation projects or the Commissioner of Economic and Community Development for any other state agency program or project is satisfied that replacement housing, in accordance with subdivision (3) of subsection (b) of section 8-271 is available to such person.

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**Sec. 8-273. Establishment of regulations and procedures.** (a) In order to promote uniform and effective administration of relocation assistance and land acquisition of state agencies, the Commissioner of Transportation and Commissioner of Economic and Community Development shall consult together on the establishment of regulations and procedures for the implementation of such projects and programs.

(b) The Commissioner of Transportation is authorized to establish for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects such regulations and procedures as each may determine to be necessary to assure (1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as



practicable; (2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and (3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the Commissioner of Transportation for transportation projects and by the Commissioner of Economic and Community Development for any other state agency program or project.

(c) The Commissioner of Transportation is authorized to establish for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects such other regulations and procedures, consistent with the provisions of this chapter, as each deems necessary or appropriate to carry out this chapter.

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**Sec. 8-273a. Relocation assistance by the Department of Transportation.** Notwithstanding any other provisions of the general statutes to the contrary, whenever the Commissioner of Transportation undertakes the acquisition of real property on a state or federally-funded project which results in any person being displaced from his home, business, or farm, the Commissioner of Transportation is hereby authorized to provide relocation assistance and to make relocation payments to such displaced persons and to do such other acts and follow procedures and practices as may be necessary to comply with or to provide the same relocation assistance and relocation payments as provided under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of

1970, 42 USC 4601 et seq. and any subsequent amendments thereto and regulations promulgated thereunder.

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**Sec. 8-274. Contracts and agreements for services.** In order to prevent unnecessary expenses and duplications of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons authorized under this chapter, the Commissioner of Transportation may, for transportation projects, and the Commissioner of Economic and Community Development may, for all other state agency programs or projects, enter into contracts or agreements with any individual, firm, association, or corporation for services in connection with such projects or programs, or may carry out its functions under this chapter through any federal, state or local governmental agency or instrumentality having an established organization for conducting relocation assistance programs. A state agency shall, in carrying out the relocation assistance activities described in section 8-272, whenever practicable, utilize the services of state or local housing agencies, or other agencies having experience in the administration or conduct of similar housing assistance activities.

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**Sec. 8-275. Availability of funds.** Funds appropriated or otherwise available to any state agency for a particular program or project, or for the acquisition of real property or any interest therein for a particular program or project, shall be available also for obligation and expenditure to carry out the provisions of this chapter as applied to that program or project.

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**Sec. 8-276. Cost of payments and services included in project costs.** If a state agency acquires real property, and state financial assistance is available to pay the cost, in whole or part, of the acquisition of such real property, or of the improvement for which such property is acquired, the cost to the state agency of providing the payments and services prescribed by this chapter shall be included as part of the costs of the project for which state financial assistance is available to such municipality and shall be eligible for state financial assistance in the same manner and to the same extent as other project costs.

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**Sec. 8-277. Payments to displaced persons not considered income or resources.** No payment received by a displaced person under this chapter shall be considered as income or resources for the purpose of determining the eligibility or extent of eligibility of any person for assistance under any state law or for the purposes of the state's personal income tax law, corporation tax, or other tax laws. Such payments shall not be considered as income or resources of any recipient of public assistance and such payments shall not be deducted from the amount of aid to which the recipient would otherwise be entitled.

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**Sec. 8-278. Appeals to commissioners.** Any person or business concern aggrieved by any agency action, concerning their eligibility for relocation payments authorized by this chapter may appeal such determination to the Commissioner of Transportation in the case of relocation made necessary by a transportation project or to the Commissioner of Economic and Community Development in the

case of relocation made necessary by any other state agency program or project. The Commissioner of Transportation and the Commissioner of Economic and Community Development shall have the power to certify official documents and to issue subpoenas to compel the attendance of witnesses or the production of books, papers, correspondence, memoranda or other records deemed necessary as evidence in connection with an appeal pursuant to this section. If any person to whom such subpoena is issued fails to appear, or having appeared refuses to give testimony or fails to produce the evidence required, the Superior Court, upon application of the Attorney General representing the appropriate commissioner, shall have jurisdiction to order such person to appear or to give testimony or produce the evidence required, as the case may be. The Commissioner of Transportation, or a hearing officer duly appointed by said commissioner, or the Commissioner of Economic and Community Development, or a hearing officer duly appointed by said commissioner, shall have the power to administer oaths and affirmations in connection with an appeal pursuant to this section.

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**Sec. 8-279. Application of chapter.** (a) Nothing in this chapter shall be construed as creating in any condemnation proceedings, brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to July 6, 1971.

(b) No payment provided for any item or items under the provisions of this chapter shall be made by the state agency if reimbursement for such item or items has been made in a condemnation proceeding.



(c) Nothing in this chapter, shall be construed to limit, restrict or derogate from any power, right or authority of a state agency or any commissioner thereof, contained in any other statute, to proceed with any programs, projects or activities within such state agency's or commissioner's power to accomplish under such statutes.

(d) If Congress enacts legislation permitting, or giving the states the option, to make payments for relocation assistance of a lesser amount than is provided for in this chapter, or in Public Law 91-646, or as amended at a later date, the state agency shall make the payments in such lesser amount, notwithstanding the provisions of this chapter.

(e) All state agencies charged with preparing relocation plans or carrying out such plans pursuant to the provisions of this chapter shall file such plans with the Commissioner of Economic and Community Development who shall maintain a file of such plans which may be inspected at reasonable times by any person, owner or lessee of any affected business or farm, or governmental agency.

(f) This chapter shall apply to any displacement of a person occurring within the state of Connecticut as a result of a state agency program or project, notwithstanding the source of funding for such program or project.

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**Sec. 8-280. State grants-in-aid. Conditions.** (a) The state, acting by and in the discretion of the Commissioner of Economic and Community Development, may enter into a contract or agreement with a state agency to provide state financial assistance to such state agency in

the form of a grant-in-aid equal to two-thirds of the net cost of carrying out a program of relocation assistance pursuant to a relocation plan as provided under section 8-281 and approved by the commissioner. Such grant-in-aid shall: (1) Provide actual administration costs not to exceed one hundred dollars for each dwelling unit and two hundred fifty dollars for each farm or business relocated in accordance with the provisions of this chapter; (2) provide advance grants for relocation assistance paid pursuant to the provisions of said section to persons, families, businesses and farm operations and nonprofit organizations not otherwise entitled to relocation assistance from any program of any other state agency or any program of the federal government and who have not been reimbursed for moving costs in a condemnation proceeding; (3) include the cost of the preparation of the relocation plan.

(b) The Commissioner of Economic and Community Development shall not provide a grant-in-aid pursuant to subsection (a) of this section to any town, city or borough for the cost of carrying out a program of relocation assistance for persons displaced as the direct result of code enforcement activities undertaken by a town, city or borough, unless such town, city or borough (1) places, pursuant to section 8-270, a lien on all real property in such town, city or borough, which is owned by the landlord of the persons who are displaced by such code enforcement activities, and (2) assigns to the state the claim of the town, city or borough against such landlord for the costs of carrying out such program of relocation assistance. The Attorney General shall be responsible for collecting such claim and may carry out such responsibility by (A) enforcing any such lien assigned to the state by the town, city or borough, (B) placing and enforcing a lien on any other real



property owned by the landlord in the state or (C) instituting civil proceedings in the Superior Court against such landlord. Two-thirds of all funds collected by the Attorney General from a landlord pursuant to this subsection shall be deposited in the General Fund and the remaining one-third of such funds shall be remitted to the town, city or borough which brought code enforcement activities against such landlord.

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**Sec. 8-281. Approval of relocation plan required for receipt of state grant-in-aid.** To be eligible to receive financial assistance under section 8-280, a state agency shall cause to be prepared and file with the Department of Economic and Community Development for the approval of the commissioner a relocation plan based upon a plan or program of governmental action within the area of operation of the state agency which will cause the displacement of persons, families, businesses, farm operations and nonprofit organizations. Such relocation plan shall conform to the provisions of this chapter and shall include but not be limited to the following: (a) The number of persons, families, businesses and farms to be displaced by the proposed governmental action; (b) a statement concerning availability of sufficient, suitable accommodations as shall meet the requirements for occupancy of those persons, families, businesses and farms displaced and the dates when such accommodations will be available; (c) a plan for carrying out the relocation of such displaced persons, families, businesses and farms; (d) a description and identification of the area to be affected.

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**Sec. 8-282. Reimbursement for fees, penalty costs, taxes.** In addition to amounts otherwise authorized by sections 8-266 to 8-281, inclusive, the state agency, as defined in section 8-267, shall reimburse the owner of real property acquired for a project for reasonable and necessary expenses incurred for (1) recording fees, transfer taxes and similar expenses incidental to conveying such real property; (2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such property; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the state, or the effective date of possession of such real property by the state agency, whichever is earlier.

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CHAPTER 439

## ENVIRONMENTAL PROTECTION DEPARTMENT AND STATE POLICY

**Sec. 22a-1. Policy of the state.** The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. It is now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. It shall further be



the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

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**Sec. 22a-1a. Declaration of policy: Coordination of state plans and programs.** (a) In furtherance of and pursuant to sections 22a-1 and 22a-15, the General Assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influence of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Connecticut residents.

(b) In order to carry out the policy set forth in sections 22a-1a to 22a-1f, inclusive, it is the continuing

responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may: (1) Fulfill the responsibility of each generation as trustee of the environment for succeeding generations; (2) assure for all residents of the state safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our Connecticut heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve an ecological balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources; and (7) practice conservation in the use of energy, maximize the use of energy efficient systems and minimize the environmental impact of energy production and use.

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**Sec. 22a-1b. Evaluation by state agencies of actions affecting the environment. Public scoping process. Environmental monitor.** The General Assembly directs that, to the fullest extent possible:

(a) Each state department, institution or agency shall review its policies and practices to insure that they are consistent with the state's environmental policy as set forth in sections 22a-1 and 22a-1a.



(b)(1) Each sponsoring agency shall, prior to a decision to draft an environmental impact evaluation pursuant to subsection (c) of this section for an action which may significantly affect the environment, conduct an early public scoping process.

(2) To initiate an early public scoping process, the sponsoring agency shall provide notice on a form that has been approved by the Council on Environmental Quality, which shall include, but not be limited to, the date, time and location of any proposed public scoping meeting and the duration of the public comment period pursuant to subdivision (3) of this subsection, to the council, the Office of Policy and Management and to any other state agency whose activities may reasonably be expected to affect or be affected by the proposed action.

(3) Members of the public and any interested state agency representatives may submit comments on the nature and extent of any environmental impacts of the proposed action during the thirty days following the publication of the notice of the early public scoping process pursuant to this section.

(4) A public scoping meeting shall be held at the discretion of the sponsoring agency or if twenty-five persons or an association having not less than twenty-five persons requests such a meeting within ten days of the publication of the notice in the Environmental Monitor. A scoping meeting shall be held not less than ten days following the notice of the project in the Environmental Monitor. The public comment period shall remain open for at least five days following the meeting.

(5) A sponsoring agency shall provide the following at a public scoping meeting: (A) A description of the

proposed action; (B) a description of the purpose and need of the proposed action; (C) a list of the criteria for a site for the proposed action; (D) a list of potential sites for the proposed action; (E) the resources of any proposed site of the proposed action; (F) the environmental limitations of such sites; (G) potential alternatives to the proposed action; and (H) any of the information the sponsoring agency deems necessary.

(6) Any agency submitting comments or participating in the public scoping meeting pursuant to this section shall include, to the extent practicable, but not be limited to, information about (A) the resources of any proposed site of the proposed action, (B) any plans of the commenting agency that may affect or be affected by the proposed action, (C) any permits or approvals that may be necessary for the proposed action, and (D) any appropriate measures that would mitigate the impact of the proposed action, including, but not limited to, recommendations as to preferred sites for the proposed action or alternatives for the proposed action that have not been identified by the sponsoring agency.

(7) The sponsoring agency shall consider any comments received pursuant to this section or any information obtained during the public scoping meeting in selecting the proposed actions to be addressed in the environmental impact evaluation and shall evaluate in its environmental impact evaluation any substantive issues raised during the early public scoping process that pertain to a proposed action or site or alternative actions or sites.

(c) Each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment



shall in the case of each such proposed action make a detailed written evaluation of its environmental impact before deciding whether to undertake or approve such action. All such environmental impact evaluations shall be detailed statements setting forth the following: (1) A description of the proposed action which shall include, but not be limited to, a description of the purpose and need of the proposed action, and, in the case of a proposed facility, a description of the infrastructure needs of such facility, including, but not limited to, parking, water supply, wastewater treatment and the square footage of the facility; (2) the environmental consequences of the proposed action, including cumulative, direct and indirect effects which might result during and subsequent to the proposed action; (3) any adverse environmental effects which cannot be avoided and irreversible and irretrievable commitments of resources should the proposal be implemented; (4) alternatives to the proposed action, including the alternative of not proceeding with the proposed action and, in the case of a proposed facility, a list of all the sites controlled by or reasonably available to the sponsoring agency that would meet the stated purpose of such facility; (5) an evaluation of the proposed action's consistency and each alternative's consistency with the state plan of conservation and development, an evaluation of each alternative including, to the extent practicable, in terms of whether it avoids, minimizes or mitigates environmental impacts, and, where appropriate, detailed mitigation measures proposed to minimize environmental impacts, including, but not limited to, where appropriate, a site plan; (6) an analysis of the short term and long term economic, social and environmental costs and benefits of the proposed action; (7) the effect of the proposed action on the use and conservation of energy resources; and (8) a

description of the effects of the proposed action on sacred sites or archaeological sites of state or national importance. In the case of an action which affects existing housing, the evaluation shall also contain a detailed statement analyzing (A) housing consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action by income group as defined in section 8-37aa and by race, and (B) the consistency of the housing consequences with the long-range state housing plan adopted under section 8-37t. As used in this section, "sacred sites" and "archaeological sites" shall have the same meaning as in section 10-381.

(d)(1) The Council on Environmental Quality shall publish a document at least once a month to be called the Environmental Monitor which shall include any notices the council receives pursuant to sections 22a-1b to 22a-1i, inclusive, and shall include notice of the opportunity to petition for a public scoping meeting. Filings of such notices received by five o'clock p.m. on the first day of each month shall be published in the Environmental Monitor that is issued not later than ten days thereafter.

(2) The Council on Environmental Quality shall post the Environmental Monitor on its Internet site and distribute a subscription or a copy of the Environmental Monitor by electronic mail to any state agency, municipality or person upon request. The council shall also provide the Environmental Monitor to the clerk of each municipality for posting in its town hall.

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**Sec. 22a-1c. Actions which may significantly affect the environment. Definition.** As used in sections 22a-1 to 22a-1i, inclusive, "actions which may significantly affect the environment" means individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air, historic structures and landmarks as defined in section 10-320c, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals. Such actions shall include but not be limited to new projects and programs of state agencies and new projects supported by state contracts and grants, but shall not include (1) emergency measures undertaken in response to an immediate threat to public health or safety; or (2) activities in which state agency participation is ministerial in nature, involving no exercise of discretion on the part of the state department, institution or agency.

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**Sec. 22a-1d. Review of environmental impact evaluations. Notification to municipalities and agencies.** (a) Environmental impact evaluations and a summary thereof, including any negative findings shall be submitted for comment and review to the Council on Environmental Quality, the Department of Environmental Protection, the Connecticut Historical Commission, the Office of Policy and Management, the Department of Economic and Community Development in the case of a proposed action that affects existing housing, and other appropriate agencies, and to the town clerk of each municipality affected thereby, and shall be made available to the public for inspection and comment at the same time.

The sponsoring agency shall publish forthwith a notice of the availability of its environmental impact evaluation and summary in a newspaper of general circulation in the municipality at least once a week for three consecutive weeks and in the Environmental Monitor. The sponsoring agency preparing an environmental impact evaluation shall hold a public hearing on the evaluation if twenty-five persons or an association having not less than twenty-five persons requests such a hearing within ten days of the publication of the notice in the Environmental Monitor.

(b) All comments received by the sponsoring agency and the sponsoring agency's responses to such comments shall be forwarded to the Secretary of the Office of Policy and Management.

(c) All comments so forwarded to the Secretary of the Office of Policy and Management shall be available for public inspection.

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**Sec. 22a-1e. Review and determination by Office of Policy and Management.** The Office of Policy and Management shall review all environmental impact evaluations together with the comments and responses thereon, and shall make a written determination as to whether such evaluation satisfies the requirements of this part and regulations adopted pursuant thereto, which determination shall be made public and forwarded to the agency, department or institution preparing such evaluation. Such determination may require the revision of any evaluation found to be inadequate. Any member of the Office of Policy and Management which has prepared an evaluation and submitted it for review shall not participate in the decision of the office on such evaluation. The



sponsoring agency shall take into account all public and agency comments when making its final decision on the proposed action.

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**Sec. 22a-1f. Exceptions.** (a) Environmental impact evaluations need not be prepared for projects for which environmental statements have previously been prepared pursuant to other state or federal laws or regulations, provided all such statements shall be considered and reviewed as if they were prepared under sections 22a-1a to 22a-1f, inclusive.

(b) Environmental impact evaluations shall not be required for the Connecticut Juvenile Training School project, as defined in subsection (1) of section 4b-55, and the extension of such project otherwise known as the Connecticut River Interceptor Sewer Project, or a project, as defined in subdivision (16) of section 10a-109c, which involves the conversion of an existing structure for educational rather than office or commercial use.

(c) A constituent unit of the state system of higher education may provide for environmental impact evaluations for any priority higher education facility project, as defined in subsection (f) of section 4b-55, or for any higher education project involving an expenditure of not more than two million dollars, by (1) reviewing and filing the evaluation for such project with the Office of Policy and Management for its review pursuant to section 22a-1e, or (2) including such project in a cumulative environmental impact evaluation approved by the Office of Policy and Management.

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**Sec. 22a-1g. Regulations.** Within six months of October 1, 1977, the Commissioner of Environmental Protection shall adopt regulations to implement the provisions of sections 22a-1a to 22a-1f, inclusive. Such regulations shall include: (1) Specific criteria for determining whether or not a proposed action may significantly affect the environment; (2) provision for enumerating actions or classes of actions which are subject to the requirements of this part; (3) guidelines for the preparation of environmental impact evaluations, including the content, scope and form of the evaluations and the environmental, social and economic factors to be considered in such evaluations; and (4) procedures for timely and thorough state agency and public review and comment on all environmental impact evaluations required by this part and for such other matters as may be needed to assure effective public participation and efficient implementations of this part.

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**Sec. 22a-1h. Environmental impact evaluations.** Until the adoption of regulations in accordance with the provisions of section 22a-1g, each state agency, department and institution shall prepare environmental impact evaluations in accordance with sections 22a-1b, 22a-1c and 22a-1d.

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**Sec. 22a-1i. Environmental contamination risk assessment by Department of Public Health.** (a) For the purposes of this section, the following terms shall have the following meanings unless the context clearly denotes otherwise:



(1) "Dose-response assessment" means the quantitative determination of the potency of the toxic agent under study and the incidence of biological effects and disease in humans and biological models.

(2) "Exposure assessment" means the determination of what exposures to the toxic agent under study are anticipated or experienced by the population under study.

(3) "Hazard identification" means the quantitative determination of whether the toxic agent under study can cause adverse effects in individuals or populations under study.

(4) "Risk assessment" means the use of various databases to estimate the human health effects of exposure of individuals or populations to various hazardous substances and situations. The risk assessment process includes, but is not limited to, hazard identification, dose response assessment, exposure assessment and risk characterization. Risk assessment shall not include normal day-to-day activities conducted by state agencies mandated under federal or state laws or regulations. Specifically, activities such as environmental permitting shall not be considered to constitute a risk assessment activity, unless otherwise defined as such in state or federal regulation.

(5) "Risk characterization" means the determination of the estimated population incidence of the adverse effect anticipated following exposure to the toxic agent under study.

(b) The Department of Public Health shall be the lead agency responsible for the risk assessment of human health regarding toxic substances identified in all environmental

media, including, but not limited to, food, drinking water, soil and air.

(c) Risk assessments shall be conducted or reviewed by the Department of Public Health after the need for such risk assessments has been established by the state agency responsible for regulation of the given contamination. Such decisions on the need for risk assessments shall be made in consultation with the Department of Public Health. Nothing contained in this section shall hinder or dictate the authority of any state agency to decide when a risk assessment is required.

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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

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The Respondents have staked out a clear position: "public use" has no substantive meaning. Resp. Br. at 12, 16-18.[1] This novel proposition goes against the most basic rules of constitutional interpretation, as well as every public use case ever decided by this Court. In keeping with their theory that "public use" is just a little spare verbiage, Respondents and their amici offer not one example of a taking that might actually violate the public use requirement.[2] Once it is admitted that private profit and ordinary private land use constitute public use, the idea of private use just doesn't make sense any more.

## I. PUBLIC USE ACTUALLY MEANS SOMETHING

This Court's analysis proceeds from the unremarkable proposition that the words in the Constitution are presumed to have meaning. *See, e.g., Wright v. U.S.*, 302 U.S. 583, 588 (1938) ("Every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." (quoting *Holmes v. Jennison*, 14 Pet. 540, 570-71 (1840)). Thus, without overwhelming evidence to the contrary, "public use," too, must have a unique meaning in the constitutional text. It must mean something other than ordinary private use. Pet. Br. 28-29. On some fundamental, bedrock level the examination of the meaning of the English term "public use" must inquire into the actual use to be made of the taken property, and the extent, if any, to which such use is something that society associates with government activities, not just private profits. Respondents' retort to the rather obvious

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[1] Citations appear as follows: Respondents' brief – Resp. Br.; Petitioners' merits brief – Pet. Br.; Petitioners' certiorari petition – Pet. Cert.; Appendix to the cert. petition – Pet. App.; Joint Appendix – J.A.; amicus briefs – Br. AC; and trial transcript – Tr.

[2] Indeed, amicus American Planning Ass'n (APA) simply admits that the only way to violate the public use requirement would be to condemn without statutory authorization. Br. AC APA at 24-25. Thus, as long as a statute exists, and it is followed, nothing more is required. This turns the idea of *constitutional* protection on its head.

existence of "public use" in the text of the Constitution is a misinterpretation of history and an attempt to draw nonexistent implications from this Court's decisions.

Respondents contend that colonial history allowed the condemnation of property for private use, and thus public use must have included those colonial practices. Resp. Br. at 29-30. A glance at the sources cited by Respondents, however, reveals that colonial governments did not in fact condemn land for private development. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1260-65 (1996); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Envtl. L. 1, 2, 14-15 (1980); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 205-208 (1978). Regulation was common, and there were requirements appropriate to a new land being settled. *See* Hart, 109 Harv. L. Rev. at 1260-1280, 1283. There were limited takings for roads and riparian rights. *See* Meidinger, 11 Envtl. L. at 2, 14-15; Berger, 57 Or. L. Rev. at 205-208. But there was nothing that would undermine the meaning of public use.

Respondents also point to the existence of post-colonial Mill Acts that allowed condemnation of property for manufacturing mills. Resp. Br. at 30-32. Eighteenth century condemnations for grist mills were akin to public utilities, because the mills ground grain for the public. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885). Later Mill Acts often encompassed condemnations for manufacturing mills that were not open to the public, and Respondents cite various cases upholding such acts, while omitting the cases and legislative decisions rejecting such acts or requiring that the mills provide services to the public, often under regulated pricing.[3] The post-colonial history of state

[3] *See, e.g., Sadler v. Langham*, 34 Ala. 311 (1859); John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. Legal Stud. 455, 469-71 (1998); *Loughbridge v. Harris*, 42 Ga. 500 (1871); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 584-85 (1903); *Jordan v. Woodward*, 40 Me. 317 (1855); *Ryerson v.*

(Continued on following page)



Mill Acts is too divided (and too late) to provide solid evidence of the original meaning of public use.

That conclusion is bolstered by this Court's decision in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). *Head* involved New Hampshire's General Mill Act – a type of legislation that did not exist when the Fifth Amendment was ratified. Although the plaintiffs had not raised a public use challenge, this Court went out of its way to point out that it was *not* holding that general benefit to the community constituted a public use. *Head*, 113 U.S. at 20-21. Instead, it interpreted the act as a regulation of the interests of competing riparian landowners and thus well within the normal scope of government activities.

Respondents also disingenuously cite to the opinions in both *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) and *Eastern Enter. v. Apfel*, 524 U.S. 498, 545, 554 (1998) as supporting their position that the Takings Clause is really only a "just compensation" clause, with no public use guarantee. In both cases, the owner challenged the lack of compensation (and deprivation of due process in *Eastern Enter.*), not lack of public use, *see* 483 U.S. at 834; 524 U.S. at 517-19, so it is hardly surprising that compensation was the focus of the Court's comments.

## II. THESE CONDEMNATIONS ARE NOT FOR PUBLIC USE

As described in the following sections, a potential increase in tax revenues and jobs is not a "public use" within the meaning of the Fifth Amendment. Even if this Court were to conclude that economic development could be a "public use," economic development condemnations are notably less "public" than conventional condemnations

*Brown*, 35 Mich. 333 (1877); An Act for the Regulating of Millers in their taking of Tole (May 3, 1726), in *Acts and Laws of the Colony of Rhode-Island* at 142 (1730); An Act for regulating the making of Dams or banks for reserving water, where the same may affect the propertys of other persons (May 29, 1744), in 3 *The Statutes at Large of South Carolina* at 609 (Thomas Cooper, ed., 1838); *Harding v. Goodlett*, 11 Tenn. 41 (Tenn. Err. & App. 1832); *Tyler v. Beacher*, 44 Vt. 648 (1871).

and should be subjected to closer scrutiny. In their opening brief, Petitioners actually presented four different ways that this Court could rule in their favor: (1) trickle-down benefits are not a public use; (2) a condemnation that lacks a reasonably foreseeable use is not a public use; (3) economic development projects particularly need safeguards and minimum standards to ensure public use; and (4) the Connecticut dissent's test. The first two of these do not even require enhanced judicial scrutiny, while the second two do. However, Petitioners would prevail under any of these analyses. In this reply brief, Petitioners address only the first three of these alternatives, as those were the ones addressed by the Respondents.

### A. The Use Of Eminent Domain To Gain The Trickle-Down Benefits Of Ordinary Business Violates The Constitution.

The declared purpose of the condemnations at issue in this case is the generation by private parties of "economic development" – increased tax revenues and more jobs.[4] Petitioners have used the descriptor "economic development" condemnations to distinguish those condemnations from redevelopment condemnations, and because that seems to be the most common shorthand used by courts. However, this is somewhat of a misnomer. "Economic development" can refer to any number of programs, activities, and projects. The question is not whether "economic development" as a concept can be a public use. The issue instead is whether the trickle-down,

[4] The NLDC brought its condemnation actions pursuant to Conn. Gen. Stat. Chapter 132, §§ 8-186, *et seq.*, which governs takings for economic development, specifically authorizing eminent domain "to meet the needs of industry and business." Pet. App. 429. Perhaps hoping to add a more public flavor to this case, Respondents point to several "non-economic benefits" that it suggests also may be considered by this Court as purposes for public use. Resp. Br. at 42. Respondents chose the statutes to proceed under years ago and filed their condemnations accordingly. *See* J.A. 6 (condemnation action brought under Chapter 132), and it is four years too late for Respondents to add new purposes now.



consequential "benefits" of ordinary business activities can be called public uses. Respondents point out that Petitioners admit that ordinary businesses often do produce some diffuse benefit to others. Resp. Br. at 23 n.11. Of course they do. In fact, Petitioners admit that any lawful private use of real property can be characterized as having some positive side-effects or incidental public or social benefit. But Petitioners' point, apparently missed by Respondents, is that if such social "benefits" of ordinary business become public uses within the meaning of the Fifth Amendment, then all private lawful uses of land become public uses, thus rendering "public use" absolutely meaningless.[5]

In their opening brief, Petitioners explain why this Court should reject the idea that the tax revenues and jobs that come from ordinary business activity constitute a public use. Pet. Br. 12-17. The recent Michigan Supreme Court decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) gives a good, recent explanation of what types of activities constitute public uses and why "economic development" does not. Pet. Br. 18-27. Respondents claim that this Court should discount the *Hathcock* framework, because Michigan uses a different technique of

[5] In terms of economic benefits, local governments already seek to condemn open, undeveloped land for industrial development in the name of taxes and jobs. *See, e.g., Merrill v. City of Manchester*, 499 A.2d 216, 238-39 (N.H. 1985). Respondents are correct that no city has yet condemned a church for Wal-Mart, *see* Resp. Br. at 36-37. They've done it for Costco instead. *See* Pet. Br. at 16; *see also* Br. AC Becket Fund at 4-11 (giving many examples of condemnation of religious and nonprofit institutions for higher tax uses). There are also trickle-down noneconomic benefits. For example, a local government could condemn small independent stores for large chain stores in the name of economic development. A few years later, it could condemn the chain stores in favor of small independent stores, because those have the secondary effect of promoting a greater sense of community. Government already promotes health and fitness, so a city could condemn an apartment building for a private health club. If side effects of ordinary private land uses become public uses under the Fifth Amendment, then all of these would be perfectly constitutional.

constitutional interpretation. In particular, Respondents claim that because Michigan has historically distinguished between "public use" and "public purpose," the *Hathcock* opinion makes a poor model for federal law. Resp. Br. at 33 n.11. Yet Michigan does not require literal use by the public, any more than federal courts do. 684 N.W.2d at 781. The *Hathcock* framework works just as well in categorizing this Court's cases as it does with Michigan cases. Pet. Br. 21-26.[6] Or, as the author of the professors' amicus brief for Respondents put it, "the *Hathcock* Court's three-part categorization of public purpose may prove to be highly effective in establishing new parameters for the field." Robert H. Freilich & Robin A. Kramer, *Condemnation for Economic Development Violates Public Use Clause: The Michigan Supreme Court Overturns Historic* Poletown *Decision*, 27 Zoning & Plan. L. Rep. 1 (2004).

[6] Respondents characterize several decisions of this Court as supporting their theory that eminent domain can be used for private development. Resp. Br. at 27-28. However, these cases, too, fit neatly into the three *Hathcock* categories. The IOLTA funds in *Brown v. Legal Foundation*, 538 U.S. 216, 239-40 (2002) are classic examples of a public benefit "whose very *existence* depends" on a government program. *See Hathcock*, 684 N.W.2d at 781 (emphasis added). The railroad in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) involved the transfer of something everyone agrees is a public use – railroad tracks – in one of the mostly highly regulated industries in the country. *See id.* at 411-14 (passenger service had halted due to poor track maintenance; ICC agreed with Amtrak that change in ownership was needed to ensure continuing maintenance). Finally, the pesticide testing information in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), too, falls into the category of heavily regulated industry, and of course the whole area of pesticides has significant public health implications. *See id.* at 992 (noting that FIFRA regulated the use, sale and labeling of pesticides and required that the EPA determine a pesticide would not cause "unreasonable adverse effects on the environment" before permitting its sale). *See also* 7 U.S.C. § 136a (2004). Amicus APA also suggests that several of the Court's other cases do not fit into the categories. Br. AC APA at 8. The amicus is incorrect; the tramway in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) was open to the public. The other three cases were examples of comprehensive state irrigation and water management programs.



Just as this Court could do, the *Hathcock* court identified the three broad categories of eminent domain actions that can be called public uses even though the property will be owned by private parties (necessary coordination, heavily regulated industries, and facts of independent significance).[7] What the first two categories capture is, in essence, that most uses of eminent domain have, historically, been for infrastructure – transportation, utilities, shipping, drainage. While they may be privately owned, they still are significantly more public than ordinary private business ventures. Many infrastructure projects, because of the exigencies of constructing a very large network, require public coordination. *Hathcock*, 684 N.W.2d at 781-82. Others are regulated to such a great degree that they take on a public aspect. *Id.* at 782. Infrastructure projects have a noticeably more public character than ones for private office space or, as in this case, private something or other.

The Respondents and amici suggest that the need for public coordination is just as acute with small private development projects as with infrastructure. That simply is not true. Utilities and transportation networks require hundreds if not thousands of miles of continuous strips of land. Small projects don't. (Or, as the author of the APA amicus brief put it, "shopping centers and commercial office building[] . . . projects entail relatively small amounts of land, are not strictly site-dependent, andoften generate very high gains from trade." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 81-82 (1986)). Moreover, as everyone knows, private development happens all

[7] *Hathcock* does not "freeze" its constitutional interpretation at the date of constitutional ratification. *See* Br. AC APA at 15-17. It identifies enduring principles, with reference to original meaning, just as this Court does. "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. U.S.*, 199 U.S. 437, 448 (1905), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (interpreting the Establishment Clause according to "what history reveals was the contemporaneous understanding of its guarantees").

the time, all over the country, without eminent domain. To claim public coordination is necessary and therefore justifies condemnation does not accord with reality.[8]

There is a further problem with Respondents' plea for public coordination of private development – like the rest of Respondents' argument, it has no limiting principle. All cities lack large tracts of undeveloped land, and in most cities, different people own different pieces of property near each other. Although New London is smaller than some other cities, it is comparable in size to, for example, York, PA, Cambridge, MA, Berkeley, CA, and Beverly Hills, CA, all of which are densely developed. According to Respondents' theory, that means public coordination of private development is required in all cities.[9]

Respondents also complain that blight does not fit properly in the category of "facts of independent significance" and that there is no proper distinction between condemnations for blight and for economic development. Respondents claim, oddly, that Petitioners have cited no cases holding that, in blight condemnations, it is the removal of blight that justifies the taking, not the anticipated development. *Compare* Resp. Brf. 25-26 *with* Pet. Br. 24-25 n.22 (citing cases). This concept is practically black letter law. In addition to the cases relating blight law to nuisance, state cases are replete with explanations that it is indeed the intervening event – removal of blight

[8] *See* Br. AC John Norquist at 4-26; Br. AC Goldwater Institute at 5-15. One of the books cited by a Respondent amicus, Andrew Alpern & Seymour Durst, *New York's Architectural Holdouts* (1984), also includes more than 50 examples of developers finding ways to develop in the dense urban environment of New York City, even when eminent domain was not available and some owners refused to sell.

[9] Nor would eminent domain for economic development be limited to "distressed" urban areas. Connecticut's Chapter 132 applies to the entire state, not just distressed municipalities, *see* Conn. Gen. Stat. § 8-186, and the two current examples of economic development projects given by amicus NLC both occurred in relatively rural areas. *See* Br. AC Nat'l League of Cities at 23-28.



– that constitutes the public use. *See, e.g.,, Crommett v. Portland*, 107 A.2d 841, 852 (Me. 1954); *Housing and Redev. Auth.v. Greenman*, 96 N.W.2d 673, 680 (Minn. 1959).

And in fact courts from states with judicial decisions forbidding condemnation for economic development have had no trouble distinguishing between economic development condemnations and blight condemnations.[10] All of the state cases holding that economic development is not a public use explicitly distinguish blight. Pet. Cert. Br. at 13-14 (citing cases); *see also, e.g., Sweetwater Valley Civic Ass'n v. City of Nat'l City*, 555 P.2d 1099, 1103 (Cal. 1976) ("it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses").

Respondents' confusion between blight and economic development condemnations also accounts for their claim that courts should look at the overall benefits of the entire project, rather than what will replace the condemned property. Resp. Brf. at 22-28. In nearly all public use cases, this Court has looked at what will be taken and what will replace it. *See, e.g., United States v. Carmack*, 329 U.S. 230, 246 (1946) (land to be replaced by U.S. Post Office); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 608 (1908) (land to be replaced by spur track and storage). The exception to that rule has been blight condemnations. That distinction makes sense, because in blight condemnations, the public use is

[10] Respondents also assert that *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) is not solely about oligopoly and that the statute in *Berman v. Parker*, 348 U.S. 26 (1954) seemed to have purposes other than blight elimination. Resp. Br. at 26-27. Again, Respondents have missed the point. In *Midkiff*, the purpose was breaking up oligarchic land ownership. To do so, it was necessary to have a program that ensured more diverse ownership. The existence of such a program furthered the purpose rather than, as Respondents claim, demonstrating another purpose. In *Berman*, too, the blight clearance and redevelopment took place pursuant to a redevelopment plan, but the controlling purpose of the condemnations was the removal of blight. *See Berman*, 348 U.S. at 28-29 (quoting sections two and four of authorizing act).

the removal of the blighted area, not what is built on the land afterward.

### B. Even If This Court Finds That Trickle-Down Benefits Can, Facially, Be A Public Use, These Condemnations Are Still Not For Public Use.

As Petitioners point out in their opening brief, this Court could find that there is no reasonably foreseeable future use of the property, and that alone would be a basis for reversal. Alternatively, Petitioners have proposed a test that draws from existing state case law and requires that the achievement of the public benefits be reasonably certain by looking at contracts and other documents.

#### 1. These condemnations lack any reasonably foreseeable use.

The requirement of a reasonably foreseeable use for condemned property is an established doctrine within eminent domain law. The doctrine was acknowledged and discussed with approval in this Court's decision in *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930), and appears in many state court decisions as well. Pet. Br. 38-39. Respondents make no real attempt to discredit this doctrine. They fail to even comment on the wealth of state case law and try to dismiss *Vester* as only a statutory case, even though it was explicitly informed by constitutional considerations. But, as Petitioners explain in their opening brief, the lack of reasonable foreseeability becomes especially acute in economic development cases like this one. Pet. Br. 36-40. Although reasonable foreseeability follows a distinct line of caselaw, it is also possible to treat it as another form of "rational basis" analysis. Without having a reasonably foreseeable use, it is impossible to say if the use is rationally related to a legitimate government interest.

Respondents claim that the future use of these properties is reasonably foreseeable, but on this matter the facts are completely against them. Petitioners already have detailed some of these facts in their opening brief. Pet. Br. 40-42. Respondents, however, claim that the office



construction on Parcel 3 is reasonably foreseeable because (1) the development plan estimated a need for the space in ten years and (2) the marketing study from the developer also indicated a need for office space. Resp. Br. at 45-46. As to the first point, reasonable foreseeability, like just compensation, is evaluated at the time of condemnation.[11] The evidence at the time of the condemnation, including the marketing study and witness testimony, showed that the new office building on Parcel 3 was not feasible and would not occur unless the market changed. Pet. App. 177-86. Respondents' quotations from the study supposedly showing plans for the office building were actually referring to the renovation of an existing building, "Building 2," on Parcel 1 (no homes are located on Parcel 1) and not to the potential for a building on Parcel 3.[12]

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[11] *See, e.g., United States v. Reynolds*, 397 U.S. 14, 16-17 (1970) (evaluating value on date of condemnation); *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 465 (7th Cir. 2002) ("Much like the value of the property taken, 'public use' is to be determined at the time of the taking."); *Heirs of Guerra v. United States*, 207 F.3d 763, 767 (5th Cir. 2000) ("A condemnation is valid if, at the time of the taking, the government's exercise of eminent domain served a valid statutory purpose."); *Blanchard v. Department of Transp.*, 798 A.2d 1119, 1126 (Me. 2002) ("The use must also be public at the time of the taking."); *cf. Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) ("It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation.").

[12] Respondents berate Petitioners for not addressing the marketing study's finding that "rental rate and occupancy trends have been generally positive." Resp. Brf. at 45. The full sentence reads "While rental rate and occupancy trends have been generally positive over the past few years, *market values are still well below replacement cost and new construction is generally not feasible.*" J.A. 38 (emphasis added); *see also* J.A. 47 ("The program for the future phases [of office space after the renovation of the existing building] is uncertain"); J.A. 50 ("Considering market conditions . . . new construction of office and/or biotech/bioscience space is not feasible at this time"); J.A. 64 (in Conclusions section, "While new office construction is not feasible at this time, as evidenced by the inability of Shaw's Cove 7 & 8 and Mystic Executive Park to get off the ground," the renovation of the existing Building 2 is still feasible); J.A. 64 (in Conclusions section, "market conditions do not justify construction of

(Continued on following page)

Respondents simply misread the document.[13]

Regarding the unknown use on Parcel 4A, Respondents' explanation becomes even more floundering. Although they say that it is a small area of land near a park and marina and thus it can logically be used for park support, they also do not say in their brief what use is intended. It may be logical, but they just don't know what it is. Nor did the witnesses who were questioned about it. *See* Pet. App. 345-49. In fact, to the extent that they suggest that it will be used for something related to the existing park, that interpretation is contradicted by the admission that it could also be used as a museum. Resp. Br. at 46 n.24. In short, Respondents had no idea what they were going to do with the homes at the time they condemned the property in 2000, and they apparently still have no idea.

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new commercial space at Fort Trumbull on a speculative basis"). The timeline, Respondents say, shows that the office space could already have been constructed is not very legible, but it can be seen that it lists only the renovation of Building 2 and does not even include new office construction. *See* J.A. 73. The discussion of marketing efforts similarly refers only to Building 2. *See* J.A. 72-76. Respondents' accusation that this litigation has prevented the completion of the project is also utterly unsupported. The developer has had full control of the land slated for the hotel, upscale residential, and commercial renovation, all of which were scheduled to occur long before any development on the property at issue in this lawsuit. *See* J.A. 73.

[13] Respondents' brief contains a number of such factual mistakes. It lists owner-occupied homes but omits the Guretsky family, who also live in their home. *Compare* Resp. Br. 7 *with* Tr. Vol. I, at 84. It claims that William Von Winkle and Pataya Construction own "almost half" of the properties, although together they own five out of the 15 homes. *Compare* Resp. Br. 7 *with* J.A. 3. It also characterizes Von Winkle as an "absentee landlord," although he works on the property, lived in New London at the time of the trial, and has actually lived in one of the condemned homes for the last year. *See* Tr. Vol. I, at 97, 100. They also claim that the state has earmarked $10 million in relocation assistance but fail to note that these are only funds available for relocation *loans to all displaced residents in Connecticut*. *Compare* Resp. Br. 7 *with* Conn. Gen. Stat. § 8-336 (2004).



**2. These condemnations lack any minimum standards for realization of the purported public benefits.**

In their opening brief, Petitioners explain that economic development condemnations deserve enhanced judicial scrutiny in the form of minimum standards for future public benefits, drawing from a body of state case-law as well as the application of higher scrutiny in past cases of this Court.[14] Pet. Br. at 43-46. For reasons that are unclear, both Respondents and amici characterize Petitioners' argument as an attempt to apply the *Nollan/Dolan* "rough proportionality" standard. *See Dolan v. City of Tigard*, 512 U.S. 374, 398 (1994); Resp. Br. at 39-40; Br. AC APA at 20-22. Petitioners made no such argument, and "rough proportionality" has no direct applicability to public use or reasonable certainty. Instead, Petitioners believe that enhanced scrutiny is appropriate where a particular activity creates higher constitutional risk.[15] Pet. Br. 30-36. The Court has used this method in various circumstances. Exactions are one example but by no means the only one. *See, e.g.*, *Eastern Enter. v. Apfel*, 524 U.S. 498, 532-35 (1998) (retroactive legislation disfavored and thus requires close examination); *Payton v. New York*, 445 U.S. 573, 586-87 (1980) (warrantless seizures presumptively reasonable in public places and presumptively unreasonable in home); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 57-60 (1988) (discretion in licensing decisions raise unique threat to First Amendment freedoms, thus subject to greater scrutiny and facial challenge); *Miranda v. Arizona*,

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[14] Respondents claim that Petitioners cited only one case but apparently missed the seven case examples from this Court on the next page. *Compare* Resp. Br. at 40 *with* Pet. Br. 31 n.29. In addition to the other state cases cited, *Opinion of the Justices*, 250 N.E.2d 547, 558-68 (Mass. 1969) discusses the need for "adequate principles, standards, and safeguards" in statutes and contracts.

[15] Thomas Merrill, who authored the brief for the American Planning Association, similarly endorsed heightened scrutiny in the case of private beneficiary takings with high "subjective losses" like in this case. *See also*, Merrill, *supra*, 72 Cornell L. Rev. at 85-88.

384 U.S. 436, 477-78 (1966) (Miranda warnings required in custodial interrogations due to threat of intimidation and coercion, but not required in noncustodial interrogations where same level of threat is not present).[16]

In their opening brief, Petitioners explain why economic development condemnations differ so much from other, more traditional, types of condemnations. Pet. Br. at 18. Respondents haven't even bothered to deny these points, apparently conceding that such condemnations are more likely to lack immediate benefits or reasonably foreseeable uses; that the public benefits, if they occur, are not accomplished by the condemnor but by third parties; and that they are in general riskier entrepreneurial ventures. *See also* Br. AC Nat'l Farm Bureau at 16-23.

Respondents' main objection to Petitioners' specific suggestion of a reasonable certainty test is that they believe it requires economic predictions that courts are ill-suited to make. Resp. Br. at 38-39. Yet Petitioners' test does not require courts to make any such predictions. Instead, it requires courts to look at contracts, statutes, and other documents that courts routinely examine to determine if they set guarantees and standards that provide a reasonable certainty of the benefits used to justify the condemnation. Pet. Br. 43-46.[17]

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[16] The Connecticut Supreme Court dissent took a similar approach. It concluded that *Midkiff* required deference to the facial validity of the statute – in this case, the Connecticut legislative finding that economic development could be a public use for purposes of eminent domain. However, the dissent then also concluded that because such condemnations posed greater constitutional risks than other condemnations, the individualized, as-applied decisions of whether particular condemnations were for public use should receive greater scrutiny. *See* Pet. App. 148-55, 160-61.

[17] Respondents suggest that, because private development projects fall generally in the sphere of economic policy, this Court should not inquire further. Again, a minimal standards test does not require economic judgments, but this Court also need not accept Respondents' assumption that "public use" and "substantive due process" are identical. Unlike the "vague contours" of substantive due process, *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), public use is an explicit and specific provision of the Constitution. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 850

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Respondents' final objection is that even if this Court adopted Petitioners' reasonable certainty test, the homeowners should still lose. Resp. Br. at 41. But Respondents' comments have little if anything to do with the test that Petitioners discuss. Respondents point to state statutes that require certain development plan procedures and environmental studies, but none of the statutes have any actual requirements or standards for the creation of economic development or production of public benefit. Resp. Br. at 43-44. Respondents also point to the supposed oversight of the project by a state funding agency, presumably on the theory that the state agency will make sure everything works out well in the future. But oversight without standards means nothing. Minimum standards "might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value." Pet. App. 188 n.28. Here, there is "no development agreement, no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives . . . , and no indication of possible penalties if developers do not perform as required." Pet. App. 183; *see also Opinion of the Justices*, 250 N.E.2d 547, 560 (Mass. 1969) ("[i]n the absence of adequate statutory guidance and standards . . . and of clear provision for reasonable review of

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(1998) (due process is a "less rigid and more fluid" concept than other provisions of the Bill of Rights). In *United States v. Carolene Products*, 304 U.S. 144, 152-53 (1938), this Court first identified varying levels of scrutiny, including rational basis scrutiny for some unenumerated liberty and property interests. However, even *Carolene Products* notes that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 153 n.4. "Public use" is just such a specific prohibition.

compliance with appropriate standards" the project was not for public use). Reasonable certainty comes from guidelines, contracts, and requirements, not from a promise that someone else will figure it out later.[18]

## III. THIS COURT SHOULD GIVE GUIDANCE TO THE STATES ON THIS IMPORTANT FEDERAL CONSTITUTIONAL QUESTION

Respondents and amici assert that the protection of property from takings for private use should be left to the states. They suggest that federal law is not needed, that it will encourage a rush to federal courts, that state courts are curbing any abuses that might occur, and that in any event, abuses will be solved by the democratic process. Resp. Br. at 36-38; Br. AC APA at 12-13. Each of these contentions is deeply mistaken.

The public use requirement is part of the U.S. Constitution, as well as state constitutions. The U.S. Constitution and this Court set the baseline, the floor beneath which private takings may not sink. And in practice, once this Court sets a standard, especially in the public use context, the states follow its guidance. Thirty-three state supreme courts cited *Berman* in approving urban renewal as a public use.[19] If this Court rules in favor of unrestrained takings for private businesses and the trickle-down benefits that flow from them, it can expect state courts quickly to follow suit. The author of the professors' amicus brief for

[18] The only actual written requirement of any kind that Respondents point out is the requirement that property will be devoted "principally" to the uses in the plan and "in accordance" with the plan. Resp. Br. at 44. That language is no guarantee of anything. For Parcel 4A, as the development plan shows no use for the land, an agreement to follow the plan is meaningless. For Parcel 3, the plan language provides no guarantee that the developer will actually build anything at all. At the time of the condemnation, there was no agreement, no timeline for construction, no standards, and no penalty for nonperformance.

[19] *See, e.g.*, *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986); *Levin v. Township Comm. of Bridgewater Township*, 274 A.2d 1, 19-20, 23 (N.J. 1971); *Lindauer v. Okla. City Urban Renewal Auth.*, 496 P.2d 1174, 1176 (Okla. 1972).



Respondents characterized the results of *Poletown* as "catastrophic." *See* Freilich, *supra*, 27 Zoning & Plan. L. Rep. at 1, 3. The Connecticut Supreme Court adopted a standard even more sweeping than *Poletown*, *see* Pet. App. 43-45, and a ruling in favor of Respondents in this case will subject the entire country to such catastrophic impacts.

Amici also argue that if this Court enforces the public use clause, there will be a rush of claimants into federal court as a result. *See, e.g.*, Br. AC APA at 13, 18. This argument is unjustified. First, eminent domain litigation almost always begins when the state files a condemnation complaint in state court, which effectively selects the initial forum. *See, e.g.*, Ala. Code § 18-1A-71 (2004); Mich. Comp. Laws § 213.52 (2004). Second, condemnees usually raise state claims better suited to state court litigation as well as constitutional claims. For example, the homeowners in this case raised several claims requiring the construction of state statutes. *See* Pet. App. 192-93. While state courts are fully capable of hearing claims under state law and the U.S. Constitution, federal courts are usually reluctant to hear cases with predominantly state claims. And federal courts can always abstain if there is an ongoing state condemnation action.

Respondents and amici would have the Court believe that any abusive takings for economic development are being taken care of by state courts. The problems with this analysis are manifest. As discussed in Petitioners' original petition, the states vary widely in their treatment of public use and thus also vary widely in their protection of individual rights. Pet. Cert. 12-14. If this Court declines to place any limits on condemnations for private use, state courts will be much less likely to put a check on abuses. Moreover, any abuses against people of modest means, minorities, and the politically powerless also will rarely make it to court.[20] *See* Br. AC NAACP at 7-12; Br. AC

[20] The Respondents' claim that the political process will remedy any abuses is fatally disconnected from the real world. *See* Resp. Br. at 35-37. Not only are targeted landowners often, as here, individuals or small groups with limited resources and little political clout, but they are often up

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Better Government Ass'n at 18-20. Similarly, homeowners can rarely afford litigation, which is why nearly all appellate public use cases involve businesses. Homeowner cases, when they are brought at all, usually involve pro bono or public interest representation.

## IV. PETITIONERS ARE ASKING FOR A LIMITED RESTRICTION ON THE USE OF EMINENT DOMAIN FOR PRIVATE BUSINESS, WHILE RESPONDENTS SEEK UNLIMITED POWERS

Petitioners' standard is not a high one. "Public use" cannot mean simply the ordinary, incidental "benefits" of the ordinary private use of property. Alternatively, when taking for economic development, condemnors should have a use for property and minimal standards for the achievement of the benefits justifying the condemnation. Nor will a ruling in favor of the homeowners work a radical change either on jurisprudence or private development in this country. Courts in only six states currently hold that eminent domain may be used for economic development. Pet. Cert. at 12. This Court has never ruled on the issue. Meanwhile, private development continues apace throughout the country. Respondents and their amici produced no evidence that any of the seven states with judicial decisions forbidding eminent domain for economic development, or any of the states that lack statutory authorization for such condemnations, have suffered any negative consequences or lack of development.

Respondents, of course, claim that development as we know it will grind to a halt. Yet despite all the huffing and puffing, Respondents and amici were able to come up with only a handful of successful economic development projects

against elected officials backed by well-funded interests seeking to develop their land for corporate profit. Moreover, in economic development condemnations, the success or failure of the project lies many years in the future, probably long after every politician involved has left office. As Justice Marshall noted in dissent in *Vance v. Bradley*, 440 U.S. 93, 114 n.1 (1979), "the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard."



that involved eminent domain. Of the twenty-some projects discussed by amici, which they insist required the use of eminent domain for economic development, nearly all were condemnations in blighted or damaged areas.[21] Of the

[21] Br. AC Nat'l League of Cities et al. at 20, n.23, 22: Susanna Baird, *Don't Dump on Us: 20 Years of Activism for Dudley Group*, Boston Globe, Nov. 7, 2003, at 3 (prior to development, much of Boston's Dudley Street had become an illegal dumping ground for car parts and construction debris); *Estes Park, Colorado Rises to the Challenges of the Next Century*, Nation's Cities Weekly, vol. 16, n.8, Feb. 22, 1993, at 5 (Riverside plaza was developed after a devastating flood that "damaged or destroyed nearly all of the retail businesses"). Br. AC MA Chapter of Nat'l Ass'n of Indus. and Office Properties: Press Release, Mayor Menino, "Chinatown Community Cut Ribbon for the Metropolitan," (Aug. 16, 2004) (Metropolitan Building development in "an area dominated by vacant buildings and a surface parking lot"); http://www.mccahome.com/default.aspx (Boston Convention Center owned and operated by public agency). Neither Colorado nor Massachusetts have statutes that permit condemnation of nonblighted areas. *See Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc.*, 85 P.3d 1066, 1069-71 (Colo. 2004); Mass. Gen. Laws ch. 121C §§ 1, 2. Br. AC California Redevelopment Association at 8-9: As California's law requires that area be blighted, the inability to condemn for economic development alone will not affect California. *See Sweetwater Valley Civic Ass'n. v. City of Nat'l City*, 18 Cal. 3d 270, 277-78 (1976). Br. AC City of New York: *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 268, 274 (1958) (Lincoln Center area "substandard and insanitary"); *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (noting the characteristics of Times Square that led to the city's declaration of its blighted state); Br. AC City of New York at 15 (in Brooklyn Metrotech development, "half of the buildings in the area were deemed to be in either 'poor' or 'bad' condition"). Br. AC Mayor and City of Baltimore: The brief itself describes the Inner Harbor as "blighted and unhealthful." *See id.* at 5, 8, 11 & 16-17. Br. AC Conn. Conf. Municipalities: Jim Roberts, *Bridgeport Studying Plans to Develop Industrial Space*, Fairfield County Bus. J., Aug. 21, 1995, at 3 (Bridgeport West End development in area that was "an eyesore"); News Release, Conn. Dep't of Econ. & Cmty. Dev., *North Colony Colony Street Industrial Park in Meriden Wins National Development Award*, Aug. 7, 2001 (Meriden project in abandoned industrial area containing environmentally hazardous substances); Jo Fleischer, *Lacey Manufacturing to Expand into New Quarters in Bridgeport*, Fairfield County Bus. J., Dec. 26, 1994 at 5 (Barnum Street project in "heavily blighted" area); Angela Carter, *City Plans River Street*

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two or three actual "economic development" projects, one, the Mississippi Nissan plant, proceeded without eminent domain. *See, e.g,* Nikki Burns, *Agreement Reached Between State, Black Landowners*, The Mississippi Link, April 17, 2002, at 1 (plant developed without homes when family refused to sell).

A ruling in favor of the homeowners will not disturb the general course of development throughout the country. On the other hand, a ruling in favor of the Respondents will change the law dramatically for home and business owners. Every home and every business, everywhere in the country, will be subject to condemnation if a local government prefers some other private party's use of the property. Or, as counsel for the NLDC put it recently, "We need to get housing at the upper end, for people like the Pfizer employees. . . . They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city – the young urban professionals who will invest in New London, put their kids in school, and think of this as a place to stay for 20 or 30 years." Iver Peterson, *There Goes the Old Neighborhood, to Revitalization*, The New York Times, Jan. 30, 2005, at A25. The condemnations in this case are an act of raw preference for one type of people, one type of housing, and higher tax dollars over the current residents. Cities may seek wealthy residents and higher taxes, but they cannot do so at the expense of constitutional rights. The ruling of the Connecticut Supreme Court paves the way for increasing use of eminent domain for private development. This Court should resist Respondents' urging to read public use out of the Constitution and thereby fundamentally alter the rights of all property owners in the United States.

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*Renewal*, New Haven Register, June 6, 2001 at A3 (New Haven project in area of "vacant and blighted" buildings); *see also Courtesy Sandwich Shop v. Port of New York Authority*, 190 N.E.2d 402, 404-06 (N.Y. 1963) (condemnations for World Trade Center authorized by traditional authority over ports in order to centralize port functions, activities, and services).

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In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA and CHARLES DERY, JAMES and LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

vs.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE FARM BUREAU FEDERATIONS OF THE FOLLOWING STATES: CALIFORNIA, CONNECTICUT, FLORIDA, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, NEW HAVEN COUNTY, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, TEXAS, UTAH, AND VIRGINIA IN SUPPORT OF PETITIONERS

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**BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION, CONNECTICUT FARM BUREAU FEDERATION, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU FEDERATION, IOWA FARM BUREAU FEDERATION, KANSAS FARM BUREAU FEDERATION, LOUISIANA FARM BUREAU FEDERATION, MICHIGAN FARM BUREAU FEDERATION, NEW HAVEN COUNTY FARM BUREAU FEDERATION, NEW JERSEY FARM BUREAU FEDERATION, NEW YORK FARM BUREAU FEDERATION, NORTH CAROLINA FARM BUREAU FEDERATION, OHIO FARM BUREAU FEDERATION, OKLAHOMA FARM BUREAU FEDERATION, PENNSYLVANIA FARM BUREAU FEDERATION, RHODE ISLAND FARM BUREAU FEDERATION, TEXAS FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, AND VIRGINIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS**

With the joint written consent of the parties filed with the Clerk of the Court, the American Farm Bureau Federation and the state farm bureau federations listed above respectfully submit this brief as *amici curiae*.[1]

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[1] Counsel for *amici curiae* authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF THE *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-for-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5.5 million member families. The state farm bureau federations appearing here as *amici curiae* are constituent members of AFBF, representing the interests of farmers and ranchers in their respective jurisdictions. Notably, they include the Connecticut Farm Bureau Federation, representing the state where this case arose.

These *amici curiae* have a direct stake in the outcome of this case. The decision of the Connecticut Supreme Court in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) allows the condemnation of private land merely because a government agency believes it can obtain greater economic benefit by having different private owners develop the land for different private uses.

The farmer and rancher members of *amici curiae* own and lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. As valuable as that land is to our members and to the rest of the country, however, it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government. Thus, each of our



members is threatened by the decision below with the loss of productive farm and ranch land solely to allow someone else to put it to a different private use — unless the decision below is reversed and Connecticut and other states are told that "public use" does not include the kind of purely economic transfer attempted by the City of New London.

In order to protect the property rights of its members, AFBF and various of its state affiliates have participated as *amici curiae* in this Court in support of landowners in recent Fifth Amendment cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002).

In recent times, various governmental agencies have experienced budget problems. In the face of diminishing funds, such agencies have sought other ways of augmenting their treasuries. One way — exemplified by the decision below — is to condemn private land thought to be producing less tax revenue than it could and transfer it to other private parties who represent that they will redevelop the land in a way that produces more income to the government. The sparsely developed lands of farmers and ranchers are particularly vulnerable to such takings.

American farmers and ranchers need the protection of the Fifth Amendment if they are to find economically feasible ways to use their land and remain

in the agriculture business — the business of feeding the American populace.

The *amici* AFBF and its constituent state members have a vital interest in this Court's reversing the decision of the Connecticut Supreme Court and affirming the Fifth Amendment's limitation that the "awesome" power of eminent domain[2] be used only to acquire property for *public* use, not for *private* economic development.

## SUMMARY OF ARGUMENT

1. Eminent domain is an *in rem* proceeding. Thus, the government's intent in engaging in the process is irrelevant. To say, as did the court below, that private redevelopment is a public use because the city's intent was to benefit the municipal financial base, is a fiction that has no constitutional basis.

2. Judicial review of whether property is being taken for public use must be real review in order to vindicate the constitutional guarantee that "public use" is the only basis for exercising that power. Deference to legislative decision-making that is so abject as to accept at face value whatever justification a municipality puts forth is no judicial review at all. It is its antithesis.

3. Government agencies should focus their attention on governing, not on speculative real estate

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[2] Courts have repeatedly so characterized the power to compel private citizens to yield their land to the government. (E.g., *Winger v. Aires*, 89 A.2d 521, 522 [Pa. 1952]; *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 156 [Cal. App. 1985].)



ventures. The decision below exemplifies an unfortunate recent trend by municipalities to attempt to balance their budgets by entering into what amount to high risk partnerships with "redevelopers," i.e., people who will take over land condemned by the government and convert it into some commercial or industrial use that is touted as a higher generator of taxes and jobs than the uses currently being made. The municipal portion of the investment is made by acquiring private property through eminent domain and then transferring it to other private citizens for less than its acquisition price. Often such bargain prices are coupled with tax abatements. If the project doesn't perform as advertised, the agency — and all its taxpayers — suffers. When the only task of the agency is to acquire non-blighted private property so it can be transferred to (and "redeveloped" by) another private party, there is no "public use."

4. When this Court approved the broadening of the public use concept to include the acquisition, clearance and redevelopment planning for seriously deteriorated slums in *Berman v. Parker*, 348 U.S. 26 (1954), it did so on the expressed belief that the property owners being displaced would receive full compensation for their losses. That has not proven to be true. Whatever the rationale might be for imposing strict (or even "harsh," to use this Court's word) valuation rules when the property will be put to use for an actual public works project (a city hall, a post office, a highway), there is no justification for doing so when the project is merely a private development designed to make a profit for its private developers.

I

**EMINENT DOMAIN IS AN *IN REM* PROCESS. THUS, THE GOVERNMENT'S *INTENT* IN ENGAGING IN THAT PROCESS IS NOT RELEVANT. THE ONLY THING THAT IS RELEVANT IS WHAT THE GOVERNMENT ACTUALLY DOES.**

Eminent domain is not based on intent; it is based on — and judged by — action. The key in the context at bench is not what the government *says* it *intends* to do with property it seeks to condemn, but what it *actually does* with that property.

For example, during World War I, Congress enacted legislation to permit the President to control coal use and price until the war's conclusion. After the war, an official purportedly acting pursuant to this wartime legislation seized coal and paid less than its market value. On the former owner's suit, the government pointed to the presidential order setting the price. This Court disregarded the *words of the order* which invoked a statute that had run its course with the war's conclusion and focused instead on the government's *action*. As this Court put it, "[t]he incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].)

The government's attempted explanation of its intent to operate under a specific authority was, in a word, irrelevant. What counted was its action, and its action demanded a constitutional resolution — one that examined reality. It lacked constitutional authority.



More recently, the State of Washington sought to change a rule regarding title to oceanfront land that had been owned by the federal government before statehood. This Court held that the question was a matter of federal law and that the State could not charge federal law. As Justice Stewart put it, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967]; Stewart, J., concurring; emphasis in original.)[3]

Or, as this Court summarized succinctly, "Condemnation proceedings are in rem . . . ." (*U.S. v. Petty Motor Co.*, 327 U.S. 372, 376 [1946].)[4]

In the context at bench, the question is whether the government is actually taking property for public use, not whether it harbors some general intent to act in the public interest. If the facts show that the taking is not for a public use, that should end the matter. As shown in the next section of this brief, a condemning agency is not entitled to a free pass merely because it is

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[3] See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-653 (1981); Brennan, J., dissenting, but apparently expressing the substantive view of a majority of the Court [see 450 U.S. at 633-634; Rehnquist, J., concurring.]

[4] For the same reason, when property is valued in eminent domain, the personal needs, wants, desires, or plans of the owner are irrelevant. As an *in rem* process, all that matters is the objective view of the market. (4 Nichols on Eminent Domain § 12.04[2], p. 12-97 [rev. ed. 1998].)

able to draft a condemnation resolution that mouths the appropriate magic words about "public use."

*Berman v. Parker*, 348 U.S. 26 (1954) is wholly consistent with this view. There, the legislative determination focused wholly on the objective facts of municipal deterioration and the grossly substandard state of the housing in the target area. (348 U.S. at 30.) In light of those objective facts, Congress decided that redevelopment of the area on a wholesale scale was essential. The blight was so broadly spread that waiting for individual buildings, or even blocks, to be dealt with would not resolve the problem.

Thus, the problem in *Berman* was the objective deterioration of the neighborhood on a scale that did not admit of individual or piecemeal resolution. In light of that, Congress concluded that governmental intervention was required. The resolution to the slum problem was for government to condemn the entire area, raze the structures, prepare the area for redevelopment, and simultaneously plan the redevelopment. It was the slum clearance that was the "public use."

None of that involved any subjective determination or examination of governmental "intent." It dealt wholly with governmental action. Indeed, it was the property owner challenging the taking of his land who *tried unsuccessfully to inject intent* into the proceedings. He argued that the government's intent was to take his property so it could turn it over to some other citizen for private use.

This Court refused to buy that argument. It held simply that the public use was ridding that part of Southwest Washington of an awful combination of slum factors — an issue that Congress decided had to be



resolved by the government itself because of the enormity of the task of both assembling the land and planning for its reuse. *How* that public use was accomplished — by the government itself, or through the recruitment of private industry — was held irrelevant. (348 U.S. at 35-36.) In other words, because the creation, planning, and assembly of the project area was itself a public use, Congress' decision to have the reconstruction be a giant public works project or one concluded by private parties was not relevant to the case.

It is not relevant here either. The key to *Berman* was that — before any property titles were transferred into private ownership — there was a legitimate public use in redeveloping a notorious slum. ***The point here is that there was no legitimate public use in New London in the first place.*** This project is simply a recent example of a city seeking to go into the real estate market to make money. Its purpose is to change individual land ownerships so a favored owner (with a municipally preferred use — at least the preference *du jour*) could own and develop the property, with the city then anticipating getting its cut by way of increased tax revenues.

Others have amply briefed the predicate issue: this kind of redevelopment is no public use at all. The point being made here is that whether the city intended to benefit the populace in general by engaging in a process it believes would create jobs and increase the tax base is a smokescreen. It is not relevant to a determination of whether a use proposed as part of an eminent domain project is, in fact, a public use. As a matter of objective fact, this one is not. And it shouldn't be treated like one.

## II

## A MERE GOVERNMENTAL STATEMENT THAT PROPERTY IS BEING TAKEN FOR "PUBLIC USE" CANNOT BE ACCEPTED ON FAITH. JUDICIAL INQUIRY IS REQUIRED.

As shown *ante*, any focus on the government's intent is improper *ab initio*. Even a well-intended municipality may not transgress Constitutional limitations. The Connecticut court not only committed that error, it compounded it by accepting uncritically — for the sake of "deference" to legislative choice — the city council's mere statement that its prime intent was to benefit the public by increasing the city's economic development.

Reasoned deference is one thing; abject abdication of legitimate judicial inquiry is something quite different. And quite wrong.

As Justice Holmes explained for this Court, "[t]he greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922].)

The problem in this case is that the Connecticut Supreme Court refused to recognize such limits; it upheld a system of virtually unreviewable deference to municipal declarations of public use. With respect, the city's simple statement that it would rather have a more economically "productive" use made of property already being put to legitimate use by its owners is not



legitimate governmental planning; it is an outright municipal land grab.[5]

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court ended years of debate and confusion in the lower courts when it reaffirmed that the remedy for a regulatory taking was just compensation. The defendant county and its many *amici* had voiced fears that any rule allowing constitutional challenge to land use regulations and thus requiring adherence to the Fifth Amendment's just compensation clause would cripple municipalities' ability to govern. This Court's rejection of those hyperbolic pleas was clear and instructive:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities*, and the Just Compensation Clause of the Fifth Amendment

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[5] The Justices of this Court have recognized that there is nothing sacrosanct about those who occupy desks in city halls, or any reason to differentiate their legal responsibilities from other government employees. As Justice Brennan aptly put it: "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co.*, 450 U.S. at 661; Brennan, J., dissenting [see *ante*, p. 7, fn. 3].)

is one of them." (*First English*, 482 U.S. at 321; emphasis added.)[6]

Indeed, the obvious point of the Bill of Rights is to "limit the flexibility and freedom of governmental authorities," as all of its provisions are designed to secure individual rights against governmental incursions. One of those provisions is the Fifth Amendment's restriction of the power of eminent domain (an otherwise inherent attribute of sovereignty) to takings "for public use." That intended limitation needs enforcement to make it real. As Justice Frankfurter explained for this Court in a *statutory* context: "Statutes . . . are not inert exercises in literary composition. They are instruments of government." (*U.S. v. Shirey*, 359 U.S. 255, 260 [1959].) Surely, the Constitution is entitled to equal dignity.

Perhaps underlying that conclusion — and highly pertinent at bench — is this Court's repeated recognition that, when the governmental interest is financial, its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money . . . ."]; *United States v. Winstar Corp.*, 518 U.S. 839, 896 [1996] [". . . statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of

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[6] In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court flatly rejected, as contrary to settled Fifth Amendment law, a city's contention that its decisions could not be judicially "second-guessed."



meeting its legitimate public responsibilities to private parties"]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceedings."].)[7]

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) There is no reason why scrutiny of the public use requirement in that same clause should receive any less respect.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) is instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, fn. 10), this Court stressed that what is important is *not* the voiced legislative rationale (because that would always justify the government act unless the legislature had "a stupid staff" incapable of using the proper magic words to

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[7] It thus seems appropriate to note that Professor James Buchanan (whose *amicus curiae* brief supported the Petition for Certiorari at bench) received the Nobel Prize in Economics for demonstrating that, for all the familiar platitudes about public interest, government officials act in pursuit of their perceived self-interest, the same as private parties. (See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* [1962].)

justify action [505 U.S. at 1025, fn. 12]), but whether the underlying facts actually support the legislative result. Remanding the case to give the State an opportunity to defend its legislative handiwork, this Court "emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration . . . or [its] conclusory assertion . . . ." (505 U.S. at 1031.)

The same analysis recommends itself in the "public use" context. It is easy for a city council to use words *saying* that its action is designed to enable a "public" use of private property, but the proof of that assertion requires more than superficial examination to vindicate the Constitution's primacy.

This Court's refusal to abdicate judicial review was aptly phrased many decades ago:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; [and] that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . . Under our system of government, such a conclusion is obviously untenable. . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." (*Sterling v. Constantin*, 287 U.S. 378, 397-398 [1932].)



Whether government action complies with the Constitution is a question for the judiciary — and has been since *Marbury v. Madison*, 1 Cr. 137 (1803).

The rule adopted below pays no more than lip service to this Court's venerable history of judicial review. The Connecticut Supreme Court concluded that "responsible judicial oversight" will do "much to quell the opportunity for abuse of the eminent domain power." (*Kelo*, 843 A.2d at 586.) But that court's actions show that there will be no "responsible judicial oversight" in Connecticut or in any other state that adopts its rationale. For the Connecticut Supreme Court simply accepted uncritically the city's assertion—that its patent condemnation to convert one private land use by one group of citizens into an opportunity for a different private entity to make a different type of private development was a genuine "public" use and thus a legitimate exercise of the power of eminent domain.

The Connecticut rule denies any real enforcement of the Fifth Amendment's "public use" limitation. It ought to be overturned.

## III

## THE POWER OF EMINENT DOMAIN SHOULD NOT BE A MEANS FOR GOVERNMENT TO ENGAGE IN RISK-TAKING, ENTREPRENEURIAL VENTURES.

Cases like this are a far cry from *Berman v. Parker*, 348 U.S. 26 (1954), the half-century old decision in which this Court concluded that it was a valid "public use" to condemn a horribly blighted area

— an area that ranked low in every measurable category except crime rate and disease, where it topped the charts — for the purpose of slum clearance and transformation into something productive and beneficial to the community.

The case at bench involves no blight. The City of New London made no pretense of asserting that the homes in this neighborhood were substandard in any ordinary meaning of the term; they simply produced less of a municipal tax base than a more intense commercial/industrial use could provide.

Thus, a ruling that places programs like New London's outside the constitutional pale does not threaten the ability of municipalities to continue engaging in legitimate programs of slum clearance (or blight elimination, as it is more generally called today).

This case involves something quite different, i.e., municipalities that view themselves as entrepreneurs, or at least partners in entrepreneurial endeavors that might — with an emphasis on the "might" — redound to their municipal economic benefit. They also might not.

And there's the rub. Government is not supposed to be a player in the entrepreneurial game. Government agencies and officials may look longingly at some of the financial gains registered by private entity developers and wish that they could realize similar returns for their municipal treasuries. But that is not the business of government.

Government is designed to provide essential services to the populace that the populace is not well equipped to provide for itself. *Laissez faire* review, like that authorized by the Connecticut Supreme Court, has



emboldened municipalities to dabble in the risk-takers' market. As one court described it:

> "By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it then *can use as a grubstake to subsidize commercial development in the project area in the hope of striking it rich.* Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart to locate within the project area rather than in the neighboring communities." (*Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 204-205 [Cal. App. 1977]; emphasis added.)

The law should not encourage municipalities to act in this fashion.[8] What cities end up doing is essentially entering into partnerships based on guesses

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[8] This leads some to all sorts of strange and illegal games. See, e.g., *99¢ Only Stores v. Lancaster Redev. Agency*, 60 Fed. Appx. 123 (9th Cir. 2003) (attempt to condemn discount store in order to turn property over to larger discount store); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (attempt to condemn vacant land planned for church facility in order to transfer to "big box" store); *Lancaster Redev. Agency v. Dibley*, 25 Cal. Rptr. 2d 593 (Cal. App. 1993) (attempt to pervert law intended to provide low income housing in order to finance "business park").

about the future tax stream from a proposed development and betting their anticipated tax revenue in a high stakes developmental poker game. In order to make such projects work, however, cities often end up selling the properties to redevelopers at far less than their cost to the cities, and then granting tax write-offs as additional inducements. By the time they finish, the new tax revenues that were supposed to pay for the project have gone up in smoke:

> "In essence, the tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area." (*Regus*, 139 Cal. Rptr. at 205.)

Worse than that, some cities have engaged in destructive entrepreneurial competition with other municipalities, in an effort to lure businesses to cross municipal borders and bring their tax dollars with them. In other words, their projects do not create new jobs and new taxes; they merely shift them from one locality to another. That serves no general public interest:

> "[U]nrestricted use of development powers fosters speculative competition between municipalities in their attempts to attract private enterprise, *speculation which they can finance in part with other people's money*. When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas



> are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose." (*Regus*, 139 Cal. Rptr. at 204 [1977]; emphasis added.)[9]

This case is the proverbial "Exhibit A." The city of New London never even pretended that this residential neighborhood is blighted, asserting only that it is less intensely developed than it might be and thus, less productive of tax revenue than it might be. But aside from the kind of rosy projections often seen at the outset of large-scale development projects, it is uncertain what the outcome will be.

> "The promoters of such projects promise that in time everyone will benefit, taxpayers, government entities, other property owners,

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[9] An illustration of such "competitive speculation" appeared in *99¢ Only Stores*, 60 Fed. Appx. 123. There, the record showed that two adjacent cities engaged in such cutthroat competition to attract businesses from each other that they eventually entered into a "treaty" precluding such competition to staunch the municipal blood-letting. See also Frank Clifford, "Pirating the Auto Retailers," Los Angeles Times, Nov. 9, 1990, p. A1, describing the predatory practices of adjoining cities in the competition for auto dealers (and their sales taxes). Noting that the heat of competition often makes cities offer terms so friendly that the anticipated tax revenues are far less than originally budgeted. "The rules of the auto mall war are simple. Raid your neighbor's dealers before he raids yours." (*Id.* at A40.)

> bondholders; all will profit from increased future assessments on the tax rolls, for with the baking of a bigger pie bigger shares will come to all. But the landscape is littered with speculative real estate developments whose profits have turned into pie in the sky . . . ." (*Regus*, 139 Cal. Rptr. at 205.)

Speculative development projects are the province of private enterprise, not government.[10] It is one thing for private entrepreneurs to "litter the landscape" with failed ideas. That is endemic to the capitalist system. Entrepreneurs are risk-takers by definition — some win, some lose. Not so the government, which has no legitimate business gambling public funds on speculative projects.

As government agencies have more and more often sought to reap the rewards of such entrepreneurial development, more of them have contributed to the littered landscape. A recent New York Times article, for example, reports that since 1957, some 300 to 400 major shopping malls have been destroyed, locked up, or converted to other uses. (Peter T. Kilborn, "An Enormous Landmark Joins Graveyard of Malls," New York Times, Dec. 24, 2003, p. A10.) Such malls are a favored land use of redevelopers using the cities' power of eminent domain for their land acquisition.

Some of the more highly publicized condemnations for purely private use provide vivid

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[10] Government bonds, for that reason, pay lower interest rates than speculative "junk" bonds because they are close to risk free. Thus, people are willing to invest in them for a lower rate of return.



illustrations of the dangers to the municipal fisc from such risk-taking.

— *Item*: The City of Yonkers, N.Y., was pressured by the Otis Elevator Co. for space to expand its facilities. The company threatened to leave town if not accommodated. The city agreed and condemned land for Otis. (*City of Yonkers v. Morris*, 335 N.E. 327 [N.Y. 1975].) After expansion, Otis left town anyway, leaving the city holding a very empty bag when the courts refused to provide any remedy. (*City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42 [2d Cir. 1988].)

— *Item*: The City of Detroit, of course, provided the classic illustration of all that is wrong with using the eminent domain power to benefit private parties. It responded to a threat similar to that of Otis Elevator. Detroit's threat came from General Motors, which said it would move its Cadillac assembly plant if Detroit didn't provide it with space. Detroit capitulated and acquired, and then transferred to GM, 465 acres formerly occupied by a thriving community that included 1200 households, 16 churches, more than 100 businesses, a U.S. post office, and a 278-bed hospital. The acquisition cost was some $200 million; the sale price to GM was $6.5 million. GM's promise was 6000 new jobs.[11] But no

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[11] In fact, the Poletown plant was designed to consolidate manufacturing — already being done in Detroit — employing 10,000 workers. Assuming Poletown produced 6000 jobs, that would be a net loss of 4000 for the area. (See William Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 Pace L. Rev. 231, 263, fn. 182 [1984].) It turned out to be worse.

more than 3000 ever materialized. (See *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 [Mich. 1981]; Armond Cohen, *Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization* [Lincoln Inst. of Land Policy 1982].)

*Poletown* was finally overruled nearly a quarter of a century later when the Michigan Supreme Court held that such condemnation could not satisfy any concept of public use. (*County of Wayne v. Hathcock*, 684 N.W.2d 765 [Mich. 2004].)

— *Item*: The City of New York sought to prevent the New York Stock Exchange from moving to New Jersey by offering to buy a building site, provide construction funds, and give the company tax breaks. Total cost to the public would have been about $1 billion. The deal fell through, but not before the existing tenants had been evicted from the proposed site and the city was stuck paying the landlord $1 million per month in compensation for that loss, plus a $22 million deposit that was forfeited. (Charles V. Bagli, "45 Wall St. Is Renting Again Where Tower Deal Failed," New York Times, Feb. 8, 2003, p. B3.)

— *Item*: In the frenzy to attract new businesses, an Illinois agency actually advertised in the general media that it would condemn any property desired by someone who would redevelop it. (See *Southwestern Illinois Dev. Agency v. Al-Muhajirum*, 744 N.E.2d 308, 309 [Ill. App. 2001].) The Illinois Supreme Court put a stop to that, commenting acidly that it was unseemly for government agencies "to act as a default broker of land . . . ." (*Southwestern Illinois Dev. Agency v. National City Environmental*, 768 N.E.2d 1 [Ill. 2002].)



Cases like these have spawned a recent outpouring of justified criticism both in legal commentaries and in the general press.[12] This growing volume of such criticism has led even general magazine commentary to denigrate the constitutional power of eminent domain. As one commentator noted scornfully, "eminent domain [is] a legal term meaning 'we can do anything we want.'" (Steve Lopez, "In the Name of Her Father," Time Magazine, July 14, 1997, p. 4.) It shouldn't be.

The point is simply this: government agencies are not equipped to engage in the kind of risk-taking that

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12 See, e.g., Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use,"* 2000 L. Rev. Mich. St. U. Detroit Coll. L. 639; Stephen Jones, *Note, Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285 (2000); Joseph J. Lazzarotti, *Public Use or Public Abuse?*, 68 U.M.K.C.L. Rev. 49 (1999); Laura Mansnerus, *Note, Public Use, Private Use and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 413 (1983); John Gibeaut, *The Money Chase*, ABA Journal, March 1999, p. 58; Dean Starkman, "Condemnation Used to Hand Business to Another," Wall St. Journal, Dec. 2, 1998, p. A1; Eric Felton, "Kiss Your House Goodbye," Reader's Digest, March 2001, p. 135.

is endemic to the entrepreneurial process. They don't do it well and, when they try, they fail as often as not.[13]

The Connecticut Supreme Court dismisses cases like these as being "particularly egregious" governmental lapses that courts are capable of rejecting. (*Kelo*, 843 A.2d at 536.) But they are more than that. They are the result of the permissive attitude exemplified by the decision below that has emboldened local government agencies to overstep the constitutional bounds in a search for the entrepreneur's pot of gold. If this Court makes it plain that such ventures are not allowed, by putting the concept of "public" back in "public use," government agencies will get back to the business of governing, rather than speculating in real estate.

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[13] See Louis Uchitelle, "States Pay for Jobs, but It Doesn't Always Pay Off," New York Times, Nov. 10, 2003, p. A1, describing how Indianapolis paid $320 million to lure United Airlines into building an aircraft maintenance center there, only to see United walk away from it leaving the city more than empty handed: it lost its aircraft maintenance center and also forfeited the anticipated tax revenue. See also *Community Redev. Agency v. Force Electronics*, 64 Cal. Rptr. 2d 209 (Cal. App. 1997) (agency unable to pay condemnation judgment after an improvident redevelopment deal fell through and asked leave to pay over time; constitution forbade time payments); *Los Angeles Unified School Dist. v. Trump Wilshire Assocs.*, 50 Cal. Rptr. 2d 1682 (Cal. App. 1996) (agency unable to pay condemnation judgment and forced to abandon).



## IV

## WHEN THIS COURT SWEEPINGLY UPHELD THE USE OF EMINENT DOMAIN IN *BERMAN V. PARKER*, IT BELIEVED THAT THE PRIVATE PARTIES DISPLACED FOR THE PUBLIC GOOD WOULD BE JUSTLY COMPENSATED FOR THEIR LOSSES. THE REALITY IS OTHERWISE.

In *Berman*, this Court expressed its confidence that government agencies could be trusted to wield the power of eminent domain wisely. History has not been altogether kind to that thought (as noted in many of the briefs filed in this case)[14] but, in any event, the Court believed that landowners being displaced would be protected:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (*Berman*, 348 U.S. at 36.)

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[14] Indeed, the sad truth began to manifest in the immediate aftermath of *Berman* itself. Where this Court had been told that the slums of Southwest Washington, D.C. would be razed, with one-third of the replacement housing to be low-cost, renting for $17 per room (see 348 U.S. at 30-31), the reality is that the entire area was built out with fancy office buildings, co-ops, restaurants, and a shopping center.

That made it sound as though the Court believed that property owners being displaced for projects that would not be occupied by public buildings (the classic "public uses") would at least be fully compensated for their troubles. Indeed, the Court's earlier opinions were sweeping in their description of the just compensation guarantee. (E.g., *Seaboard Air Line R. Co. v. U.S.*, 261 U.S. 299, 306 [1923] [property owner to be put "in as good a position pecuniarily as if the property had not been taken"]; *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 196 [1910] ["the question is, What has the owner lost?"]; *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 124 [1950] ["word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'"]; *U.S. v. Cors*, 337 U.S. 325, 332 [1949] ["political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice"].)

It has not turned out that way. If the condemning agency and its *amici curiae* in *Berman* convinced the Court that full compensation would be provided, it wasn't true. (See, e.g., *Community Redev. Agency v. Abrams*, 126 Cal. Rptr. 473, 483, fn. 9 [Cal. 1975] [saying that this Court's concepts are "panoramic," making up in "idealism" what they "lack[] in universal application"].)

Assuming any justification for compensation rules described as "harsh" (*U.S. v. General Motors Corp.*, 323 U.S. 373, 382 [1945]) when property is taken for actual public facilities that will be used by, and serve, the general public, there is none when the property will be turned over to private redevelopers for the purpose of generating their own profits. Such profit



making projects generate ample funds and ought to pay their own way.

## CONCLUSION

The Ninth Circuit made the point with abundant clarity:

> "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use', and if those officials could later justify their decision in court by merely positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." (*Armendariz v. Penman*, 75 F.3d 1311, 1321 [9th Cir. 1996] [en banc].)

That is plainly where this Nation is headed if the decision below is allowed to stand. It is one thing to conclude (as this Court did in *Berman*) that clearing a notorious slum is a legitimate public use, regardless of the tools chosen by government to redevelop the area after clearance. In the same vein, the public use concept probably has room for the occasional need to deal with an aberration like the unique and oligopolistic title holding scheme dealt with in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

However, if the concept of "public use" can be stretched to such an extent that a government agency need only declare that it is furthering some public goal by taking unoffending property from one private owner

to give to another for a redevelopment that will hopefully generate increased tax revenues, then the concept has lost all meaning.

These *amici curiae* pray that the Court reverse the decision below and declare that the Fifth Amendment's "public use" limitation has real meaning.

Respectfully submitted,


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(19)

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IN THE

# Supreme Court of the United States

SUSETTE KELO, ET AL.,

*Petitioners*,

v.

CITY OF NEW LONDON, CONNECTICUT, ET AL.,

*Respondents*.

*On Writ of Certiorari*
*to the Supreme Court of Connecticut*

## BRIEF OF *AMICI CURIAE* AMERICA'S FUTURE INC. AND SOMERSET TRANSMISSION & REPAIR CENTER IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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## INTEREST OF *AMICI CURIAE*[1]

America's Future Inc. (AF) is a nonprofit educational organization founded in 1946. Its mission includes the preservation of our free enterprise system and our constitutional form of government. For 58 years it has supported our Republic in protection of economic freedom and capitalism. Towards these goals, AF has defended the constitutional safeguards for private property. AF has consistently main-

[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than the *amici curiae*, their employees or members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the timely filing of all *amicus curiae* briefs in this matter and copies of their letters of consent have been lodged with the Clerk of the Court.

tained that the Constitution is the most profoundly important instrument ever devised by man for the protection of freedom, and it must be preserved against erosion caused by overreaching governmental policies. AF distributes a newsletter and radio program in furtherance of these objectives. *Amicus* AF has a direct and vital interest in the issues presented to this Court based on its active participation in promoting economic freedom for nearly sixty years.

*Amicus* Somerset Transmission & Repair Center is a sole proprietorship that has operated since 1978 at 591 Somerset Street in Franklin Township, New Jersey. At that time this small business stepped into a decrepit building featuring broken windows and a lack of functioning heat. The structure's block walls were cracked horizontally throughout, and its beams had sagged and were pulling the walls inward. Plastic sheets hung from the ceiling to catch leaking rainwater. Though an eyesore to the community, it presented an opportunity to a nineteen-year-old aspiring mechanic named Court Throckmorton. With his older sister co-signing on a loan, he acquired the property in order to develop it into his own business. Mr. Throckmorton proceeded to rebuild the facility and develop his service business, and in the subsequent 26 years employed a dozen or so workers. He taught his employees the skills to run a business, many of whom went on to successfully operate small businesses of their own. In one example, Mr. Throckmorton charitably took in a disaffected sixteen year-old as an employee, picking him up at 6:30 am each day; now that former employee successfully manages a car dealership. In contrast to Fortune 500 corporations, Somerset Transmission & Repair Center has never laid off an employee, and no employee has ever quit in anger.

Since September 1999, *Amicus* Somerset Transmission & Repair Center has faced a possible eminent domain action to take its property for the benefit of a new business. This planned condemnation has disrupted Mr. Throckmorton's future plans for his business and interfered with investment in it. *Amicus* Somerset Transmission & Repair Center has a direct and vital interest in the action at bar due to its likely impact on the eminent domain threatened against it.



## SUMMARY OF ARGUMENT

"Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). This "essential principle," *id.*, enjoys its fullest protection in the Fifth Amendment requirement limiting governmental takings to "public use." Simply put, the Constitution prohibits taking private property from one business to give to another. The free market is far better suited to allocating scarce resources to their most efficient uses than government is. But whether efficient or not, the Fifth Amendment flatly protects businesses and individuals against the infringement at bar on the rights of private property. The Constitution plainly does not allow municipalities to take property from one for the benefit of another.

Yet municipalities nationwide are attempting to bypass the "public use" requirement of eminent domain, and are snuffing out a lifetime of effort by thousands of small businessmen, including *Amicus* Somerset Transmission & Repair Center. Small businesses plant their roots in communities based on personal relationships with their customers, and forced relocations disrupt and destroy those ties that bind. The small businesses are the ones that create the vast majority of jobs and also sponsor the countless local causes that cry out for support, ranging from the Boys and Girls Club and Little League sports teams for youths to the fundraising drives to pay medical costs for a particularly sick neighbor. The destruction of these small businesses simply to transfer their property to other businesses is as wasteful as it is unconstitutional.

In these governmental takings, the condemned business owner can typically claim only an appraised value for the hol-

low building and land that he actually owns, receiving $0 for the goodwill and revenue stream from customers he has nourished over the years. A business leasing its property usually receives no compensation, and the employees get nothing. The denigration of "public use" to mean almost anything, including unproven claims of increasing tax revenue, is contrary to the plain meaning of the Fifth Amendment and numerous precedents of this Court.

It was unconstitutional for the court below to authorize the town of New London to take the properties of Susette Kelo and many others for the benefit of a private companies that could include the wealthy pharmaceutical corporation Pfizer Inc. Manufacturing Viagra surely is not the "public use" that our Founders had in mind when they wrote eminent domain into the Constitution. With the exception of protecting the health and safety of its citizens, government has no legitimate interest in taking property from one business to give to another. It is not a proper governmental function to be robbing from Peter to give his land to Paul.

"The greatest evil is not done now in those sordid 'dens of crime' that Dickens loved to paint … [but] in clear, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice." C.S. Lewis, *The Screwtape Letters* 6 (rev. ed. 1982). This observation by C.S. Lewis is particularly apropos to the taking of the property of small businesses to hand over to other businesses. The Fifth Amendment forbids this growing, pernicious practice, and it is long overdue to enforce the Fifth Amendment by reversing the decision below.



## ARGUMENT

### I. PRIVATE PROPERTY RIGHTS, AS SECURED BY THE FIFTH AMENDMENT, MUST WITHSTAND THE TAKING FROM ONE BUSINESS TO GIVE TO ANOTHER.

Taking property from one business to give to another is not a "public use" within the meaning of the Fifth Amendment. U.S. Const. amend. V (mandating that property may not be "taken for **public use,** without just compensation") (emphasis added). Government has neither the power nor the expertise to prefer one business over another, except perhaps in areas of health, safety or morals not at issue here. The right of private property, if it is to have any meaning at all, surely includes the right of a longstanding sole proprietorship such as *Amicus* Somerset Transmission & Repair Center to withstand seizure of its location to hand it over to another business.

As Justice Harlan restated in his prescient dissent in *Plessy v. Ferguson*:

> "Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. **The right of eminent domain nowhere justifies taking property for a private use.**"

163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (quoting *Olcott v. The Supervisors*, 16 Wall. 678, 694 (1873), emphasis added). The decision below contravenes this basic principle, and must be reversed.

"It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). There

this Court found a lack of the requisite "public use" in the excessive widening of a street proposed by the City of Cincinnati. Specifically, the City sought to resell land excessively taken in order to fund the expense of the necessary street widening. "[T]he excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use within the meaning of that term as it heretofore has been held to justify the taking of private property." *Id.* at 444 (quotations omitted).

This Court expressly affirmed the principle that taking private property "for the purpose of selling it at a profit and paying for the improvement ... is clearly invalid." *Id.* (quotations omitted). While this Court ultimately rested its decision on a failure by the City to "strictly follow[]" its requirements to justify the excessive condemnation, the holding leaves little doubt that "public use" does not extend to financial needs of government. *Id.* at 448 ("[T]he power conferred upon a municipal corporation to take private property for public use must be strictly followed.").

The *Cincinnati* ruling and its precedential authority have been consistently affirmed. "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). Where the essential "public use" is lacking, the taking of one by government to give to another must be rejected. *See Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896) (invalidating a taking due to a lack of public use). "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Id.* at 417. *See also Madison-*



*ville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905) ("It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, **grows out of the essential nature of all free governments**.") (emphasis added).

The rulings of *Missouri Pacific R. Co.* and *Cincinnati*, and their progeny, prohibit the taking from one business to give to another as sought here by the City of New London, Connecticut, against condemnees that include investment properties. *Missouri Pacific R. Co.* rejected a taking from a private railroad company for the benefit of another business seeking to build an additional grain elevator at a railway station. In words applicable here, this Court rejected such condemnation as "a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit." 164 U.S. at 416. *See also Consolidated Gas Corp.*, 300 U.S. at 80. It was reversible error for the court below to embrace an academic view that "'the term 'public use' as used in the Fifth Amendment was meant to be descriptive, rather than proscriptive.'" *Kelo v. New London*, 268 Conn. 1, 54 n.49 (2004) (quoting Matthew P. Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245, 1249 (2002)).

The private beneficiaries of the taking at bar are profit-maximizing entities. They remain free to make purchases of real property on the open market just as any other company can. But the Constitution does not permit forced transfer from small businesses, such as rental apartments, to private beneficiaries. Even though government asserts a financial benefit for itself from this compelled transaction, such windfall does not satisfy the requirements of the Fifth Amendment. In *Cincinnati*, this Court implicitly rejected alleged financial

benefit to a municipality as a legitimate "public use." *See* 281 U.S. at 443 ("In what way the excess condemnation of these properties was in furtherance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise.").

This Court did not hold otherwise in *Ruckelshaus v. Monsanto Co.*, where business intellectual property was taken for public and potentially private benefit within a statutory framework that provided full remedy for all business loss to the condemnee. 467 U.S. 986, 1019 (1984) ("Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of [federal law], we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution."). In contrast, such remedy for lost business is utterly lacking in most eminent domain actions.

The aberrational ruling of this Court in favor of taking real property from one to give to another in *Berman v. Parker* is readily distinguishable from the action at bar. 348 U.S. 26 (1954). In *Berman*, this Court upheld a taking of a slum but justified it based on bona fide interests in "[p]ublic safety, public health, morality, peace and quiet, law and order." *Id.* at 32. The unquenchable thirst for taxes presented here was not one of the acceptable rationales. Increasing tax revenues and allegedly promoting economic development are not legitimate reasons for taking from one party to give to another. In contrast, the *Berman* ruling relied on its observation that:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.



*Id.* at 32-33. Nothing of the sort justifies the taking at issue here. *See also Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923) (approving eminent domain for two highways having an obvious "public use," in contrast to the private benefit contemplated here).

"To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *County of Wayne v. Hathcock*, 471 Mich. 445, 482 (2004). There the Supreme Court of Michigan properly overturned its own precedent in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616 (1981), which had unleashed eminent domain actions nationwide to take property from one private entity to give to another without satisfying the traditional "public use" limitation. The notorious *Poletown* ruling authorized the demolition of hundreds of businesses, more than a thousand homes, and even several churches in a Polish community near Detroit in order to build a new General Motors plant. In July the Michigan Supreme Court repudiated that ruling and returned to the original intent of the "public use" limitation, declaring the *Poletown* decision to be a "radical departure from fundamental constitutional principles." *County of Wayne*, 471 Mich. at 483. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Id.* at 468.

The decision below relied heavily on the now-discredited *Poletown* decision, twice heralding it as a "landmark case." 268 Conn. at 41, 45 n.39. The court below even insisted on going beyond the *Poletown* ruling, eschewing its heightened scrutiny of takings for private use. "Indeed, we conclude that the application of a 'heightened scrutiny' standard [of *Pole-*

*town*] is inconsistent with our well established approach of deference to legislative determinations of public use." *Id.* at 45 n.39 (citation omitted). The dissent below foreshadowed the subsequent overturning of *Poletown* by declaring that "the majority reaches the wrong result with respect to the plaintiffs' properties, in part because it overlooks the fact that private economic development differs in many important respects from how we previously have defined a public use." *Id.* at 122 (Zarella, J., dissenting).

Without the "public use" limitation, there is every incentive for factions with political clout to exploit defenseless minorities lacking political clout. This is precisely the sort of economic factionalism and majority domination that James Madison sought to prevent:

> Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations: But on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.

James Madison, Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism (Virginia Convention, June 6, 1788), in 2 *The Debate on the Constitution* 611, 612 (Bernard Bailyn ed., The Library of America 1993). *See generally* Derek Werner, "The Public Use Clause, Common Sense and Takings," B.U. Pub. Int. L.J. 335, 346-48 (2001) (describing how the majorities buddy up with government officials to make political deals to expand "public use").

The right to own private property, without the fear of having it taken for another private entity, is essential in a free nation. The scope of "public use" must be limited to its plain meaning, such as the construction of municipal buildings,



highways or public parks. There is no end to the mischief in redefining "public purpose" by economic factions manipulating the political process, and the Fifth Amendment safeguards against such invasion of economic rights.

## II. THE FIFTH AMENDMENT PROTECTS SMALL BUSINESSES AGAINST ECONOMIC LOSS IN TAKINGS FOR ECONOMIC DEVELOPMENT.

This Court recently affirmed that the Fifth Amendment applies to protect income against complete takings by government. *See Brown v. Legal Found.*, 538 U.S. 216 (2003). There this Court was unanimous in holding that a "law that requires that the interest on [client] funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client." *Id.* at 240. At issue in *Brown* was the constitutionality of a Washington law requiring attorneys to deposit client trust funds in a common account for the benefit of a legal aid program if the individual interest amounts to less than individual administrative costs. Though this Court split 5-4 against compensating the client for the taken interest based on the likely excess of administrative costs over income, all Justices agreed that seizure of this interest did constitute a taking for purposes of the Fifth Amendment.

A similar taking occurs when a business owner is deprived of all of his income derived from his property in order to transfer the land to another in a condemnation proceeding. In such an exercise of eminent domain, revenue is effectively transferred by force from one property owner to another, who then exploits the property for his own business purposes. This is indistinguishable from the taking of interest from one client to assist a poorer one pursuant to the legal aid program reviewed in the *Brown* case. Under the reasoning embraced in *Brown*, this is a taking protected by the Fifth Amendment and the original business owner should be entitled to compensation for his lost income.

In the case at bar, one plaintiff is being deprived of his business property of seventeen years, while another is losing his business property of eight years:

> [T]wo of the plaintiffs own their property as business investments--the rental of apartments. These two people have put much time, money and effort into renovating their properties, one has owned his property for seventeen years, the other for about eight years.

268 Conn. at 11.

It is no consolation to the condemnee that his lost income is not directly realized by the transferee business. Like *Amicus* Somerset Transmission & Repair Center, the original business may have garnered income from fixing automobile transmissions while the transferee business may be a massive Home Depot store that sells building materials. This Court has been clear, even unanimous, in declaring that the "just compensation" in such scenario "is measured by the owner's pecuniary loss," not by the transferee's gain. *Brown*, 538 U.S. at 240. "Most frequently cited is Justice Holmes' characteristically terse statement that 'the question is what has the owner lost, not what has the taker gained.'" *Id.* at 236 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)). The owner is clearly "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934). *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (noting the duty of the public to compensate an owner for "his unique need for property or idiosyncratic attachment to it"); *id.* at 23 (Douglas, J., dissenting) (the government's obligation is "not for what it gets but for what the owner loses").

The goodwill developed by a small businessman over years, and often decades, is partially or completely lost in a taking. It is not reflected in the appraised value of the property. The Fifth Amendment should be construed to ensure



that takings compensate the owner for his loss, not what was gained by the new business. Full application of the Fifth Amendment would render many of these takings for economic development unattractive by imposing the real economic costs of the condemnation on the acquirers. It is only by avoiding payment for these real economic losses that these abusive condemnations for private benefit have flourished nationwide.

The difficulties in measuring the lost revenue to the small businessman are no greater than the obstacles in obtaining an accurate appraisal of the real property itself. Both are based on future expectations of earnings, and the market prices for the property interests. Experts are widely available to provide estimates. Both lost revenue and lost land value depend equally on anticipated future usage and demand. Moreover, this Court's decision in *Brown* implicitly rejected any distinction between taking income already earned and future income. This Court deemed it a taking to deprive clients of future interest income by depositing their funds into commingled accounts before any such interest could be earned.

Adherence to the principle of full compensation to businesses for takings has worked for nearly thirty years in the State of California, which has awarded lost goodwill to businesses in condemnation proceedings. *See, e.g., Community Development Com. v. Asaro*, 212 Cal. App. 3d 1297, 1301-02 (4th App. Dist. 1989) ("In 1975, the Legislature enacted a comprehensive revision of California's eminent domain law, which, among other things, authorizes compensation for the loss of business goodwill."). When Dr. George H. Muller's veterinary hospital of nearly 30 years was condemned by the California Department of Transportation, forcing him to relocate his business, he successfully sued for an award of $96,000 in lost goodwill. *See People ex rel. Department of Transportation v. Muller*, 36 Cal. 3d 263 (1984). Similarly, in *Redevelopment Agency v. Thrifty Oil Co.*, the California Court of Appeals ruled that the defendant was entitled to

$67,500 for the loss of goodwill when the government acquired his property through eminent domain action. 4 Cal. App. 4th 469, 475 n.10 (1992) (compensable goodwill "'consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage'") (quoting California Code of Civil Procedure § 1263.510(b)).

A few other states have also recognized the need to compensate an owner for the loss of business inherent in a taking. Condemnations in Michigan, Minnesota and Pennsylvania sometimes do allow compensation for the "going concern" value of the taken business, at least where relocation is not possible. *See, e.g., Lansing v. Wery*, 68 Mich. App. 158 (1976) (affirming inclusion of the value of a going concern in a condemnation award in favor of a 50-year-old restaurant); *State v. Saugen*, 283 Minn. 402 (1969) (holding that the going concern value was part of the property right taken by the condemnor); *Redevelopment Authority of Philadelphia v. Lieberman*, 461 Pa. 208 (1975) ("As early as 1909, this Court held that the value of a condemned waterworks property was to be determined by considering the physical property as a going concern; to do so the value of intangibles such as a franchise, market price of stock, and income based on reasonable tolls were to be considered.") (citing *Kimball Laundry Co., supra*, emphasis omitted).

But most states deny such compensation, thereby leading to rampant takings of property from one business to give to another. For example, compensation for goodwill in the takings of business is denied in Arkansas, Kentucky, Texas, Wyoming and Utah. *See Arkansas State Highway Commission v Highfill*, 248 Ark. 541, 452 S.W.2d 846 (1970); *Arkansas State Highway Commission v Wallace*, 247 Ark. 157, 444 S.W.2d 685 (1969); *Dept. of Highways v. Silver*, 487 S.W.2d 926 (Ct. App. Ky. 1972); *Huckabee v. State*, 431 S.W.2d 927 (Tex. Civ. App. Beaumont 1968); *State v. Zaruba*, 418



S.W.2d 499 (Tex. 1967); *State v. Ouzounian*, 26 Utah 2d 442, 491 P.2d 1093 (1971); *State Highway Commissioner v. Peters*, 416 P.2d 390, 396 (Wyo. 1966). In Connecticut, the value of the business is not compensable except to the extent it is reflected in the value of the property itself. *See Housing Authority of City of Bridgeport v. Lustig*, 139 Conn. 73, 76-77, 90 A.2d 169 (1952). A taking of the property of *Amicus* Somerset Transmissions and Repair Center would cause it an economic loss for its variances for automotive sales and inspections, which cannot be relocated.

Clarification of the small business owner's right to full recovery in a condemnation proceeding is overdue. This Court has previously left this issue unresolved. "The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. Doubtless such special value of the plaintiffs' land was duly considered by the President in fixing the amount to be paid therefor." *Mitchell v. United States*, 267 U.S. 341, 344-45 (1925) (citations omitted). *But see id.* at 345 ("The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction.").

If taking from one business to give to another qualifies as "public use," then the Fifth Amendment requires full compensation for economic loss by the condemned business. Affirming this requirement alone would end most of the abusive takings of one business to give to another.

## III. TAKING THE PROPERTY OF SMALL BUSINESSES FOR PRIVATE DEVELOPMENT IS ARBITRARY, IRRATIONAL AND ECONOMICALLY WASTEFUL.

The epitome of arbitrary government action is when it forcibly replaces one business with another. Government cannot properly feed more and more small businesses to giant corporations as though they all constituted an economic food chain, with a view that bigger is better. Increasing taxes by encouraging large over small corporations is not a legal justification for government to rob from the latter to give to the former. The progressive system of taxation has a built-in incentive for government to prefer big business over small business, but that bias does not create a rational basis for destroying small businesses by taking their property to hand over to larger ones. Aside from protecting the health and safety of its citizens, government has no legitimate interest in taking land from one business to give it to another.

Economic studies show that small businesses are far more effective at creating jobs than large counterparts. Small businesses annually create 60 to 80 percent of all new jobs in the United States, and employ at least half of all private sector workers. "SEC Tells Congress It Hopes to Minimize Sarbanes-Oxley Impact on Small Business," FinancialWire, Sept. 27, 2004. But the creation of these jobs requires investment in small business, in order to increase the customer base and goodwill. If the government can close down a business at any time for the benefit of another business, then this arbitrariness deters badly needed investment. When summed up with respect to the many small businesses affected by an eminent domain for development purposes, the lost investment in job creation is enormous. "Nationally, between twenty-five and forty percent of businesses forced to relocate by renewal projects fail." John P. Elwood, "Focus on: Urban America: Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven," 12 Yale L. &



Pol'y Rev. 138, 180 (1994). *Amicus* Somerset Transmission & Repair Center has suffered the threat of a condemnation for over a year, as have many businesses in its area and hundreds of thousands of small businesses nationwide.

Often the condemnations are announced long before they are realized, apparently with the purpose of deterring investment in order to depress the property value to be paid to the condemnee. In the eminent domain threatening *Amicus* Somerset Transmission & Repair Center, the town announced an enormous redevelopment plan years before it could even be possible to execute, thereby reducing as much as possible what the town will ultimately have to pay. The former mayor of Franklin Township declared that one intent of the redevelopment plan was to discourage speculators from buying and improving the properties in the redevelopment area and thus increasing the cost of those properties should the Township need to acquire them through eminent domain. Franklin Township Public Hearing Minutes ¶ 9, Nov. 26, 2002. The decision below implicitly allows this type of value-depressing delay, and must be reversed. 268 Conn. at 119-20 (allowing "a town's condemnation [despite] the town's lack of a detailed plan designating exactly what part of the defendants' land it needed for what purpose" and approving it without "a development commitment or formal site plan in place for parcel").

In the context of eminent domain for private development, the distorting incentives for economically harmful behavior are magnified. Specifically, there is a "rent-seeking" incentive that magnifies the overall waste and injustice. "[A] resource's value after condemnation is almost always higher than before [and t]he present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee." Thomas W. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 85 (1986). When the use is truly for the public, that surplus inures to the benefit of all. Moreover, the limitation of "public use" serves to minimize the

occurrence of this disruption: a town can only build a small number of municipal buildings or power plants. But when the door is opened to takings for private purposes, rent-seeking behavior incites an unlimited number of attempts to capture that surplus. The private beneficiaries of the takings have every incentive to lobby for as much as they possibly can.

The surplus, however, comes at the uncompensated expense of the small business being condemned. The years leading up to the condemnation extract further costs in lost investment. Is government endowed with the power and wisdom to choose one business over another for economic reasons? Certainly not. The Fifth Amendment prohibits this rent-seeking behavior in destroying one business for the benefit of another. When the constitutional protection is unenforced, however, towns have every incentive to increase the economic rent and share it with the developer benefiting from the taking. This economic rent is maximized by scaring away as much investment as possible from the condemnees, typically by publicizing the eminent domain as early and frequently as possible. That depresses property values, scares away improvements, and lowers the appraised value, thereby reducing the price the town eventually pays.

The familiar argument that eminent domain for private development is somehow necessary for slum clearance or blighted areas is unsupported. For starters, neither this case nor most uses of eminent domain today concern truly blighted areas. And even when areas are blighted, free enterprise is the answer rather than eminent domain. For example, in Olivette, Missouri, the developer made generous offers funded by tax rebates to acquire 150 old homes near a freeway, in order to make way for "big box" retailers including Wal-Mart and Home Depot. A premium of up to 2.5 times market value was negotiated, but for truly blighted areas such markups are modest relative to the contemplated gain. After all, blighted property is by definition worth very little. This project ultimately failed not due to any obstacles in acquiring the property, but because neighbors opposed to the increased traffic flow narrowly voted it down. George Lefcoe, "Finding the Blight That's Right for California Redevelopment," 52 Hastings L.J. 991, 1028-30 (2001). Successful examples of free market-based city planning abound, such as Columbia, Maryland, an entire city of 90,000 developed by one planner without eminent domain. As to alleged problems of clouds over titles, they can be addressed by state property laws other than unlimited eminent domain, such as requiring owners to assert their rights within a certain time period to avoid condemnation. If blighted properties were so prevalent, then developers could target multiple sites and bargain with different groups of property owners to solve the obstacle of the holdout. The solution is for the state to facilitate the free market, not frustrate it.



Arbitrary governmental interference with private property, typified by taking from one business to give to another, is loathsome to the efficient operation of free enterprise. The Nobel-prize winning Coase Theorem teaches that market efficiency will occur regardless of how legal entitlements are drawn, but they must be drawn somewhere lest economic activity dry up amid the uncertainty:

> As Ronald H. Coase has reminded us … 'uncertainty about the legal position itself' must be taken into account. The underlying rationale for the stated concern is that a society needs a system of law (including natural resource and environmental law) that provides them a stable pattern of expectations. So structured, this allows people to plan their economic affairs with reasonable confidence so that they can know in advance the consequences of their choices.

Nicholas Mercuro and Michael D. Kaplowitz, "Performance Indicators for Natural Resource and Environmental Policy: Contributions from American Institutional Law and Economics," 11 Duke Env L & Pol'y J 139 (Fall 2000) (quoting Ronald H. Coase, "The Problem of Social Cost," 3 J.L. &

Econ. 1, 19 (1960)). The specter of condemnation for private uses thoroughly disrupts "a stable pattern of expectations" essential to efficient bargaining and investment. Economic activity is greatly hindered by the growing practice of governmental taking from one business to give to another.

The most "blighted" sight of all is a huge retail store that is vacant and inevitably vandalized. A collection of small businesses is much better suited to handling the economic cycles and competitive upheavals than are their lumbering counterparts. The real property of a small business that goes bankrupt can be easily adapted to many other types of businesses. But what is to be done with the buildings left behind with the massive bankruptcies and downsizings of Fortune 500 companies? All too often, they become inefficient eyesores that scar the landscape long afterwards. For example, after K-Mart opened over 2,000 box-like stores, it subsequently collapsed financially. It then proceeded to close about 600 of its stores, blighting the landscape and leaving local communities helpless to pick up the slack. Sridhar Krishnaswami, "K-Mart to Merge with Sears, Roebuck & Co.," Business Line, Nov. 18, 2004. K-Mart laid off 55,000 employees in the process, leaving most without the skills necessary to survive by starting their own business. *Id.* Small businesses and their employees are far more resilient in handling economic downturns or shifts in buying tastes than "mega stores" surrounded by enormous parking lots.

Finally, it is worth debunking the unsupported claim that replacing small businesses with "big box" retailers, or with a corporate complex in this case, is somehow good public policy. All indications are to the contrary. Small businesses are essential to supporting the youth sports teams, the adult softball and bowling leagues, the local fire departments, the Kiwanis and Lions clubs, and all the sundry local charitable events that bind a community together. In a seminal work, Professor Robert Putnam demonstrated that a rise in social ills is correlated to a decline in these community activities.



Robert D. Putnam, *Bowling Alone: the Collapse and Revival of Community* (2000). It surely is not good policy forcibly to rip out the engine that drives these essential aspects of a productive community: small business.

The replacement of small businesses with the big boxes has a devastating effect on local charities. For example, the large retailer Target has banned the local Salvation Army chapters from soliciting donations outside its doors, a decision expected to cost charities in Broward and Palm Beach counties $70,000 each. Karla D. Shores, "Target Halts Holiday Soliciting; Decision Pulls Key Location for Salvation Army," Sun-Sentinel (Fort Lauderdale, Florida), Nov. 10, 2004. This contrasts sharply with local businesses that generously donate to the community. A Wal-Mart store in Ohio, which probably displaced a hundred small businesses, expressed its support of the local community with a paltry check of only $680 to its single selected charity, a hospice. "Xenia Wal-Mart Gives $680 Check to Dayton Hospice," Dayton Daily News, Z4-8, Jan. 2, 2003. While disdain for community activities is surely within the rights of large retailers, it is also within the Fifth Amendment rights of small businesses to say "no" to the taking of their property for the benefit of out-of-state corporations.

## CONCLUSION

The decision below should be reversed.

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In The
# Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

v.

CITY OF NEW LONDON, et al.,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF THE AMERICAN PLANNING ASSOCIATION, THE CONNECTICUT CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND THE NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether this Court should change the settled meaning of the "public use" limitation of the Just Compensation Clause by ruling either (i) that property cannot be taken by eminent domain solely for economic development, or (ii) that courts should apply a heightened standard of review in considering legislative determinations of public use.

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

The American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations. The organization has forty six regional chapters, including the Connecticut Chapter with 446 members which joins in filing this amicus brief, as well as nineteen divisions devoted to specialized planning interests. The APA is centrally concerned with redirecting growth and development into the nation's central cities, inner suburbs, and other areas already served by infrastructure and supported by urban services. It believes that it is critically important to preserve the ability of local governments to use redevelopment tools and techniques, including eminent domain when appropriate, to achieve well-defined public purposes. The APA also believes that an open and inclusive public participation process should be part of all redevelopment planning. To the extent possible, the APA believes that communities should use incentives – such as increased development densities and favorable zoning policies – as their primary redevelopment tool, and should resort to eminent domain only as a tool of last resort when incentives are insufficient to implement redevelopment plans.

Founded in 1970, the National Congress for Community Economic Development ("NCCED") is the representative and advocate for the community-based development industry. NCCED represents over 3,600 community development corporations ("CDCs") across America; its

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to the brief's preparation or submission.

membership encompasses a broad range of geographic, ethnic, racial, political, social, and economic interests, including neighborhood housing and community action agencies, farmworker organizations, public officials, financial institutions, municipalities, businesses and individuals. Community development corporations produce affordable housing and create jobs through business and commercial development activities, and are a vital force in empowering low-income communities across the nation to achieve economic and social progress.

## SUMMARY OF ARGUMENT

Petitioners ask this Court to impose a restrictive gloss on the words "public use" in the Just Compensation Clause, interpreting those words to mean that property cannot be condemned solely for economic development. This is not the first time courts have been asked to police the ends to which the power of eminent domain is devoted. From roughly 1840 through the 1930s, many state courts applying state constitutional law sought to limit eminent domain to projects that were "used by the public," a project that was eventually abandoned as unworkable and unduly restrictive. Significantly, however, during that same period this Court never endorsed a restrictive reading of public use as a matter of federal constitutional law. To the contrary, it specifically approved condemnations designed to promote economic development, and consistently applied a highly deferential standard of review to public use determinations. This history is instructive in considering petitioners' proposals that this Court restrict the use of eminent domain for economic development, or adopt a more intrusive standard of review. It reveals that these proposals are not only unwise, but would require a radical departure from a jurisprudence that has been long settled.

Petitioners and their amici advance only two specific legal arguments in support of their proposals. Petitioners request that the Court emulate the reasoning of *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).



But *Hathcock* rests on an idiosyncratic state constitutional methodology; would invite manipulation; and could lead to a variety of undesirable consequences in different areas of the law. Petitioners' amici suggest that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require a higher standard of review of public use determinations. However, there is no justification for transposing a standard of review designed to identify uncompensated expropriations to the wholly different context in which government agencies agree to pay just compensation for the property interests they acquire.

Eminent domain is concededly an unsettling power, and is subject to misuse or overuse if not properly constrained. But eminent domain is disruptive for all who experience it, not just those who might be able to persuade a reviewing court that a particular condemnation is not "public" enough. The dangers of eminent domain should be addressed by assuring that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke eminent domain, and by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages.

## ARGUMENT

### I. History Teaches That "Public Use" Should Be Given A Broad Interpretation That Includes Economic Development

The briefs filed in this case by petitioners and their amici can be read to imply that this Court in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), abdicated a constitutional role it had previously performed in protecting property owners from overly zealous exercises of the power of eminent domain, and that the law should now be restored

to its former glory. Nothing could be further from the truth. Petitioners are the ones who seek a sharp break with settled constitutional understandings. They are urging the adoption of novel constitutional limitations on the exercise of eminent domain that have never had, and never should have, any basis in federal constitutional law.

### A. The Rise and Fall of "Use by the Public"

There is little affirmative evidence that the Framers understood the words "for public use" in the Just Compensation Clause to incorporate any kind of substantive limitation on the ends to which the power of eminent domain may be devoted. These words may have been intended merely to describe the type of taking for which just compensation must be given – a taking of specific private property by public authority as opposed to some other type of taking, such as a taking by tort or taxation.[2] Nevertheless, "for public use" has been read throughout our history as imposing an implied limitation on the exercise of eminent domain – that it can be used only for public and not private uses – and this Court has accepted this interpretation. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32 (2003); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

As an implied limitation on the power of eminent domain, the core case of a forbidden private use has always been clear: when the government takes A's property and gives it to B, with no public justification other than the legislature's preference for B over A. *See Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896). What has been less clear is just what sort of justification is necessary to elevate a taking from the A to B category and transform it into a public use.

[2] *See* David A. Dana & Thomas W. Merrill, *Property: Takings* 8-25 (2002); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245 (2002).



Historically speaking, three different interpretations of "public use" can be discerned.[3] The most restrictive interpretation requires that the government actually hold title to the property after the condemnation. The next-most-restrictive definition is that public use means "use by the public." Under this definition, public title to the property is irrelevant; what is decisive is whether the property is accessible as a matter of right to the public. The third and broadest definition is that public use means public benefit or advantage. Under this conception, neither title to the property after condemnation, nor access to the property by the general public, is necessary. Instead, property can be taken for any objective that the legislature rationally determines to be a sufficient public justification.

The narrowest possible definition – that public use means public ownership – has always been regarded as a fairly uncontroversial type of taking. Many routine examples of eminent domain – such as the acquisition of land for a highway – fit this definition. But public ownership has almost universally been regarded as too narrow to serve as a comprehensive definition of public use. Starting in the early years of the nineteenth century, States frequently delegated the power of eminent domain to privately-owned turnpike, canal and railroad corporations. Later, such delegations were extended to privately-owned gas, electric, and telephone utilities. The widespread practice of delegating the power of eminent domain to these sorts of privately-owned common carriers and public utilities meant that courts almost never regarded public

[3] For useful surveys of the history of interpretation of the public use limitation, *see* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Envtl. L. 1, 4-41 (1980); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 204-25 (1978); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940).

title to condemned property as a complete definition of public use.[4]

During the colonial and early national periods, the understanding about the permissible scope of eminent domain appears to have been, at least implicitly, the broad view – that the power could be used for any purpose consistent with public benefit or advantage.[5] The issue received little attention by courts, presumably because land was plentiful and eminent domain was little used. Around 1840, however, a judicial reaction began to set in. Many state courts began to endorse the more restrictive "use by the public" test.[6] This permitted eminent domain to be delegated to railroads, turnpike companies, and the like, because these were common carriers subject to duties to serve the public on a nondiscriminatory basis. But, by definition, it would not permit eminent domain to be used by other types of enterprises, such as manufacturing plants or mining operations.

Almost immediately, those state courts which had endorsed the "use by the public" reading began to encounter cases in which the test appeared to be unduly restrictive. Mill Acts, which permitted riparian owners to build dams flooding the property of upstream owners, were a primary focus of controversy. With respect to grist mills that ground grain for area farmers, one could characterize the enterprise as being subject to common carrier-type duties, and hence as satisfying the "use by the public" criterion.[7] But as the nineteenth century unfolded, Mill Acts increasingly came to include other types of mill dams,

[4] For a rare judicial expression of the public title view, *see Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 60-61 (N.Y. 1837) (concurring opinion of Senator Tracey).

[5] *See* Meidinger, *supra* note 3, at 25; Berger, *supra* note 3, at 207.

[6] *See* Nichols, *supra* note 3, at 617-18; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 603-04 (1949).

[7] *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 18-19 (1885).



such as those powering textile plants and other types of manufacturing operations. Courts that had embraced the "use by the public" test struggled with these applications.[8] Similar problems were encountered when public utility companies began to acquire easements for electric and telephone distribution lines across private property, and many States, especially in the West, adopted statutes broadly permitting eminent domain to be used to facilitate the construction of mining operations, irrigation projects, and drainage districts. State courts that had adopted the "use by the public" test engaged in a variety of contortions in an effort generally to sustain these exercises of eminent domain.[9] By the beginning of the twentieth century, as one commentator observed, "there had developed a massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification."[10]

The *coup de grace* to the "use by the public" test was delivered in the 1930s. Beginning with the National Industrial Recovery Act, followed by the Housing Acts of 1937 and 1949, Congress began appropriating significant federal funds to state and local government authorities to assist in the process of slum removal and construction of public housing.[11] Many of these projects entailed the use of eminent domain either to clear deteriorated properties and/or to acquire sites for public housing. Following the lead of the New York Court of Appeals,[12] state courts uniformly rejected claims that these condemnations violated the public use limitation. From this point on, the

[8] *See* Nichols, *supra* note 3, at 620-21.

[9] *See Dayton G. & S. Mining Co. v. Seawell*, 11 Nev. 394, 400-01 (1876).

[10] Comment, *supra* note 6, at 605-06.

[11] *See* Berger, *supra* note 3, at 214-17; Nichols, *supra* note 3, at 629-33.

[12] *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936).

"use by the public" test faded into obscurity. It is today the law in at most only a few States.[13]

### B. This Court Has Consistently Embraced the Broad View of Public Use.

Throughout the roughly 100 years that witnessed the rise and fall of the "use by the public" standard in the state courts, this Court never once sought to impose such a restriction on eminent domain as a matter of federal constitutional law. Four cases decided by this Court around the turn of the twentieth century involving the development of natural resources are particularly instructive. These cases involved challenges to the use of eminent domain to construct a ditch to remove water from a drainage district, *O'Neill v. Leamer*, 239 U.S. 244 (1915); to construct ditches to bring water to irrigation districts, *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); and to build an aerial bucket line to transport minerals taken from a mine, *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906). They establish three propositions of importance to the present controversy.

First, in none of the four cases did the general public have any right of access to the property condemned. The Court specifically rejected the contention that a lack of public access made the exercise of the power of eminent domain constitutionally problematic. Speaking for the Court in *Strickley*, Justice Holmes noted "the inadequacy of use by the public as a universal test." 200 U.S. at 531. The Court soon reaffirmed this conclusion in a variety of contexts not involving the development of natural resources.[14] Given that

[13] *See, e.g., Karesh v. City Council*, 271 S.C. 339, 247 S.E.2d 342 (S.C. 1978).

[14] *See Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916); *Block v. Hirsh*, 256 U.S. 135, 155 (1921); *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).



the two contending approaches to interpretation of public use at the time were the "use by the public" test and the public benefit or advantage test, the Court's explicit rejection of the narrow test represented a firm embrace of the broad public benefit or advantage interpretation.

Second, the Court stressed that the conditions that might justify the exercise of eminent domain vary greatly from one section of the country to another, making it inappropriate to lay down a single federal rule binding on all States. In *Clark*, the Court upheld a Utah statute which had been applied to permit the condemnation of a ditch to convey water for irrigation to a single farm. Justice Peckham (who in other contexts was quite skeptical of state intervention in economic affairs, *see Lochner v. New York*, 198 U.S. 45 (1905)) wrote that whether such a purpose is a valid public use will "depend upon many different facts":

> Those facts must be general, notorious, and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from the denial of its validity. 198 U.S. at 368.

Given the variability of conditions from one State to another, Justice Peckham concluded: "[W]here the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation." *Id.*

Third, the public rationale for the takings in each of these cases was the State's determination that the property was needed in order to enhance the productivity of particular resources. The Court recognized that the takings in these cases could not be justified on public

health and safety grounds, *see Fallbrook Irrigation Dist.*, 164 U.S. at 163, or on the ground that large numbers of persons directly benefited from the takings, *see Clark*, *supra*; *Stickley*, *supra*. Instead, in each case the condemnation was justified because of its impact on "the growth and prosperity of the state," *Clark*, *supra*, 198 U.S. at 368, or "the prosperity of the community," *Fallbrook Irrigation Dist.*, 164 U.S. at 163 – in other words, *because it was needed to promote economic development*. Each of these decisions therefore stands for the proposition that condemnation for the sole purpose of economic development *is* a legitimate public use, provided a State so determines and this judgment is a rational one in light of the circumstances of the property and the needs of the public. Petitioners cite some of these decisions in footnotes (*see* Pet. Br. at 22 n.18, 33 n.31). But they have not explained why they should now be overruled based on a novel theory that the power of eminent domain cannot be used to promote economic development.[15]

Throughout the period when many state courts followed the "use by the public" standard, this Court invalidated only one state action as an impermissible private use. This was an order of the Nebraska Board of Transportation directing a railroad to allow a group of farmers to construct an elevator on railroad property on terms and conditions similar to those previously extended to two other firms. *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). The Court observed that the challenged order was not framed or defended as an exercise of the power of eminent domain for public use, that the beneficiaries were private individuals associated for their own benefit, that they had not been incorporated for any public purpose, and

[15] Petitioners suggest that these cases involved "instrumentalities of commerce" (Pet. Br. at 21). But if the private ditches and aerial bucket line were "instrumentalities of commerce," then so is every private driveway in the country. The stated justification for the taking in each case was that it would enhance the productivity of resources, and the Court upheld each of the takings on the assumption that this was the "public use."



that they did not represent that the new elevator would be open to use by the public. *Id.* at 416. On these assumptions, the Court held that "[t]he taking by a State of the private property of one person or corporation, for the private use of another, is not due process of law . . . ." *Id.* at 417. *Missouri Pacific* stands for the proposition that when government takes property from A and gives it to B, and fails altogether to advance a rational public purpose justification for the taking, this violates the public use limitation. There is no reason to believe that this does not remain good law.

As the federal government grew in the scope of its activities, this Court also began to encounter public use challenges to the exercise of eminent domain by federal authorities. The Court in these cases adhered to the broad conception of public use, permitting eminent domain to be used for a variety of ends, including acquiring land for a park, *Shoemaker v. United States*, 147 U.S. 282 (1893); acquiring the site of the Battle of Gettysburg for a national memorial, *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896); acquiring land to retransfer to persons whose property had been flooded by a federal reservoir, *Brown v. United States*, 263 U.S. 78 (1923); and acquiring homes that had been cut off from access to the outside world by a federal reservoir. *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946).

From its earliest encounters with the public use issue, the Court's understanding of the applicable standard of review remained essentially unchanged. In *Gettysburg Electric,* the Court said: "[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." 160 U.S. at 680. In *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), the Court said: "Congress has declared the purpose to be a public use, by implication if not by express words. . . . Its decision is entitled to deference until it is shown to involve an impossibility." In *Welch*, after quoting the foregoing standard, the Court said: "Any departure

from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." 327 U.S. at 551-52.

Against this background, it is clear that *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), represented no break with the past. Those decisions simply restated the settled jurisprudence established by this Court more than fifty years before *Berman* was decided. Under that jurisprudence, the determination of what ends constitute a public use is for the legislature to make, without any artificial restrictions on legislative choice such as the "use by the public" test. Legislative determinations of public use are subject to judicial review, but only under the highly deferential rationality standard that applies to constitutional challenges to social and economic legislation more generally.

In the years since *Berman* and *Midkiff*, litigation over the public use issue has settled into a stable pattern.[16] Federal courts, following the teachings of *Berman* and *Midkiff*, have played a minor role in the process, and have been highly deferential to legislative determinations of public use. There are thirty-one published federal appellate decisions resolving public use controversies since *Berman*. Only one of these decisions holds that a condemnation is not for a public use, and that decision turns largely on the conclusion that the taking was not an authorized public use under Indiana state law.[17] The outcome in state courts, not surprisingly in a federal system, is somewhat more variable. There have been 513

[16] The data in this paragraph are drawn from Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 Real. Prop. Prob. & Tr. J. 251 (2004); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986).

[17] *Daniels v. Area Plan Comm'n. of Allen County*, 306 F.3d 445 (7th Cir. 2002).



state appellate decisions resolving public use controversies since *Berman*, the vast majority of which interpret "public use" language in state constitutions rather than the parallel language found in the federal Constitution. These decisions are also deferential to legislative determinations of public use, but less so than federal appellate decisions. Altogether, about one in six of these decisions (17%) holds that a challenged taking is not for a proper public use, mostly under state constitutional law.

In short, the law of public use has been and largely remains state constitutional law, reflecting the vagaries and traditions of each individual state. State courts have not failed to scrutinize the use of eminent domain to assure that States do not take property from A and give it to B without an adequate public justification. They have in fact invalidated a sizeable number of takings as lacking a sufficient public use. The Connecticut Supreme Court's decision in this case, decided by a four-to-three margin, reflects the kind of careful consideration that state appellate courts continue to give to these issues. Federal courts, however, have stood to one side, and have allowed the state courts to police this issue. Petitioners and their amici have offered no compelling argument as to why this settled division of constitutional authority, reflecting over a century of unbroken federal constitutional precedent established by this Court, should now be upended.

## II. Petitioners And Their Amici Have Advanced No Principled Legal Basis For Adopting A Novel And Restrictive Approach To Public Use

Given the longstanding and settled meaning of "public use," petitioners and their amici offer surprisingly little by way of legal argument that would justify adopting a novel and restrictive approach to the public use limitation. Petitioners' primary argument is to urge the Court to emulate the reasoning of a recent Michigan Supreme Court decision construing the Michigan Constitution (Pet. Br. 18-27). Their secondary argument is that the Court should adopt a more

searching standard of review of public use determinations than the one reflected in its past decisions (Pet. Br. 30-40). Although petitioners offer no specific legal argument in support of this secondary argument, some of petitioners' amici contend that the Court's decisions involving exactions require adopting an intermediate standard of review for public use cases. None of these claims has merit.

### A. The Public Use Standard Recently Adopted as a Matter of Michigan Constitutional Law in *Hathcock* Is Unworthy of Emulation

Petitioners invite the Court to adopt as a matter of federal constitutional law the restrictive definition of public use recently adopted as a matter of Michigan constitutional law in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004). *Hathcock* involved a challenge to the use of eminent domain to acquire a number of parcels of land in Wayne County adjacent to the Detroit Airport. The project started when the airport was expanded, exacerbating noise pollution of nearby properties. With the aid of a grant from the Federal Aviation Administration, the County began to purchase nearby property affected by noise. The County eventually determined to acquire 1,300 acres in all, and to use the property to develop a business and technology park that would promote economic development in the County. Scattered within this tract were nineteen individual parcels whose owners declined to sell, which the County sought to acquire by eminent domain.

As explained in Part I, courts historically have assumed that "public use" should be defined in terms of a single variable: public ownership, use by the public, or public benefit or advantage. *Hathcock* breaks new ground by combining these definitions into a more complex, multipart definition of what is *not* a public use. Specifically, the decision holds that property is not dedicated to public use when it is taken for the use of a private for-profit enterprise, unless one of three circumstances applies: (1) the condemnation is for a highway, railroad, canal, pipeline or



similar "instrumentality of commerce" that requires the assembly of many contiguous parcels of land and hence presents the potential for an extreme holdout problem; (2) the private transferee will remain accountable to the public for its use of the property because it will be subject to continuing regulatory oversight; or (3) property has been selected for condemnation based on some attribute or condition of the condemned property of "independent public significance" such as being blighted. 471 Mich. at 472-76, 684 N.W.2d at 781-83. The Michigan Supreme Court, finding that the County did not propose to retain title to the land in the technology park, and that the project did not otherwise fit any of the categories where eminent domain was permitted, held the taking was not for a valid public use. 471 Mich. at 476-78, 684 N.W.2d at 781-83.

There are a number of reasons not to emulate the *Hathcock* decision. First, *Hathcock* rests on an interpretative method unique to Michigan constitutional law, which deviates sharply from federal constitutional law. *Hathcock* sought to fix the meaning of broad constitutional language by incorporating the particular applications of that language that a "legally sophisticated" reader would recognize to exist at the time of ratification. *See* 471 Mich. at 468-71, 684 N.W.2d at 779-80 (purporting to derive this methodology from the writings of the nineteenth-century Michigan jurist Thomas Cooley). The current version of the Michigan Constitution was ratified in 1963. The court asked: What would a legally sophisticated reader of the constitutional text in 1963 understand by the term "public use"? The answer: Such a reader would have examined Michigan decisional law on the subject, and would have understood that law to comprise only those uses that had been previously recognized by the Michigan judiciary prior to 1963, namely, public ownership, condemnations for common carriers facing extreme holdout problems, condemnations for other private entities subject to close regulatory supervision, and elimination of blighted property. Use of eminent domain for any other purpose would have been understood to be impermissible.

Whatever merits it may have as a matter of Michigan constitutional law, *Hathcock*'s methodology is inconsistent with the way this Court generally interprets the Federal Constitution. Although the Court is guided by its understanding of the general concepts the Framers understood they were constitutionalizing, it does not treat the "broad and majestic" Clauses of that document[18] as incorporating a specific list of permitted applications that a "legally sophisticated" reader would recognize at the time of ratification.[19] To some degree the Seventh Amendment's right to jury trial in suits at common law has been interpreted this way.[20] But there is a textual basis for this: the Seventh Amendment directs that the right to trial by jury in suits at common law "shall be preserved." Ordinarily, however, constitutional provisions are not construed as incorporating contemporaneous applications frozen in time. For example, the Commerce Clause, the First Amendment, the Fourth Amendment and the Equal Protection Clause have not been construed this way. Indeed, the other elements of the Takings Clause – most prominently, the word "taken" – have not been construed as having a fixed historical meaning.[21] It would be very odd, to say the least, to interpret one word of the Takings Clause ("taken") as a general concept whose application is to be determined over time, and three other words ("for public use") in an historically frozen fashion.

Interpreting the "public use" language in the Federal Constitution in a historically-frozen manner would obviously have deeply unsettling consequences. The Fifth

[18] *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

[19] *See* Antonin Scalia, *A Matter of Interpretation* 140-41 (Amy Gutmann ed., 1997).

[20] *See, e.g., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

[21] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (observing that Takings Clause was originally understood to reach only direct appropriations of property or practical ousters from possession).



Amendment has not been amended since it was adopted in 1791. If only those projects recognized as proper objects of eminent domain in 1791 were deemed permissible, huge swathes of settled eminent domain law would now have to be repudiated as unconstitutional. If we decide that 1868, when the Fourteenth Amendment was adopted, is the appropriate reference point, then the effect would be only slightly less avulsive. Takings for public utility lines, pipelines, water reclamation projects, and urban renewal were all unrecognized as of 1868.

Second, *Hathcock*'s attempt to limit the use of eminent domain for economic development to cases where property is "blighted" would generate undesirable consequences. Such a limitation could work to the disadvantage of poor and minority communities, which could be more readily subject to condemnation based on a finding of blight than middle class communities.[22] More broadly, it would seriously distort the process of development planning, by skewing economic development projects toward locations most plausibly characterized as blighted. Proper economic development planning looks to a wide range of factors, including not just the condition of existing properties, but also the potential for future economic activity in the area, population densities, proximity to transportation facilities, the presence or absence of public amenities, and other variables.[23] The straightjacket *Hathcock* seeks to impose on eminent domain could undermine the quality of planning for economic development, to the detriment of all the community.

[22] Scholars have concluded that traditional urban renewal as practiced from the 1940s through the 1960s tended to have a disproportionate impact on minority communities. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1 (2003).

[23] The American Planning Association policy guide on redevelopment, ratified in April 2004, provides a summary of the principles that planning professionals follow in designing urban redevelopment projects. See http://www.planning.org/policyguides/redevelopment.htm.

Any constitutionally-mandated finding of "blight" would also be subject to manipulation. This Court observed in *Lucas* that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eyes of the beholder" and cautioned against using this distinction as a basis for interpretation of the Just Compensation Clause.[24] Restricting the use of eminent domain to blighted areas would confront similar imponderables, as municipalities and property owners would contest whether particular takings are blight prevention programs ("harm-preventing") or "mere" economic development programs ("benefit-conferring"). Federal courts could arbitrate these disputes only by developing a jurisprudence of "blight," and closely reviewing the factual records in state eminent domain proceedings to make sure that the States are conforming to the federalized standard.

Third, *Hathcock*'s restrictive definition of public use could limit the options of government in solving important social problems in a variety of areas. Of particular relevance to the issues in this case, *Hathcock*'s limitations could severely restrict government efforts to combat urban sprawl. Developers of new shopping centers, townhouse complexes, and business centers need large tracts of land to configure their projects in ways that will attract customers. The easiest way to acquire large tracts of land is to buy up greenfields at the outer fringes of urban areas. Large sites in existing urban centers are hard to come by because of the high transaction costs of land assembly. One way to reduce the advantage developers currently see in greenfield development is to use eminent domain to assemble tracts of land in high density urban areas. But *Hathock* seems to say that, outside the context of property found to be blighted, this will be possible only if the government retains title to the property. *Hathcock* observes dismissively that "the landscape of our country is

[24] 505 U.S. at 1024.



flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." 471 Mich. at 477, 684 N.W.2d at 783. What it fails to observe is that these are mostly located along arterial highways at the perimeter of urban areas. The only meaningful land assembly option *Hathcock* leaves for fighting sprawl is state ownership of shopping centers, townhouse complexes or business centers – not a very appealing idea.

*Hathcock* could have other unhappy consequences as well, many undoubtedly unforeseeable. For example, *Hathcock* might call into question federal legislation providing for compulsory licensing of intellectual property rights.[25] The statutes that incorporate these provisions represent an exercise of the power of eminent domain in the sense that the government authorizes one party (the licensee) to "take" the rights of another person (the intellectual property owner) without permission, in return for the payment of just compensation. Yet these devices also do not appear to fit into any of *Hathcock*'s permitted "exceptions."[26] Similarly, *Hathcock* could call into question statutes that exist in about half the States authorizing private landowners to condemn rights of way to landlocked property. Michigan has specifically disapproved such takings,[27] but other States permit them, and *Hathcock*'s test for public use would arguably wipe out any room for state variation in terms of these longstanding practices.[28]

These and other uncertainties suggest that the primary effect of *Hathcock*'s complex and poorly defined test

[25] *See, e.g.*, 17 U.S.C. § 115 (compulsory license for making and distributing phonorecords).

[26] This Court has held this type of statutory scheme satisfies the public use requirement, at least in the context of licensing the use of trade secret information for federal regulatory purposes. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-16 (1984).

[27] *See Tolksdorf v. Griffith*, 464 Mich. 1, 626 N.W.2d 163 (2001).

[28] *See* Kristin Kanski, Case Note, 30 Wm. Mitchell L. Rev. 725, 729-30 & n.34 (2003) (collecting state statutes).

would simply be to transfer discretion over approval of projects that involve the use of eminent domain from politically accountable bodies to courts. The decision would almost surely impose a new source of litigation costs, as lawyers for property owners and public authorities debated different aspects of the multi-part rule. This Court should decline petitioners' invitation to subject state and local authorities throughout the Nation to this unjustifiable headache.

### B. There Is No Basis for Transplanting the Heightened Standard of Review Applicable to Development Exactions to Public Use Cases.

Petitioners argue in the alternative that this Court should jettison its longstanding commitment to deferential review of legislative determinations of public use. Although petitioners offer no specific legal argument that would justify this step, several of petitioners' amici contend that the Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should be read effectively to overrule the Court's public use precedents and compel use of a heightened standard of review in eminent domain cases. *See, e.g.*, Brief of Cascade Policy Institute *et al.*; Brief Amicus Curiae of Professors David L. Callies *et al.* In fact, those decisions do not in any way alter or undermine the Court's settled standard of review for public use determinations.

*Nollan* and *Dolan* establish a special legal standard to deal with the situation where government officials, in the course of making individual land-use permitting decisions, seek to attach conditions requiring owners to grant the public permanent physical access to their property. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), these types of requirements, if imposed directly, would constitute per se takings. The question the Court faced in *Nollan* and *Dolan* is whether it makes a difference if such requirements are imposed, not directly,



but as conditions of regulatory permits the government might simply deny altogether without incurring takings liability. The Court resolved the question by ruling that such "exactions" do not effect a taking so long as (1) there is an essential "nexus" between the exaction and the government's regulatory purposes in establishing the permitting scheme, *Nollan*, *supra*, 483 U.S. at 837, and (2) there is a "rough proportionality" between the impact of the proposed development and the property right exacted, *Dolan*, *supra*, 512 U.S. at 319. The Court acknowledged that application of these tests entails a more heightened standard of review than the traditionally deferential, rational-basis standard. *See Dolan*, *supra*, 512 U.S. at 391.

The heightened standard established in *Nollan* and *Dolan* for exactions does not extend to the quite different context of public use determinations for the exercise of eminent domain. A critical difference is that government affirmatively offers to pay just compensation in an eminent domain case, whereas the very question at issue in an exactions case is whether the government has affected an appropriation for which it must pay compensation. *Nollan* and *Dolan* themselves make this distinction clear by indicating that the government in each case could have acquired the property rights in question in those cases, regardless of whether the nexus and proportionality tests were met, so long as it was willing to pay compensation. *See Nollan*, *supra*, 483 U.S. at 842 ("if [California] wants an easement across the Nollan's property, it must pay for it"); *Dolan*, 512 U.S. at 396. The standard for deciding whether government can evade paying for an appropriation should not govern the very different question of whether government can take property upon payment of just compensation.

Furthermore, *Nollan* and *Dolan* represent an application of the doctrine of unconstitutional conditions, which has no bearing on eminent domain cases. While reaffirming the government's broad authority to regulate land uses, *Nollan* and *Dolan* focus on the danger that government

could use its ad hoc regulatory authority as leverage to extract interests in property that are unrelated to government's regulatory objectives. As the Court stated in *Nollan*, where there is no "essential nexus" between an exaction and government's regulatory objectives, there is a risk that a permitting decision can be converted into "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. The same risk of potential misuse of government authority does not exist where government mandates a straightforward exchange of property for compensation equal to the fair market value of the property taken.

Consistent with the specific nature of the problem these cases address, the Court has made clear that *Nollan* and *Dolan* have only a narrow scope. Petitioners' suggestion that *Nollan* mandates a complete rethinking of the pubic use standard was implicitly rejected by the Court's decision in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), issued five years after *Nollan* was decided, in which the Court applied, without any dissent, the deferential rational basis test in a public use case involving property retransfer to a private party. Subsequently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999), the Court ruled that the rough proportionality test of *Dolan* (and, by clear implication, the companion *Nollan* essential nexus test) does not extend "beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." In any event, in *Dolan* the Court said that the heightened standard of review for exactions does not apply to "legislative determinations" that do not present the same risk of improper leveraging as ad hoc permitting decisions. 512 U.S. at 385. Thus, the heightened standard established by *Nollan* and *Dolan* does not apply to New London's legislative determination, made in conjunction with a comprehensive planning process involving full public participation, to use the eminent domain power to affect a compensated taking.



## III. Heightened Public Use Review Is Not The Answer To Misuse Or Overuse Of Eminent Domain

Eminent domain is admittedly an unsettling power. To be wrenched from one's home or business by order of the government is a deeply disruptive experience – with or without the payment of compensation. Such coercive power should be used sparingly. Heightened judicial review under the public use requirement, however, would provide a poor mechanism for protecting property owners against the misuse or overuse of eminent domain. Such review would aid only the lucky few who could persuade a panel of judges that the purpose of a particular exercise of eminent domain is not sufficiently "public." To be displaced by eminent domain is a potentially disorienting event for any property owner who experiences it, whatever the justification for the condemnation. What is needed are more general mechanisms that will assure that eminent domain is used as a last resort, not a first resort, and that mitigate the harshness of eminent domain for all who experience it.

Fortunately, there is reason to believe that those mechanisms are already in place. They do not work perfectly, and there is unquestionably room for refinements that would provide additional protections for property owners. But constructive solutions to eminent domain abuse or overuse lie in directions other than developing novel substantive limitations on the ends to which eminent domain can be used, or injecting federal courts into local land use planning processes through a heightened standard of review.

### A. Keeping Eminent Domain a Second-Best Option

As a general rule, it is cheaper to acquire resources through voluntary exchange in the market than it is to obtain them through eminent domain. Market exchange

is of course not without cost. But the costs of eminent domain are generally greater. This is confirmed by the fact that when government units want to acquire property for which there is a thick market – such as personal property – they invariably make open market purchases or use competitive bidding, rather than having to resort to eminent domain.[29]

Eminent domain is generally more expensive because the power is cabined by a variety of procedural requirements that entail significant cost and delay for agencies seeking to acquire resources. The power of eminent domain must be properly delegated by the legislature to the body that is conducting the condemnation; the condemning authority typically must formally determine under applicable law that the exercise of eminent domain is "necessary" in order to achieve the stated public purpose; many States require that the property be properly appraised by the condemning authority before proceeding to negotiate over its acquisition; many States require that the authority make a good faith effort to acquire the property through voluntary negotiation before proceeding to condemnation; many States allow condemnees to demand trial by jury on the question of just compensation; in all States, the Due Process Clause requires that the condemnee be given a full and fair opportunity for a hearing to determine whether all legal requirements for eminent domain have been satisfied, and to contest in court the amount of compensation she will receive.[30]

One other procedural requirement, of course, is important. The legislature or its delegate must make an actual determination that condemnation is for a public use before exercising the power of eminent domain. We do not

[29] *See* Merrill, *supra* note 16, at 80.

[30] For an overview of eminent domain procedures, *see* 7 *Nichols on Eminent Domain* (Patrick J. Rohan & Melvin A. Reskins, eds., 3d ed. 2004).



believe that a restrictive judicial gloss should be imposed on the meaning of public use, or that courts should apply a heightened standard of review to public use determinations. But we *do* believe it is important that some politically accountable body determine that the exercise of eminent domain is for a public use, and that judicial review of such determinations remain available, even if under a deferential standard. The prospect of judicial review and potential invalidation of public use determinations, especially in state courts where review has been more intrusive than in federal courts, adds another important increment to the expected costs of acquiring resources through eminent domain.

Perhaps the most constructive contribution courts can make in protecting against misuse or overuse of eminent domain is to insist that the procedural requirements associated with the exercise of eminent domain be faithfully followed in every case. These requirements not only provide valuable protections *ex post* for individual property owners when they have been singled out for condemnation. Perhaps more importantly, by increasing the costs and the delay associated with acquiring resources by eminent domain, they provide important protection *ex ante* to all property owners, by creating a powerful incentive for authorities with condemnation authority to use market transactions wherever possible. Strict enforcement of procedural requirements, in other words, makes eminent domain largely self-regulating, in the sense that it will only be used in situations where the costs of negotiated exchange are prohibitive.

### B. Integrating Eminent Domain Into Land Use Planning

Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain.

Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain, by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps forgoing them altogether. It can also reduce public concerns about the use of eminent domain, by providing a forum in which the reasons for opposition can be considered, offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project. To the extent the need to undertake a planning process including public participation magnifies the cost differential between eminent domain and market transactions, these processes also provide a further disincentive to use eminent domain.

We do not suggest that a mandate to engage in a sound planning process can be extracted from the "public use" requirement of the Fifth Amendment. Planning processes, including public participation and a requirement of considering alternatives, have other roots, most prominently the administrative law traditions surrounding the local land use planning. We do think, however, that the presence of these features is relevant to this Court's consideration of whether the public use determination of New London and the New London Development Corporation was a rational one. New London and its Development Corporation engaged in an extensive planning process before determining that it was necessary to exercise the power of eminent domain; they provided multiple opportunities for public participation in the planning process; and they gave extensive consideration to alternative plans before settling on the final plan. *See* Resp. Br. at 4-9. We would urge the Court to note these features of the instant case as relevant factors confirming that the public use determination was rational – without of course necessarily suggesting that they are constitutionally required. We would also suggest that the Court note other recent



decisions in the lower courts, such as *S.W. Ill. Dev. Auth. v. Nat'l City Envt'l, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1 (2002), where eminent domain decisions were *not* accompanied by any significant degree of planning or public participation, and where the state courts held that the taking was not for a public use – without of course necessarily suggesting that the same result would be required by the Federal Constitution. The Court can instruct by example as well as by mandate.

### C. Providing Additional Compensation for Takings of Occupied Structures

The default standard for determining just compensation is fair market value – what a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker.[31] This standard, however, sometimes fails to provide full indemnification to all property owners whose property is taken by eminent domain. The most obvious shortfall is the subjective value that individual owners attach to their properties. Subjective value has many sources. Owners may have made modifications to the property to suit their individual needs and preferences; they may treasure friendships they have formed in the neighborhood; they may simply enjoy the security that comes from being in familiar surroundings. These values are ignored under the fair market value test.[32] Another important shortfall involves consequential damages caused by a taking of property, including moving expenses, attorneys fees, loss or damage to tangible personal property, and loss of business good will. The constitutional formula does not provide any compensation for any of

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[31] *See, e.g., United States v. 564.54 Acres*, 441 U.S. 506, 511-12 (1979); *United States v. Miller*, 317 U.S. 369, 374 (1943).

[32] *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24, 35-36 (1984).

these values either.[33] These systematic shortfalls in compensation help account for the intensity of opposition many homeowners express even to compensated takings.

Adjusting compensation awards to provide more complete indemnification would be a far more effective reform of the existing system of eminent domain than increasing federal judicial review of public use determinations. Additional compensation would reduce the burden imposed on particular individuals by the imposition of uncompensated residual losses. It would provide a further incentive for public authorities to forego eminent domain, if at all possible, in favor of market exchange. And it would provide a targeted and calibrated remedy for the concerns about uncompensated losses suffered by certain property owners, homeowners in particular,[34] without erecting an unnecessary general barrier to the use of the eminent domain power as a tool for economic development.

The Constitution requires "just compensation," not fair market value, and it is possible that constitutional compensation standards could be modified in ways that would provide more complete compensation for persons who experience uncompensated subjective losses and consequential damages. The Court has been reluctant to endorse deviations from the market value standard, however, because differentiating between claimants who experience such losses and those who do not would create

[33] *Miller, supra*, 317 U.S. at 376.

[34] As recognized in one amicus brief in support of petitioners, "A fair market price is not everyone's price. Some may come out ahead, in the sense that they would have been willing to sell for less. Some will find the price is fair. But others will be paid less than they were willing to sell for." Brief of Cascade Policy Institute, at 7-8. *See also* Serge F. Kovaleski and Debbi Wilgoren, *Landowners Feel Stadium Squeeze; Twenty Acres Earmarked for Baseball Isn't the District's – Yet*, Wash. Post, September 26, 2004 at C1 (describing the different reaction of different property owners to the prospect of eminent domain being used to acquire land for a new baseball stadium for the District of Columbia).



administrative problems for courts.[35] Legislatures are in a much better position to identify categories of claimants who deserve additional compensation, and to develop administrable mechanisms for providing such compensation. Congress has shown the way, through the landmark Uniform Relocation Assistance Act of 1970, 42 U.S.C. § 4601 et seq. The Relocation Act requires that all real property condemnations undertaken by the federal government provide, in addition to compensation for the fair market value of the property taken, additional compensation for moving expenses, direct losses of tangible personal property, reasonable expenses of searching for a substitute business or farm, and certain other incidental expenses. *Id.* §§ 4622(a), 4653. Federal agencies may not make financial grants to state agencies that will result in takings of real property without first receiving adequate assurances that the state agency will follow similar policies. *Id.* § 4630. Pursuant to these requirements, Relocation Act awards will be provided to the petitioners in this case. *See* Resp. Br. at 8.

The additional compensation mandated by the Relocation Act, which has not been significantly amended since it was adopted, obviously goes only part way toward solving the problem of uncompensated subjective losses and consequential damages. But the Act targets the properties of greatest concern: occupied residential structures and operating businesses and farms. A logical further step for reform would be to amend the Act to provide a further increment in compensation for classes of property at risk for significant uncompensated losses, perhaps by providing a percentage bonus above fair market value.[36] Petitioners and their supporters would be well advised to channel

[35] *See, e.g., 564.54 Acres of Land*, 441 U.S. at 511-13; 516-17.

[36] Some of the Mill Acts provided for awards equal to 150% of the damages found to have been sustained, *see Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.1 (1885); and the English practice at one time was to provide compensation equal to 110% of market value. *See* Merrill, *supra* note 16, at 92 n.97.

their energies toward pursuing this kind of reform of eminent domain – and in directing their proposals to the appropriate legislative bodies – rather than asking this Court to adopt unprecedented restrictions on the purposes to which the eminent domain power can be devoted.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, AND WILLIAM VON WINKLE,

*Petitioners*,

v.

CITY OF NEW LONDON, AND NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Connecticut**

## BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS*

Under Rule 37.5 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief as *amicus curiae* in support of Petitioners.[1] The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people and institutions in public life and public benefits. It shares a common interest with religious organizations nationwide in assuring that rights to religious exercise are not infringed by land-use laws and policies.

The Becket Fund represents plaintiffs in a host of land-use cases across the country.[2] In addition, we have filed a series of

[1] All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contribution to the preparation and submission of this brief.

[2] *See, e.g., United States v. Maui County*, 298 F. Supp. 2d 1010, (D. Haw. 2003; *Hale O Kaula v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Temple B'nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-

*amicus curiae* briefs in cases involving the rights of religious land owners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3]

This *amicus curiae* brief presents a unique perspective on the actual, and substantial, burdens suffered by religious institutions when the government relies on the asserted purpose of generating more economic development and tax revenue as a basis for taking private property and giving it to another private party. *Amicus* believes that its experience in this area of the law will assist the Court in resolving this case.

## SUMMARY OF ARGUMENT

Petitioners are being forcibly evicted from their homes in an eminent domain action by the city of New London, Connecticut, even though the condemned area is not blighted, the homes are structurally sound, and no highway or other public works project is being constructed. Instead, New London is destroying Petitioners' homes in order to transfer land to private parties who promise to develop commercial office space and perhaps generate tax revenue for the city. Petitioners' constitutional objections to these takings were rejected by the Connecticut Supreme Court.[4] In doing so, the lower court granted municipalities unprecedented power to take and condemn private property under a novel conception of public purpose—that of potential private economic development and increased tax revenue.[5]

To affirm this broad expansion of eminent domain power is to grant municipalities a special license to invade the autonomy of and take the property of religious institutions. Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property singularly vulnerable to being taken under the rationale approved by the lower court. Religious institutions will *always* be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes *precisely because* they are deemed to be "beneficial and stabilizing influences in community life." *Walz v. Comm'r*, 397 U.S. 664, 673 (1970).

In short, affirming the decision below would both declare open season on the taking of religious institutions of all faiths and functions (houses of worship, schools, hospitals, and soup kitchens, to name just a few), and turn the Fifth Amendment's "public purpose" requirement for takings squarely on its head.

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0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Community Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

[3] *See, e.g., Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. April 21, 2004) (*amicus* brief filed Nov. 21, 2003); *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. March 8, 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

[4] *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

[5] *Id.* at 528.

## ARGUMENT

### I. RELIGIOUS INSTITUTIONS SUFFER SPECIAL DISADVANTAGE FROM GOVERNMENT ABUSE OF EMINENT DOMAIN POWERS IN THE NAME OF ECONOMIC DEVELOPMENT AND GENERATING TAX REVENUE.

The exercise of eminent domain power is often particularly destructive when applied to religious institutions.[6] When religious land uses such as houses of worship, schools, cemeteries, and soup kitchens are condemned, religious expression is unavoidably burdened.[7] In many instances, this burden arises because religious institutions have specifically dedicated their property to sacred use that is irreversibly destroyed when their property is taken and put to another use.[8]

Taking a religious institution's property also burdens religious exercise because these institutions generally select and maintain their properties for specific religious ends—ends that are inextricably intertwined with the chosen location of the property.[9] Accordingly, when the government seeks, through exercise of eminent domain, to dictate where a religious institution may or may not exist, it inevitably treads on that religious institution's autonomy and expression. For if the government can control where a religious institution may locate, the government inevitably comes to control the *kind* of mission a religious institution may pursue. Conforming religious institutions to the government's vision of the "proper place" for such institutions, in effect, imposes the government's vision of their "proper role."[10]

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[6] As one court has noted, because "[c]hurches are central to the religious exercise of most religions," preventing a church from maintaining its chosen "worship site fundamentally inhibits its ability to practice its religion." *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002).

[7] Indeed, this Court has recognized that converting property devoted to religious use to an alternative use favored by the government imposes a substantial burden on religious adherents. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (government decision to log land that was sacred to Native American plaintiffs would "have devastating effects on traditional Indian religious practices.") Nonetheless, this Court denied the Free Exercise claim in *Lyng* because the land that the plaintiffs sought to preserve for religious use was owned by the government. *See id.* (holding that a "devastating" burden on the plaintiffs' religious practice "do[es] not divest the Government of its right to use what is, after all, *its* land" because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government") (citation omitted). But, of course, the situation is quite different—and the implications for treading on the autonomy of a religious institution far graver—when it is the *government* that seeks to exact the property that the religious institution itself owns and sets aside for sacred use.

[8] For example, a church may specially set aside and bless certain land as a religious cemetery and take extraordinary measures to preserve that land as holy and undefiled.

[9] For example, an Orthodox Jewish synagogue will choose to locate in an area in which it is readily accessible to its congregants; an urban, storefront church will locate in the downtown business district near the people it seeks to serve and reach with its message; and a religious shelter will seek to locate in an area accessible to the homeless people to whom it seeks to minister.

[10] Precisely because takings of religious institutions' property do burden religious exercise, courts must carefully scrutinize the inherently discretionary decisions that are involved when the government seeks to condemn religious property. *See, e.g., Yonkers Racing Corp. and St. Joseph's Seminary v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied by Yonkers Racing Corp. v. City of Yonkers*, 489 U.S. 1077 (1989) (applying strict scrutiny to City's condemnation of seminary's property); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996), *motion to vacate denied*, 951 F. Supp. 83 (D. Md. 1997) (regulatory taking substantially burdened free exercise and was not justified by compelling governmental interest); *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 805 (Colo. 1974) (Colorado Supreme Court vacated trial court's

The condemnation at issue in the case at bar does not directly involve a religious institution. However, a judgment affirming the lower court's holding—that potential economic development and tax revenue growth concerns justify forced property transfers from one private owner to another—would place religious institutions at special risk of eminent domain actions. This risk is not merely hypothetical. Examples abound in recent years of municipalities expanding the notion of a taking for "public use" in order to justify the condemnation and transfer of religious institutions' property to for-profit companies that will purportedly generate more tax revenue.

For example, in *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, a church spent over five years acquiring property that was both centrally located to its congregants and sufficient in size to build a sanctuary that allowed the entire church body to assemble for worship together in accordance with the church's beliefs.[11] However, once the City discovered the church's intent to build a place of worship, it suddenly swept in and initiated eminent domain proceedings in order to transfer the church's property to a Costco. The City sought to justify the taking by asserting that Costco would bring more economic development and tax dollars than the proposed tax-exempt church.[12] Ultimately, the court held that the Fifth Amendment could not sustain this "naked transfer of property from one private property to another."[13] Moreover, the court found "significant" evidence that the City's asserted tax and economic justifications were cover for a "discriminatory intent"

order of immediate possession because City could not meet strict scrutiny standard).

[11] 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002).

[12] *Id.*

[13] *Id.* at 1229.



aimed at "trying to keep [the church] out of the City."[14]

Another notorious example of how religious institutions are acutely vulnerable to takings based on tax revenue concerns is the landmark, but now discredited, case of *Poletown Neighborhood Council v. City of Detroit*.[15] In *Poletown*, politically powerful General Motors sought to build an assembly plant on a 465-acre Detroit neighborhood through eminent domain. The *Poletown* court asked, "[c]an a municipality use the power of eminent domain . . . to condemn property for transfer to a private corporation . . . thereby adding jobs and taxes to the economic base of the municipality and state," and answered in the affirmative.[16] That answer instantly condemned *twelve* neighborhood churches over extraordinary protest,[17] without a word of concern from the court.

For municipalities that lack the self-control to raise taxes or cut spending to balance budgets, a rule that allows them to transfer the tax-exempt property of religious institutions to a private business that will immediately add to the tax rolls is often too tempting to pass up—especially in times of municipal budget deficits and recession. A good example of this

[14] *Id.* at 1225.

[15] 304 N.W.2d 455 (1981). The lower court in this case relied in part on the *Poletown* precedent yet the Michigan Supreme Court recently overruled it emphatically. *See County of Wayne v. Hathcock*, 471 Mich. 445 (Mich. 2004).

[16] *Id.* at 457.

[17] JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989). *See also* Derek Shearer, *Poletown: Community Destroyed*, 11 MULTINATIONAL MONITOR (Jan.-Feb.1990) (book review) ("When their efforts to preserve the community failed, the residents attempted to at least save Father Karasiewicz's Immaculate Conception Church, a community centerpiece. When their legal initiatives failed there too, dozens of residents, including many elderly women, occupied the church. They were eventually arrested, and the church, like the rest of Poletown, was razed.").

phenomenon at work occurred in East Saint Louis, Illinois. Though a mosque had purchased property to develop a worship center that would minister to the poor in a depressed area of the city, the city government preferred the immediate tax revenues that would be generated by a for-profit developer. Accordingly, it condemned the mosque's property and transferred it to a private rental housing developer.[18] Simply put, cities like East Saint Louis view religious institutions as a fiscal drain on city tax revenues during tough economic times. One court has even gone as far as to hold that the more religious institutions are attracted to a city (by low real estate prices) during economic downturns, "the more compelling the City's need to exclude them if it is to have any chance to succeed."[19]

Numerous other examples similarly illustrate that religious institutions are consistently targeted for condemnation and property transfer (to for-profit entities) by municipalities asserting economic development and tax revenue concerns.[20]

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[18] *See Southwestern Ill. Dev. Auth. v. Al-Muhajinum*, 744 N.E. 2d 308, 312 (Ill. App. 2001) (rejecting challenge by mosque to the condemnation of its property in order to transfer the property to a private rental housing developer).

[19] *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (upholding the city's denial of a special use permit for a church seeking to occupy an abandoned commercial building).

[20] The following sampling of cases demonstrates the widespread threat facing religious institutions across the country from revenue hungry municipalities.

- As part of a downtown revitalization plan, the city of Boynton Beach, Florida openly sought to transfer the Jesus House of Worship Church's property to private retail developers. The city declared it would rely on its eminent domain powers if the church remained unwilling to sell. *See* Gariot Louima, *Boynton Officials Ready to Buy, Raze Businesses*, PALM BEACH POST, Dec. 11, 2002 at 1B.



- In Normandy, Missouri, the Sisters of the Good Shepherd own a large parcel that serves as a convent, retirement home for aged sisters, and a shelter for drug-addicted women. The city, however, was not content with the good deeds of the sisters and instead sought to take the religious complex and replace it with a $53 million retail and commercial development. *See* D. Paul Harris, *Nuns in Normandy Get Ready for Fight Over Redevelopment; Sisters Say Their Area Is Lovely and City's Plan Seems "Ill-Conceived,"* ST. LOUIS POST- DISPATCH , July 29, 2002 at 1

- After City Chapel church converted a downtown four-story retail building into a church for its 100 members, the city of South Bend, Indiana condemned the building for private redevelopment. *See City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443, 454 (Ind. 2001); Terrence Bland, *Church Site is "One More Piece of the Puzzle,"* SOUTH BEND TRIBUNE, Aug. 4, 2001, at A4.

- The city of New Rochelle, New York targeted two local churches for eminent domain actions in order to make way for a 309,000 square foot IKEA store. *See* Debra West, *IKEA Wants to Move In, but Neighbors Fight Moving Out*, N.Y. TIMES, Mar. 7, 2000, at B1; Lynn Cascio, *Protestors March to Embarrass IKEA*, JOURNAL NEWS, (Westchester Cty., NY), May 25, 2000, at 5B.

- In February 2002, the City of North Hempstead, New York moved for a surprise condemnation of St. Luke's Pentecostal Church after St. Luke's had completed an arduous permitting process to acquire the land, including litigation to acquire a parking variance. Unbeknownst to St. Luke's, its land had been slated for condemnation back in 1994, well before they applied for a single permit. Yet the city failed to inform St. Luke's of its demolition plans at any time before the actual condemnation and St. Luke's lost their church. *See* Stewart Ain, *Of Spiritual vs. Urban Renewal*, N.Y. TIMES, Apr. 16, 2000, at 14LI3; *In the Matter of the Application of North Hempstead Community Redev. Agency*, 2002 N.Y. Misc. LEXIS 1488, at *1-*2 (Aug. 29, 2002). Marni Soupcoff, *North Hempstead Bulldozes Constitutional Rights*, THE WESTBURY TIMES (Mineola, NY), Feb. 22, 2002. Victor Manuel Ramos, *In North Hempstead: A Spiritual Homecoming Deferred; Redevelopment Claims Dream of Church's Building*, NEWSDAY, Feb. 4, 2001, at G17.

Such high frequency of attacks gives testimony to the special

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- In September 2002, the city of Hillsboro, Oregon voted to condemn a Christian Science Reading Room in order to use the property for a private commercial and residential development to support a planned civic center. *See* William E. Dunn, *My Turn; Condemnation for City Building Bad Policy*, OREGONIAN (Portland, OR), Oct. 11, 2001, at West Zones 13; David R. Anderson, *Hillsboro Negotiates Deal to Build Civic Center*, OREGONIAN (Portland, OR), Sept. 4, 2002, at C2.

- In 2002 the city of Memphis designated a 15.5-acre parcel of land as the site for a new basketball stadium for use by private NBA teams. The area chosen for condemnation included churches that agreed to vacate after the city raised the threat of condemnation. *See* Deborah M. Clubb, *City Pays COGIC $1.8 Million for Lots Near Arena,* COMMERCIAL APPEAL (Memphis, TN), Mar. 7, 2002, at B1.

- Two Atlantic City, New Jersey churches were forced to sell their properties under threat of condemnation in order to give the property to the MGM Grand Casino. The churches were both destroyed, yet the MGM eventually chose to locate elsewhere. *See* Bill Kent, *Real-Life Monopoly: MGM Bids on the Boardwalk*, N.Y. TIMES, July 14, 1996, at 13NJ-6.

- In May 2001, the San Jose Redevelopment Agency targeted several churches for condemnation in order to secure land for a proposed 40 parcel high-density housing redevelopment plan. *See* Edwin Garcia, *Remaking Downtown San Jose; City Targets 40 Properties for Development as Housing, Landowners Who Refuse Plan Could Be Forced to Sell Sites*, San Jose Mercury News, May 12, 2001, at 1A.

- The Ventura City Council has targeted the property of a religious fraternal organization for condemnation in order to build a new cultural arts center. *See* John Scheibe, *City Council to Study Proposal for Arts Center; New 600-Seat Building Could Cost $21.8 Million to $26.7 Million*," VENTURA COUNTY STAR, August 4, 2003, at B01.



disadvantage religious institutions face under the broad reading of "public use" implemented by the court below. Because religious institutions are overwhelmingly non-profit and tax-exempt, they will generate less in tax revenues than virtually *any* proposed commercial or residential use. Accordingly, when a municipality considers what properties should be included under condemnation plans designed to increase for-profit development and increase taxable properties, the non-profit, tax-exempt property of religious institutions will by definition *always* qualify and *always* be vulnerable to seizure.[21]

Thus, should this Court affirm the lower court's weakening of the "public use" requirement, municipalities will have permission to declare open season on the property of religious institutions of all faiths and functions in the name of padding the public purse. Moreover, the religious organizations most at risk under such a regime are those small groups of believers, those minority faiths, those poor religious institutions, that cannot hope stand up to the power of large commercial enterprises aided and abetted by municipal governments.[22]

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[21] It is also significant that takings for traditional "public uses" such as building a road, constructing a government building, or providing a public right-of-way are *categorically* different from the types of takings that would be permitted in the name of generating more tax revenue. *All* private property, regardless of its present use and owner, is owned subject to the possibility that the government might one day need it for the traditional category of public purposes. In contrast, the class of properties eligible for being taken in the name of generating additional tax revenue is more limited and *is* dependent on the nature of the present use of the property, the identity of the owner, or both. Property that is already being put to uses that contribute to the government's desired level of tax revenue will not be subject to takings, whereas properties that do not (like religious institutions) will be.

[22] It bears noting that while religious institutions face additional eminent domain risks stemming from religious discrimination, many other charitable organizations will face similar dangers because of their tax-exempt status alone. Indeed, several charitable organizations have faced condemnation threats in recent years to satisfy municipal appetite for more tax revenue. *See, e.g.,* Sue Britt, *Moose Lodge Set for Court Fight;*

## II. RELIGIOUS LAND USE INHERENTLY SERVES THE PUBLIC INTEREST, YET CONNECTICUT'S EMINENT DOMAIN STANDARD WOULD ENABLE FORCIBLY UPROOTING IT IN FAVOR OF PURELY PRIVATE INTERESTS.

Because religious institutions "uniquely contribute to the pluralism of American society by their religious activities," *Walz*, 397 U.S. at 689, society protects and encourages their activities through law and policy—most especially in the land use context.[23] Religious institutions' quintessential public

*Group to Fight Home Depot Land Takeover*," BELLEVILLE NEWS-DEMOCRAT (Missouri), April 1, 2002, at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, *Hudson, American Legion Closer on Hall; City Wants Building to Demolish for Project*," PLAIN DEALER (Cleveland), March 8, 2003, at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, *Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization*? TALLAHASSEE DEMOCRAT, July 13, 2003, at A1 (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, *Vote on Land Confiscation*, DAILY JOURNAL (Illinois), October 6, 2004, at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center).

[23] *See Texas Monthly v. Bullock*, 489 U.S. 1, 12 (1989) (property tax exemption for churches "possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity"); *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000), *cert. denied by Boyajian v. Gatzunis*, 531 U.S. 1070 (2001)(recognizing that "religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood."); *Concerned Citizens of Carderock v. Hubbard*, 84 F.Supp.2d 668, 674-75 (D. Md. 2000) ("It is certainly also reasonable to presume that 'churches ... and other places of worship' properly belong among this category of uses as wholly compatible with single family home life."; *Congregation Dovid Ben Nuchim v. Oak Park*, 199 N.W.2d 557, 559 (Mich. Ct. App. 1972) (holding that houses of worship bear "a real, substantial, and beneficial relationship to the public health, safety



mission makes them dependent on the general public's donations instead of profits. This dependence makes them highly sensitive to the power of taxation. Recognizing this truth, governments at all levels[24] exempt these inherently

and welfare of the community."); *Bd. of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); *Am. Friends of Soc'y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979), *appeal denied by Am. Friends of the Soc'y of St. Pius v. Schwab*, 425 N.Y.S.2d 1027 (N.Y. 1980) (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community."); *Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (affirming that "religious institutions, by their very nature, are beneficial to the public welfare."); *Board of Zoning Appeals* v. *Schulte*, 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); *Young Israel Organization* v. *Dworkin*, 133 N.E.2d 174, 183 (Ohio Ct. App. 1956) ("To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society."); *Congregation Comm. v. City Council*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956) ("The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals."); *Yanow* v. *Seven Oaks Park*, 94 A.2d 482, 491 (N.J. 1953) ("the welfare of the residential community demands [] inclusion [of houses of worship] in that area"). *See also* RATHKOPF & RATHKOPF, THE LAW OF ZONING AND PLANNING § 20.01, at 20-24 (recognizing that the exclusion of churches "either from the community as a whole or from a residential district therein—has no reasonable relationship to the public health, safety, morals, or general welfare."); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22 at 578 (4th ed. 1996) ("[R]eligious uses contribute to the general welfare of the community. . . ."); Terry Rice, *Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses*, 8 PACE L. REV. 1, 3 (1988) (The "dominant status" of churches and schools "is based on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare.").

[24] "All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax." *Walz*, 397 U.S. at

charitable organizations from taxation to avoid undercutting their general goal of furthering the public interest.[25]

The notion that religious institutions provide necessary public goods and should therefore be encouraged is as old as the founding itself.[26] Congress reaffirmed this commonsense policy when enacting the Revenue Act of 1938,[27] by stating that,

> "[t]he exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare."[28]

The lower court's decision, however, turns this longstanding, axiomatic truth on its head. Under its permissive reading of the

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[25] "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 672.

[26] "The absence of concern about [religious tax] exemptions could not have resulted from failure to foresee the possibility of their existence, for they were widespread during colonial days." *Id.* at 682. "Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation." *Id. See also* 9 VA. STAT. AT LARGE 200 (1775-1778, Hening) (exempting from taxation "any . . . houses for divine worship, or seminary of learning."); N.Y. Laws of 1797-1800, c. 72, at 414 (exempting from taxation any "house or land belonging to . . . any church or place of public worship [or] alms house").

[27] Revenue Act of 1938, ch. 289, 52 Stat. 447.

[28] H. R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938).



"public use" requirement, that which makes religious institutions worthy of government praise makes them doubly vulnerable to government avarice. Municipalities will *always* be able to gain short-term tax revenues by tearing down religious institutions and handing the land over to private businesses instead.[29] The lower court's standard requires no balancing whatsoever of the competing public goods that religious institutions are universally recognized to provide as a matter of law.[30] The court did not circumscribe its rationale or limit its holding strictly to the facts. In fact, all the lower court requires is that municipalities *intend* to take religious institutions' land for tax and economic development purposes.[31] These institutions will therefore be at the mercy of any municipality that merely claims that increased tax collection is in the public interest. Yet, as discussed *supra* § I, tax and economic concerns are often pretexts for outright discrimination against religious institutions.

In sum, the lower court does not acknowledge the serious, long-term, and (in many cases) irreversible damage to the general welfare that will result from its sweeping deference to municipalities that do more than mouth the mantra of more economic development and tax revenue. To affirm the lower

[29] "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock*, 471 Mich. 445, 482 (Mich. 2004 While *amicus* concurs with this theoretical assessment, it believes that in practice, tax-exempt property owned by religious institutions will be one of the *primary* targets for municipal bulldozers, with minority faiths bearing the brunt of the discrimination.

[30] *See supra* n.23.

[31] *Kelo*, 843 A.2d at 541.

court's ruling would place the "benevolent neutrality toward churches and religious exercise"[32] traditionally shown by governments to religious institutions at grave risk.

## CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be reversed.

Respectfully submitted,

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[32] *Walz*, 397 U.S. at 676.

(22)

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# Supreme Court of the United States

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SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, AND WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, AND NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Connecticut**

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# BRIEF OF *AMICI CURIAE* BETTER GOVERNMENT ASSOCIATION, CITIZEN ADVOCACY CENTER, DKT LIBERTY PROJECT, NATIONAL INSTITUTE FOR URBAN ENTREPRENEURSHIP, AND OFFICE OF THE COMMUNITY LAWYER IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE

The Better Government Association, Citizen Advocacy Center, DKT Liberty Project, National Institute for Urban Entrepreneurship, and the Office of the Community Lawyer submit this brief as *amici curiae*[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide this Court with the views of community groups and their constituents, who often are the victims of takings for "economic development."

The Better Government Association was founded in 1923 by citizens concerned at a local level with growing threats to the electoral process, the principles of good government, and their liberty. Eighty years later, the BGA remains a non-profit, non-partisan organization committed to the same principles that mobilized its founders: that a public office is a public trust; that anything that diminishes that trust, such as waste, fraud, or corruption, ultimately undermines the public's confidence in government; and that such actions cost legitimate programs scarce resources and lead to decisions based upon private gain rather than public good. The BGA views condemnation for "economic development" as one such action.

The Citizen Advocacy Center is a non-profit, non-partisan community legal organization dedicated to strengthening American democracy in the 21st century. In particular, it aids those who organize grassroots community efforts, protecting their right to participate in the democratic process. Property ownership has been a hallmark of

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[1] Pursuant to Rule 37.3, counsel for *amici curiae* state that all parties have given written consent to the filing of this brief. Copies of the consent letters are on file with the Clerk. Further, pursuant to Rule 37.6, counsel for *amici curiae* also state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

American democracy since the Framers penned the Constitution. Use of eminent domain in the name of "economic development" is not only antithetical to CAC's vision, but it is also often accomplished outside the political process and without the input of the citizenry.

The DKT Liberty Project was founded to promote civil liberties – among them property ownership – against the encroachment of governmental authorities. This non-profit organization advocates vigilance over regulation of all kinds, but especially regulation that threatens the reservation of power to the citizenry underlying our constitutional system. The DKT Liberty Project opposes the exercise of eminent domain for "economic development" as an abuse of power which contracts the liberty reserved to the people.

The National Institute for Urban Entrepreneurship is a Washington, D.C. – based non-profit, non-partisan corporation that develops and implements legal and entrepreneurship programs that support the growth of viable, sustainable businesses by Blacks, Latinos, and other entrepreneurs of color. Further, it strives to be a national catalyst for a culture of entrepreneurship, innovation and private sector economic growth in urban communities. Both the destruction of urban small business and the targeting of minority neighborhoods evident in "economic development" takings are antithetical to NIUE's mission.

The Office of the Community Lawyer is a non-profit citizen advocacy project, founded to provide free non-partisan legal services to concerned citizens at a community and state level on issues of public significance, to litigate on behalf of citizens to sustain access to justice, and to teach citizens the skills they need to advocate effectively on their own behalf in dealing with their government. The Office of the Community Lawyer also monitors local governmental activities to ensure the accountability of government



officials, and to deter those officials from acting unlawfully or in a manner contrary to the general interests of the community. The Office of the Community Lawyer views the condemnation of private property for "economic development" as a use of government power that is contrary to the general interests of the community, and an exercise of governmental authority that often is immune from citizen advocacy, given that it targets individual landowners who often do not have the resources to contest the taking and thus safeguard their property.

Collectively, *amici* stand for the preservation of private property ownership in America. In this case, the private corporation that wields the City of New London's eminent domain power seeks to condemn petitioners' property in a working-class waterfront community for the development of an office park. The purpose of the taking is "economic development."[2] We believe that takings such as these are unfaithful to the Constitutional roots of private property ownership in America. This Court should restore meaning to the words "public use" in the Fifth Amendment of the Constitution, and stop this unconstitutional practice.

## SUMMARY OF ARGUMENT

In creating our nation, the Founding Fathers sought to ensure protection of the citizenry's right to own property, something that the English sovereign had refused to do. Among the measures taken to protect these rights was the Fifth Amendment's limitation on takings of private property for "public use" alone. This Court has long appreciated the importance of that limitation, making the Takings Clause the first provision of the Bill of Rights to be applied to the states through the operation of the Fourteenth Amendment.

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[2] *See, Kelo v. City of New London*, 843 A.2d 500, 507-09 (Conn. 2004), *cert granted*, 125 S. Ct. 27 (2004).

Modern social science has confirmed that the sanctity of property ownership is well justified, uncovering a host of hidden negative effects accompanying takings of private property on the health of the community, small businesses, and individuals.

Recently, however, local authorities have attacked the right of property ownership by engaging in widespread takings for the "public benefit" of "economic development." In contrast to the words of the Framers, i.e., "public use," authorities justify these takings by reference to speculative, often illusory, indirect public benefits of higher tax revenues and more jobs. These anticipated benefits, however, often are never realized, and almost always are counterbalanced by the hidden costs to the community associated with such takings. In addition, "economic development" is so broad a justification that it invites the wealthy and powerful to appropriate the eminent domain power for their own advantage and can be called upon to authorize takings of almost any land at any time, from anyone, inviting abuse by local authorities.

Courts often uphold these takings because they read this Court's precedent as writing the Public Use limitation out of the Takings Clause of the Fifth Amendment. Such an interpretation is incorrect on the face of that precedent, i.e., *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Those decisions address extreme facts and do not authorize takings for economic development alone, despite the unduly broad reading given them by local authorities and some courts. Furthermore, eliminating the Public Use limitation is directly contrary to the intent of the Framers. As such, this Court must revitalize the Public Use limitation by holding that economic development alone is not a "public use" under the Fifth Amendment.



## ARGUMENT

### I. Condemning Authorities Have Engaged In Widespread Abuse Of Their Powers In The Name Of Economic Development.

In practice, the "Public Use" limitation of the Fifth Amendment's Takings Clause has all but disappeared. City councils and local agencies now strip citizens and their small businesses of valuable non-blighted properties that these citizens have worked hard to purchase and maintain in neighborhoods not suffering from blight, and often give those properties to wealthy, politically-connected private businesses to tear down for private uses that will enhance those businesses' private profits. Often, those same businesses select the property they want and even finance the condemnation. *See, e.g., Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1, 4 (Ill. 2002), *rev'g on reh'g*, 2001 Ill. LEXIS 478 (Ill. 2001), *cert. denied*, 537 U.S. 880 (2002) (hereinafter *SWIDA*). The supposed public use justification for such takings is that they will create "economic development," benefiting the community at large. These benefits, however, are speculative at best, and subvert the function of the free market. Worse yet, they fall far short of counterbalancing the harm done to the fundamental American right of property ownership, to the well being of individual property owners, and to the solvency of small businesses. These "economic development" takings are the most insidious abuse of eminent domain power, and they are happening everywhere.

An enormous research effort to ascertain the magnitude of takings from private citizens to give to other private parties over a five year span, from January 1, 1998 to December 31, 2002 indicates that 10,282 filed or threatened condemnations occurred in 41 states during that period. *See* Dana Berliner, *Public Power, Private Gain: A Five-Year,*

*State-By-State Report Examining the Abuse of Eminent Domain* 2 (2004). Researchers scoured newspapers, published and unpublished court opinions, and court filings for any mention of such takings or threats of such takings. They compared their research for the state of Connecticut, the only state that records such figures officially, against the official state records. State records indicated that 543 redevelopment condemnations were ordered in that five year period, although researchers found press reports describing only 31 of them. *Id.* Therefore, in Connecticut, the press covered little more than 5% of the total. If this ratio of takings discovered by the research effort to the actual number of takings that occurred is consistent across the nation, then more than 180,000 threatened or filed takings occurred during that brief time span – nearly 100 per day.

What is more, many state agencies and local governments have observed no limits on using eminent domain to obtain private property for private businesses off-market. For example, the Empire State Development Corporation has agreed to condemn an entire Times Square city block in Manhattan for the New York Times, displacing dozens of businesses, hundreds of homes and a dormitory. The Times will be paying only $62 per square foot, compared to $130 per square foot for comparable properties, and taxpayers may spend $29 million in acquisition costs that exceed an $84.94 million rent concession.[3] Further, the Times has asked the city for $400 million in tax free Liberty Bonds, which were created to rebuild New York after September 11, 2001, to finance the project.[4] In Las Vegas, Nevada, the Las Vegas Redevelopment Agency demolished a thriving city block,

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[3] David W. Dunlap, *Blight to Some Is Home to Others; Concern Over Displacement by a New Times Building*, N.Y. Times, Oct. 25, 2001, at D1.

[4] Charles V. Bagli, *Developer Wants 9/11 Bonds for Times's Project in Midtown*, N.Y. Times, July 17, 2003, at B1.



including one older widow's building containing several small businesses, for a parking lot desired by a consortium of casinos.[5] After seven years of litigation, including recusals by many judges who took campaign contributions from casinos,[6] the Nevada Supreme Court reversed the trial court, which had found that the taking violated the Public Use limitation of the Fifth Amendment, and upheld the taking.[7] The Riviera Beach, Florida, City Council voted unanimously to spend $1.25 billion taxpayer dollars on a development plan that requires condemnation of 300 businesses and 1,700 homes housing about 5,100 people.[8] The city intends to sell the land to private yachting, shipping, and tourism interests.[9] Riviera Beach is one of the last bastions of affordable waterfront housing in Florida and home to a unique culture of Bahamian conch fishing families.[10] Wyandotte County, Missouri, condemned the homes of 150 families on 1,200 acres and transferred it to a private company that built the

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[5] Michael Squires, *Few Gains Seen From Land Fight*, Las Vegas Review-Journal, Aug. 15, 2004, at 1B.

[6] *See, e.g.*, *Steve Wynn Cases Reach Nevada Supreme Court*, AP Wire, June 10, 2000 (noting five judges had recused themselves from the case); *see also City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1060 (Nev. 2000) (hereinafter *Eighth Judicial*).

[7] *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert denied*, 124 S. Ct. 1603 (2004). Although the Redevelopment Agency asserted that the property was blighted, the trial court held that there was no blight on or near the block, a fact also noted by a dissenting justice of the Nevada Supreme Court. *Id.* at 48 (Leavitt, J., dissenting).

[8] Scott McCabe, *Residents Vow to Fight Riviera Plan*, The Palm Beach Post, Dec. 17, 2001.

[9] Thomas R. Collins, *Many Businesses Feeling Put Out By Riviera Plans*, The Palm Beach Post, Jan. 6, 2003, at 1A.

[10] Jim Di Paola, *The Path to Progress*, CityLink Online (Broward County, Fla.), Jan. 30, 2002.

Kansas International Speedway.[11] The Supreme Court of Kansas upheld the taking.[12] These examples of condemnations for so-called "economic development" represent only a tiny fraction of the thousands of economic development takings that occur all over America every year.

These condemnations make a mockery of the Fifth Amendment's Takings Clause. Yet so fundamental is this right that it was the very first of all the rights identified in the Bill of Rights to be incorporated against the states through the operation of the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *see also Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994). In applying the Fifth Amendment to the states, this Court wrote, "No court . . . would hesitate to adjudge void any statute declaring that 'the homestead now owned by A. should no longer be his, but should henceforth be the property of B.'" *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 237 (Harlan, J.) (quoting *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 665, 663 (1874) (Miller, J.)).

One hundred thirty years later, many local authorities are doing just that: taking private property from one private owner and giving it to another, as if there were no "Public Use" limitation in the Takings Clause of the Fifth Amendment. This case provides this Court with the opportunity to restore the Fifth Amendment to its original form, as incorporated as to the states in the period immediately after the Civil War.

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[11] John T. Dauner & Steve Nicely, *Speedway Wins High Court Test; Ruling Approves Condemnation Powers, 125 Percent Valuation*, The Kan. City Star, July 11, 1998, at A1.

[12] *See State ex rel. Tomasic v. Unified Government*, 962 P.2d 543 (Kan. 1998).



## II. As Were The Framers, Community Groups Are Particularly Concerned About Eminent Domain, Given Its Potential For Abuse And The Impact That It Has On Individuals, Small Businesses, and Communities.

### A. The Framers Included The Takings Clause In The Bill of Rights To Protect Property Owners From The Depredations Of Overreaching Local Authorities.

It is fitting that the Takings Clause was the first right ever applied to the states through the operation of the Fourteenth Amendment because of the vital importance accorded property ownership by the Framers. Arthur Lee of Virginia wrote, on the eve of the Revolution, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775).

Indeed, the Founding Fathers took up arms against an English system in which the rich and powerful could get whatever they wanted through the sovereign. As they drafted the Constitution, the Framers realized that they must protect against such abuses in our own new government. Alexander Hamilton wrote: "One great objt. of Govt. is personal protection and the security of Property." 1 *Records of the Federal Convention of 1787* 302 (Max Farrand rev. ed. 1966). He recognized that the Constitution itself was the embodiment of the belief in that object of government, extolling the Constitution as the guarantor of "additional security . . . to liberty, and to property." The Federalist No. 85, at 481-82 (Alexander Hamilton) (Issac Kramnick ed., 1987).

### B. Social Science Demonstrates The Importance Of Property Ownership By Illuminating The Negative Effects That Deprivations Of Property Visit Upon Individuals And Communities.

Modern social science confirms the belief of the Framers regarding the importance of property ownership in protecting the liberty and general welfare of individuals. In their rush to attract wealthy corporations with offers of below-market real estate for development, local authorities often fail to realize that by using the eminent domain power for large scale development projects they often wipe out neighborhoods with the stroke of a pen. These takings are not for a "public use"; they are instead for "economic development," which, in theory, provides the public with indirect benefits, like higher tax revenues. But the Fifth Amendment does not authorize takings for some vague "public benefit," and modern studies confirm the wisdom of the Framers in having narrowly constrained the power to condemn private property.

These studies show that such uses of the condemnation power inflict several hidden costs upon the public weal. First, a most disturbing hidden cost of eminent domain use is the destruction of the community itself, of the functioning social system. Herbert J. Gans, *The Urban Villagers: Group and Class in the Life of Italian-Americans* 362 (2d ed. 1982) (hereinafter Gans, *The Urban Villagers*). Eminent domain scatters church congregations, grade school classes, and extended family units to the four winds. For example, when Detroit leveled an entire neighborhood to make room for a General Motors plant, supposedly enhancing the greater good through economic development, it also destroyed sixteen churches, a 278 bed hospital, and several schools. Armand Cohen, *Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization* 4 (1982).



Dr. Mindy Thompson Fullilove has termed the experience of those who are victims of large-scale condemnation projects both at the community-wide and individual levels "root shock." Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It* 11-17 (2004) (hereinafter Fullilove, *Root Shock*). She writes: "The elegance of the neighborhood – each person in his social and geographic slot – is destroyed, and even if the neighborhood is rebuilt exactly as it was, it won't work. The restored geography is not enough to repair the many injuries to the mazeway." *Id.* at 14. Jane Jacobs makes a similar point in her seminal piece on urban renewal, describing the unique quality of every neighborhood as a "sidewalk ballet," where persons and buildings each play a unique part in the lives of all persons in the neighborhood. Jane Jacobs, *Death and Life of Great American Cities* 50-51 (1961). Removal of one part has an effect on all others who participate in the dance, but removal of the entire stage leaves people unable to interact properly with their surroundings – they lose their social place in the world. Fullilove, *Root Shock* 19-20.

The fact is that individual citizens hold a deep personal attachment to their neighborhoods, and the destruction of those neighborhoods leads to the second hidden cost of eminent domain – the crippling psychological effect on the individuals who made their homes and lives in the condemned communities. One of the first studies of the psychological effects of forced relocation found that 46 percent of women and 38 percent of men from one community experienced "a fairly severe grief reaction or worse." Gans, *The Urban Villagers* 379. A study of those displaced from the old Southwest neighborhood of Washington, D.C., found that former residents felt a deep sense of loss a year later, and 25% had not made a single friend after being forced from the neighborhood. Bernard J.

Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 34 (1989) (hereinafter Frieden & Sagalyn, *Downtown, Inc.*). Dr. Fullilove describes the psychological effects on the individual as follows:

> Root shock, at the level of the individual, is a profound emotional upheaval that destroys the working model of the world that had existed in the individual's head. Root shock undermines trust, increases anxiety about letting loved ones out of one's sight, destabilizes relationships, destroys social, emotional, and financial resources, and increases risk for every kind of stress-related disease, from depression to heart attack.

Fullilove, *Root Shock* 14.

### C. Economic Benefits Often Do Not Materialize And Do Not Outweigh The Economic Costs Of Eminent Domain.

Worse yet, the purported economic benefit often is not realized by communities that engage in takings of property for private parties. Two facts often lead to so-called "economic development" takings providing only negligible benefit, if any. First, state and local agencies often fail to account for the negative economic impact the taking will have on the community; and second, the corporation or developer given the property for its private profit often fails to deliver on its promises.

First, the local authorities do not weigh the significant cost to the economy of takings against the alleged benefits. In fact, the proposed benefit itself often is not analyzed. *See, e.g., Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 710 N.E.2d 896 (Ill. App. 1999), *aff'd*, 768 N.E.2d 1 (Ill. 2002) (hereinafter *SWIDA*) (no study of economic impact of race track parking lot expansion undertaken). The economic cost of takings can be measured by the cost to displaced



individuals, the loss of small businesses, and the destruction of communities. Relocation almost always causes economic difficulties for individuals, particularly because a taking for economic development will always lead to less housing or less affordable housing in the area, resulting in higher rent. In one study, 86 percent of those that relocated were paying more rent, with the median rent almost doubling. Gans, *The Urban Villagers* 380; *see also* Scott Greer, *Urban Renewal and American Cities: The Dilemma of Democratic Intervention* 3 (1965) ("[a]ll ten studies . . . indicate substantial increases in housing costs").

In addition, local businesses are often sacrificed to make way for larger, often regional or national concerns, and their demises are part of the economic cost of takings. During urban renewal efforts in the mid-twentieth century, 39,000 businesses were evicted through 1963 and 100,000 through 1971. More than a third of those businesses subsequently failed – a rate much higher than the normal business failure rate. Frieden & Sagalyn, *Downtown, Inc.* 35. Local businesses tied to neighborhood customers proved particularly vulnerable. *Id.* These failures reduce tax revenue and jobs, directly offsetting the proposed benefits of the larger benefited business. Recent studies of big box stores like Wal-Mart, often the beneficiary of eminent domain takings, demonstrate this.[13] A study of the economic impact of Wal-Mart in Mississippi concludes that "[t]he net increases are minimal as the new big-box stores merely capture sales from existing business in the area." Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, Bus. Week, Oct. 6, 2003. Iowa State University economics professor Kenneth E. Stone, co-author of the study,

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[13] *See, e.g.*, Alex Daniels, *Eminent Domain for Stores Draws Ire; Wal-Mart Benefits from Land Seizures*, Ark. Democrat-Gazette, Oct. 18, 2003, at 37.

comments, "I see it pretty much as a zero-sum game." *Id.* Significantly, local business owners are more likely to keep profits in the community and reinvest there, whereas national chains are owned by persons outside the community or even by stockholders spread across the country. Such entities are less likely to reinvest as much locally.

Furthermore, economists are beginning to realize that there is an economic cost to the destruction of communities themselves. R. Scott Fosler writes: "Social institutions are also increasingly seen as being economically important. For example, the role of the family and of other community influences in preparing students for school and productive employment is now recognized as having major economic significance." R. Scott Fosler, *Does Economic Theory Capture the Effects of New and Traditional State Policies on Economic Development, in Competition Among States and Local Governments: Efficiency and Equity in American Federalism* 249 (Daphne A. Kenyon and John Kincaid eds., 1991).

These costs combined often outweigh any benefit that the economic development project provides in the end. A study of the Los Altos redevelopment area in California found that the destruction of profitable, non-subsidized small businesses and subsequent delivery of land and subsidy to larger businesses produced a loss. Furthermore, the study also found that the loss was likely to occur in other communities that undertook similar redevelopment efforts. Colette Marie McLaughlin, *Suburban Commercial Redevelopment in Los Altos: A Case Study of Unsustainable Development* 2, 4 (1998).

The net loss is sometimes caused by the failure of the new private property owner to live up to the promises it made to induce the taking. The Poletown taking in Detroit is a perfect example of a taking in which the costs paid by the



city, small businesses, and individuals clearly were not outweighed by the actual economic benefit realized. To pave the way for a new General Motors plant, Detroit destroyed 1400 residential structures – homes – and 600 businesses and paid more than $200 million to prepare the site to GM's specifications. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, Dollars & Sense, July 2001. In return, General Motors paid $8 million to acquire the property and promised the city that it would create more than 6000 jobs. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting). But General Motors finally opened its plant two years late, seven years after the condemnations, and created roughly half of the promised number of jobs. Ilya Somin, *Poletown Decision Did Not Create Desired Benefits*, Detroit News, Aug. 8, 2004, at 13A. Although the city did not keep formal statistics by which to measure the success or failure of the project, the city likely lost more jobs than it gained by destroying the neighborhood.

Small wonder, then, that the Michigan Supreme Court this year overruled its landmark decision approving the taking, *Poletown*, 304 N.W.2d at 455, in an even more significant (and better-reasoned) decision limiting the authority to conduct takings. In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court held that Wayne County, Michigan's effort to condemn nineteen parcels of land for transfer to private developers who would construct a 1,300 acre business and technology park was "wholly inconsistent with the common understanding of 'public use' at the time our [state] Constitution was ratified." *Id.* at 769-70. Striking this taking, the Court called *Poletown* a "radical and unabashed departure from the entirety of [the] Court's [] eminent domain jurisprudence." *Id.* at 785.

### D. Allowing Eminent Domain For "Economic Development" Encourages The Wealthy And Powerful To Arrogate That Power To Themselves.

As Professor Cass Sunstein observed, some of the most important clauses in the Constitution, including the Takings Clause, are all directed toward preventing "a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). By their very nature, "economic development" takings promote that evil.

Private corporations and developers often use their political connections and substantial resources to take advantage of "economic development" takings, allowing them to procure land for significantly less than its market value. They even go so far as to send lobbyists to cities to gain access to "free" property. Timothy Sandefur, *This Land Is Not Your Land*, Nat'l Rev., Aug. 23, 2004. They are there to "convinc[e] the state to use its power to displace residents from their homes and businesses." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 51 (1998) (hereinafter Kochan, *"Public Use"*). Unfortunately, small landowners who lack the political power and resources of large companies are powerless to stop them because allowing takings for "economic development" totally eviscerates the Public Use limitation on the Takings Clause and allows those with more power to use eminent domain to their own economic advantage. *Id.* at 52.

Examples of this abuse abound. In *Pappas*, the casinos that ended up with the elderly widow's property wield tremendous political clout in Las Vegas. There, the Agency



was able to obtain a questionable turnover order, without serving proper notice on the widow, from a judge who was an investor in one of the casinos in the consortium seeking her property, and whose son had been given a job at one of the casinos' golf courses during litigation. Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, The Nation, Jan. 26, 1998, at 11. So generous were those casinos with political contributions that after that first judge was forced to recuse himself, there was a "chain reaction of subsequent recusals" from judges who had taken casinos' contributions. *Eighth Judicial*, 5 P.3d at 1060. The Nevada Supreme Court actually had to mandamus a judge who had received contributions to hear the case. *Id.* Ultimately, a different judge, who had not taken casino contributions, conducted the trial, but the Nevada Supreme Court later reversed his findings of unconstitutionality and upheld the taking, citing *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *See Pappas*, 76 P.3d at 10-12, 17.

In *SWIDA*, the condemning agency actually put its eminent domain power up for sale, circulating a "Quick-Take Application Packet" advertising that, for a sliding scale fee, the agency would condemn land at the request of "private developers" for their "private uses." *SWIDA*, 2001 Ill. LEXIS 478, at *51 (Kilbride, J., dissenting). Taking advantage of that offer, an international raceway corporation sought to take property from the small business next door to expand parking at its racetrack without incurring the cost of building a multilevel parking facility on its own property. *SWIDA*, 710 N.E.2d at 903. The raceway corporation treated agency officials to free race tickets and hosted them at its Hospitality Suite at the track. Steve Eder, *Land Seizure for Raceway Makes Top 10 Worst List; Eminent Domain Use Is Criticized*, St. Louis Post-Dispatch, Mar. 8, 2002, at C1. The trial court approved the taking, but ultimately a divided

Illinois Supreme Court struck it down. *SWIDA*, 768 N.E.2d at 11. The dissenting justices contended that *Berman* and *Midkiff* authorized such a taking. *Id.* at 17-23 (Freeman, J., dissenting).

### E. Allowing Eminent Domain For "Economic Development" Victimizes Racial Minorities And The Underprivileged.

Eminent domain has a disturbing history of having been used to eliminate minority neighborhoods. Even when used to take land for a proper public use, this racial targeting occurred. In Frieden & Sagalyn, *Downtown, Inc.*, retired Federal District Judge Miles Lord recalled of his supervision of the Minneapolis highway project as attorney general of Minnesota in the 1950s:

> We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose onto society.

*Id.* at 28-29.

In other cases, the motivation was not so obvious, but the disparate impact was. Ninety percent of the 10,000 families displaced in Baltimore were black and Los Angeles crushed one Mexican neighborhood under the weight of five freeways. *Id.* at 29. From 1949 to 1963, 63 percent of those displaced for urban renewal were nonwhite. *Id.* at 28; *see also* Gans, *The Urban Villagers* 363 (eighty percent of urban renewal efforts directed at non-white minority groups). Dr. Fullilove estimates that 1,600 black neighborhoods were destroyed by urban renewal. Fullilove, *Root Shock* 17. Litigation has even been filed alleging that cities and towns



target specific areas where minorities live to force them out of the community and bring in residents the local government considers more desirable. *See, e.g.*, Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004.

If eminent domain also could be used to effectuate "economic development," the opportunity for this kind of abuse would increase exponentially. An economic development standard would be so broad that it would become illusory. Condemning authorities would be able to take anyone's property at any time because they always could hypothesize a use for property that could be economically superior to a current use, especially if no real proof of the superiority is necessary. Thus, approving "economic development" takings would make eminent domain a ready tool to remove unwanted minority groups from the community.

Eminent domain also allows local authorities to target low-income families. Indeed, bulldozing their properties requires the state to pay the least amount of compensation. Gans cites a study which concluded that "[a]t a cost of more than three billion dollars, the Urban Renewal Agency has succeeded in materially reducing the supply of low-cost housing in America." Gans, *The Urban Villagers* 380. In fact, as of June 30, 1967, urban renewal had destroyed 400,000 housing units and built only 10,760 low-rent units to replace them. Fullilove, *Root Shock* 59.

Furthermore, despite the obligation to do so, local government officials failed to compensate adequately those who were displaced. Only about half of those evicted between 1949 and 1963 received any payment to help them relocate, only one-half of one percent of the government outlays for urban renewal. Frieden & Sagalyn, *Downtown, Inc.* 33. "In effect, a low-income population has subsidized the clearance of its neighborhood and the apartments of its

high-income successors both by its own losses and by its share of the federal and local tax monies used to clear the site." Gans, *The Urban Villagers* 363. In 1968, Economist Anthony Downs found that evicted families paid between $157 million and $230 million in uncompensated costs of urban renewal. Frieden & Sagalyn, *Downtown, Inc.* 36.

Visiting these costs upon the victims of condemnation is particularly unfair because often these people are forced to relocate from the communities that are bulldozed. In such cases, these victims are not even able to share in any indirect benefit that may be received by the public from the private development that caused the condemnation.

The use of eminent domain to oust those without power to defend themselves, including minorities and the poor, in favor of the wealthy and powerful, is exactly the abuse the Framers created the Constitution to prevent. The breadth of the economic development rationale allows the state to take virtually anyone's property at any time. This Court cannot permit such a thinly-veiled opportunity for discrimination to continue masquerading as a Fifth Amendment "public use."

## III. State Courts Are Split Despite The Inadequacy Of Economic Development As A Public Use.

Despite all of this, some state courts nonetheless allow "economic development" to justify takings. These courts effectively vitiate the Public Use limitation explicit in the text of the Fifth Amendment, relying (incorrectly) on this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Several state supreme courts have held that "economic development" is a constitutionally sufficient public use for a condemnation since *Midkiff*, including the Connecticut Supreme Court in the case below. *See, e.g., Kelo v. City of*



*New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004); *see also General Bldg. Contractors, LLC v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873 (Kan. 2003); *Vitucci v. New York City Sch. Const. Auth.*, 289 A.2d 479 (N.Y. 2001); *Jamestown v. Leevers*, 552 N.W.2d 365 (N.D. 1996); *Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *cf. Pappas*, 76 P.3d at 17. These courts predictably rely on the extremely deferential standard seemingly set forth in *Berman* and *Midkiff* when analyzing the issue under the federal constitution. *See, e.g., Kelo*, 843 A.2d at 525-28. It is thus this Court's obligation to revitalize the Public Use doctrine to place a check on state governments who are far too willing to destroy property ownership in derogation of the Fifth Amendment.

Not all state courts, however, hold that economic development is an adequate justification for a taking. Since *Midkiff*, several have rejected economic development as a public use that would support the taking of private property from one private party and the delivery of that property to another private party. *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *SWIDA*, 768 N.E.2d 1 (Ill. 2002); *City of Bozeman v. Vaniman*, 898 P.2d 1208 (Mont. 1995); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985). Before *Midkiff*, a number of other state supreme courts had rejected economic development takings. *See In re Petition of Seattle*, 638 P.2d 549 (Wash. 1981) ("retailing" of shopping mall project not a public use); *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967) ("industrial development" not a public use); *Opinion of the Justices*, 131 A.2d 904 (Me. 1957) (takings for "industrial development" not a public use).

These opinions often emphasize that allowing takings for economic development could allow the government to take

anyone's property at any time. The Illinois Supreme Court pointed out that allowing takings simply because they will contribute to the tax base of the community could justify virtually any taking because "incidentally, every lawful business does this." *SWIDA*, 768 N.E.2d at 9. It recognized the potential for abuse that such a rationale represents. In addition, these courts also reject the notion that profits for the business benefiting from the taking is good for the public at large. In *Hathcock*, the Michigan Supreme Court wrote, "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *Hathcock*, 684 N.W.2d at 786; *see also SWIDA*, 768 N.E.2d at 10-11; *accord Daniels v. Area Plan Comm'n*, 306 F.3d 445, 465-66 (7th Cir. 2002); *Amendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc).

This Court must resolve this conflict in favor of the courts that reject the notion that economic development alone can constitute a public use. Those courts have correctly concluded that such takings are antithetical to the fundamental right to property ownership that the Framers cherished and enshrined in the Fifth Amendment. This Court must restore the federal constitutional grounds upon which to deny such takings by holding that they violate the Fifth Amendment's Takings Clause.

## IV. *Berman* And *Midkiff* Are Driven By Extreme Facts And Do Not Authorize Takings As A Means Of Achieving Ordinary Economic Development.

State courts rely heavily on *Berman* and *Midkiff* when they uphold takings in the name of economic development. This reliance is unjustified. *Berman* and *Midkiff* addressed



singular sets of facts and do not support the use of eminent domain to achieve ordinary economic development.

In *Berman*, the taking involved a neighborhood in Washington, D.C., in which conditions were documented to be utterly inconsistent with human health and safety, and thus intolerable: almost two-thirds of dwellings were "beyond repair"; well over half "had outside toilets"; and over 80% "lacked central heating." *Berman*, 348 U.S. at 30. In addition, the general death rate was 50% greater there than in the rest of the District of Columbia, with deaths from tuberculosis and syphilis occurring at an even greater rate. *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953), *modified and aff'd sub nom., Berman v. Parker*, 348 U.S. 26 (1954). But in a larger sense, *Berman* was an attempt to address the near-insurmountable problem of substandard housing in our nation's capital. Without eminent domain, proper plumbing, heating and safe buildings would not have been possible.

Similarly, *Midkiff* arose under unique facts. It addressed Hawaii's efforts to break up a "land oligopoly traceable to [its] monarchs" "much as the settlers of the original 13 Colonies did" by transferring land from the very few citizens who owned it to other private individuals so they could participate in the fundamental right of property ownership. *Midkiff*, 467 U.S. at 241-42 & n.5. *Midkiff*, like *Berman*, addressed a problem which could not be solved without the taking of property. Land was overvalued, with almost all of the private property in the state held by only 72 individuals. *Id.* at 231. At its heart, *Midkiff* is a case where the state acted as Robin Hood. It took land from the few to give the opportunity to own property to the many who could not compete with those former feudal landowners. It is a supreme irony that courts now look to *Midkiff* as a

justification for taking small parcels of property from the many and giving them to the wealthy few.

Both *Berman* and *Midkiff* responded to extreme circumstances that normal market forces could never correct. The D.C. slumlords of the 1940s and 1950s had no incentive to improve their buildings and neighborhoods because people living there had no ability to better their condition. Further, the feudal lords in Hawaii would never sell land because increasing supply would lower the value of land as a whole.

Neither case suggests that where, as here, normal market forces can be used to spur economic development, the government should intercede and take property on behalf of a private party. If the corporations that are the beneficiaries of takings need land badly enough, they should have to pay a free market price for it themselves, rather than paying a below market value subsidized by taxpayers and those ousted from their homes and businesses. After all, the profits made on the new site accrue directly to those corporations, with at best only indirect benefit to the public at large.

What is more, the costs levied on property owners were justified by the public uses at issue in those cases. *Berman* was directed at improving the health and welfare of the individuals who were victims of the slumlords who would not or could not invest the money to improve those unsanitary urban slums. In that sense, *Berman* visited much of the cost of that taking on property owners who had otherwise refused to pay the ordinary costs incident to owning and maintaining property.

In *Midkiff*, those who lived on the land were given the right to purchase, rather than lease, the land they already lived on. 467 U.S. at 233. The hidden cost, then, was much lower than in most takings because communities were not destroyed, but rather remained intact and individuals were not ousted from their homes. They benefited from the taking



because they were allowed to participate in a quintessentially American institution – property ownership.

Thus, *Berman* and *Midkiff* do not abandon the "Public Use" limitation to the Fifth Amendment. Indeed, a more recent case from this Court demonstrates the continued vitality of the Takings Clause. In *Dolan v. City of Tigard*, this Court said: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." 512 U.S. at 392. Nor is there reason why the Public Use limitation should be relegated to the status of a relic.

## V. The Fifth Amendment's Takings Clause Obligates This Court To Revitalize The Public Use Limitation By Holding That Economic Development Alone Is Not A Public Use.

Although *Berman* and *Midkiff* call for a "narrow" scope of judicial review, they do not eliminate judicial review entirely. Indeed, *Midkiff* specifically states: "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." 467 U.S. at 240. Yet the deference given to legislatures in the very same opinions has prompted state courts and scholars to conclude that *Berman* and *Midkiff* wrote the words "public use" out of the Fifth Amendment. *See, e.g.*, Kochan, "*Public Use*" at 74 (the public use limitation is a "meaningless standard of review").

Reading this clause out of the Constitution violates fundamental principles of constitutional law. When the first ten Amendments to the Constitution were ratified by the states as they were proposed by the First Congress in 1791, they became essential forces to guide and shape American society. The Fifth Amendment, with its promise that "nor

shall private property be taken for public use, without just compensation," created protection for citizens from their government that is essential to the American way of life. U.S. Const. amend. V. Absent a formal constitutional amendment, this promise may not be broken or excised, but rather must be fulfilled.

> As men whose intentions require no concealment, generally employ words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.

*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

The Framers included a "public use" limitation on takings in the Fifth Amendment, and that limitation must be given meaning. It long served as a bulwark against tyranny by the sovereign. *See* Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 57-60 (1964). Absent the "public use" limitation, eminent domain could be used to deprive one citizen of his home and business simply to benefit another at the whim of a sovereign, contrary to the intent of the Framers. As the elder Justice Harlan wrote more than a century ago: "[A] government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 237. For this reason, Justice Harlan agreed that no court would "hesitate to adjudge void" any government action declaring that "the homestead now owned by A should no longer be his, but should henceforth be the property of B." *Id.* (quoting *Citizens' Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 663).



Yet as recent experience has established, takings in the name of economic development allow exactly that. Local officials decide, often at the prompting of some major corporation, that the corporation could make a more profitable use of property owned by homeowners or small businesses. Rather than allow the free market to do its work, these local authorities strip rightful local owners of the property, often destroying communities at the same time, and then hand the properties over, usually at below-market rates, to wealthy businesses. Such actions are contrary to the most strongly held values of American society:

> If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.

*SWIDA*, 710 N.E.2d at 906 (Kuehn, J., specially concurring).

## CONCLUSION

The Fifth Amendment prohibits the government from taking property owned by private citizens to situations where the property will be put to "public use." U.S. Const. amend. V. It says nothing to authorize takings for the "public benefit." As usual, the Framers' choice of words reflects wisdom. Read fairly, rather than stretched past the breaking point, "public use" provides an objective and readily ascertainable standard. The "benefit" of economic development takings, in contrast, is subject to considerable

debate in any case, and often is undermined by the many hidden costs of takings. In addition, whether any benefit will pass to the public hinges on the performance of private businesses.

Taking property from a private citizen to promote the economic redevelopment of a community may sound like a good idea, but it is an evil – and all the more insidious because it seems that so many people will benefit from just a few peoples' loss. The problem is that not just one person loses – *everyone loses* because everyone's ownership rights are diminished. This concept, in fact, has been tried elsewhere in the world and has failed abysmally: "the theory of the Communists may be summed up in the single sentence: abolition of private property." Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848), *reprinted in 50 Great Books of the Western World* 425 (Robert Maynard Hutchins ed., 1952).

More than a quarter century before Marx was born, our Founding Fathers created a government founded upon private property ownership and required that no "private property be taken for public use, without just compensation." U.S. Const. amend. V. To this day, that government thrives, and the people of this nation have never seen fit to modify the Fifth Amendment. Until they do, this Court must give force to that amendment as it is written, including the "Public Use" limitation of the Takings Clause. We ask this Court to give life to this provision, rather than sounding its death knell, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).



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IN THE
*Supreme Court of the United States*

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, AND WILLIAM VON WINKLE,
*Petitioners*,
v.
City of New London and New London Development Corporation,
*Respondents*,

**On Writ of Certiorari to the Supreme Court of Connecticut**

***Brief Amici Curiae* of Brooklyn United for Innovative Local Development (BUILD), Rev. Herbert Daughtry, and The New York City and Vicinity Carpenters Labor-Management Corporation in Support of Respondents**

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## INTEREST OF *AMICI CURIAE*[*]

**Brooklyn United for Innovative Local Development (BUILD)** is a Brooklyn-based community organization committed to promoting economic opportunity, financial self-sufficiency, and prosperity in the socioeconomically depressed communities of our borough. In part because of decades of economic stagnation, Brooklyn's glorious vibrancy has been shrouded by stark social realities: nearly half its African-American men are without jobs, and more of them in prison than college, and over 60% of our children are failing to meet educational standards.

BUILD believes that overcoming the challenges confronted by inner-city communities like Brooklyn's demands a multi-dimensional strategy, part of which is development that generates the jobs, attractive amenities, and business opportunities that are *essential* for combating unemployment, poverty and undercapitalization. We recognize that the use of eminent domain authority can be indispensable to bringing such development – and the enormous attendant community benefits – to fruition.

**Rev. Herbert Daughtry** is the National Presiding Minister of the House of the Lord Churches. His forty years of involvement in church and community activity have earned him the title "The People's Pastor." Active in the struggle for the integration of schools and for community control of schools in the 1960s, Rev. Daughtry was a leader of the Coalition of Concerned Leaders and Citizens to Save Our Jobs, a 1970s effort which used boycotts to win jobs and services for African Americans from Brooklyn merchants. He is president and founder of the African People's Christian Organization, a member of the Black Leadership Commission on AIDS, and chairman emeritus of the National Black United Front. He also has served as co-chair of the Ministers Against Narcotics and

[*] No counsel for any party authored any part of this brief. No person or entity, other than *Amici* and their counsel made a monetary contribution toward submission of this brief, which is filed with the parties' written consent.

vice chair of the Bedford Stuyvesant Youth in Action Board.

**The New York City and Vicinity Carpenters Labor-Management Corporation** is a New York nonprofit organization that seeks to promote economic competitiveness in the building and construction industries and expand work opportunities for union carpenters and their employers. Many of its union members live in Brooklyn. Unions built Metrotech, a complex, built on land assembled under eminent domain powers, that included the first Class A office building in Brooklyn since the 1960s and first hotel since the 1920s, and that, in addition to tax revenues and construction employment, has resulted in thousands of permanent jobs for Brooklynites. That project catalyzed private construction that has invigorated the economy for Borough and City residents and built capacity for local minority- and women-owned contractors.

Union labor also built Atlantic Terminal and Atlantic Center, projects that replaced blighted, largely vacant inner city property with a vibrant shopping center – which, in addition to tax revenues and jobs, represented a pioneering effort to attract national retailers and a large supermarket to residents of a poor, predominantly minority neighborhood, who had long been denied the opportunity for high-quality, low-priced food shopping that those in affluent neighborhoods take for granted. This project created 1080 full-time jobs (with benefits), 48% of which are held by people living within two miles.

**The Atlantic Yards Project.** *Amici* are strongly supportive of Atlantic Yards project, a proposal to replace a blighted site – now largely occupied by rail yards, vacant and industrial property -- with a mixed-use development, projected to include 4,000 units of rental housing, including 2,000 set aside for low- and middle-income renters, four office buildings, a sports arena designed by renowned architect Frank Gehry – which would be home to the NBA Nets, the first professional sports franchise to call Brooklyn home since the Dodgers left town in 1957 – along with six acres of open space and a community center.



The project will bring an estimated 10,000 permanent and 15,000 construction jobs, contracting opportunities for minority- and women-owned business, and billions of dollars in net benefits, including $2.8 billion in new net tax revenue to New York City and New York State over 30 years. It will make a real difference for a city where 48.3% of African-American males are unemployed or out of the workforce entirely, more than 1 in 5 households pay half their income on rent, and fiscal problems continue to force cuts in important services.

*Amici* do not seek to persuade the Court of the wisdom of the Atlantic Yards proposal, the merits of which are being vigorously debated in meetings throughout the community and on the editorial pages of the city's newspapers. Nor do the legal issues before the Court in this case have potential to directly affect the proposed project – which, like Metrotech and Atlantic Center, will be built in a blighted area under State law that, unlike Connecticut's, does not authorize eminent domain exclusively for economic development purposes.

Rather, this Brief is submitted in the hope that our perspective, derived from participation in the urban development process will aid the Court's informed resolution of the issues presented. This experience contradicts many of the assertions advanced by the Petitioner property owners and their *amici*. In particular, while their accounts fairly accentuate the costs that the condemnation power can impose and highlight examples of its misuse (including notorious instances of racial discrimination), the Court should not decide the case on the jarring premise – advanced by Petitioners and repeated in numerous *amicus* briefs – that government promoted economic development projects should be viewed as transferring wealth *from* individuals of modest means *to* the wealthy or that such efforts are opposed by poor and working people and people of color. The purpose of projects like the one at issue is to make a material difference in the lives of residents of economically distressed cities, the vast majority of whom are themselves of

extremely modest means; our experience with similar projects teaches that these purposes can in fact be accomplished.

**Summary of Argument**

The question at the heart of Petitioners' challenge is, in one sense, an extremely difficult one: when do the public benefits of a project that will revitalize a large section of a distressed city, increase employment opportunity for the city's inhabitants, and provided sorely needed additional tax revenues warrant displacing people who live in the area and would prefer to remain? But the hard questions this case raises are ones of social and economic policy. As a matter of *federal constitutional law*, the questions Petitioners raise have one clearly correct answer: the Fifth Amendment's "public use" language supplies no authority for a federal court to overturn Respondents' State-authorized determination that the public benefits warranted use of the eminent domain power. Rather, the Constitution entitles Petitioners to the same remedy as those whose property is appropriated to build a road or government building (or develop a "blighted" area): Just Compensation.

Rather than have the case decided in accordance with settled precedent, Petitioners ask the Court to announce either of two alternative new rules of constitutional law: (1) a "bright line" rule that the eminent domain power *can never* be used for an economic development project like this one – or (2) one providing that such exercises (but no others) should be subject to heightened judicial scrutiny, whereby any property owner (not merely a homeowner) could obtain an injunction from a federal court if the court were persuaded that the benefits the project was intended to provide were insufficiently "certain."

Both proposals should be firmly rejected. The first is simply an invitation for this Court to unlearn the most basic lessons of judicial restraint – and return to a regime where federal courts presumed to delimit, in the name of the Constitution, the legitimate objects of State government. The specific limitation Petitioners urge would also defy logic: governments would be



categorically without power to pursue large objects that were central to their survival – and a homeowner who could not prevent the government from erecting a municipal parking lot could stop a project, including one broadly supported by her neighbors, that offered vast benefits for the people of the city.

Such results might be tolerated if the Constitution plainly limited condemnation to the construction of government buildings or if this Court had a long history of so construing it – perhaps even if there was long practice of governments confining themselves to such pursuits. But the opposite is true: for this Nation's entire history, legislatures have authorized private condemnation when doing so was to the public advantage; this Court has, for nearly as long, held that "public use" does not prohibit a taking by or transfer to a private party where the government has determined that doing so confers a public advantage – in cases arising from circumstances that are, in every constitutionally meaningful respect, indistinguishable from this one.

This Court should also reject the heightened scrutiny proposal and adhere to the rule that exercises of the eminent domain power are reviewed under the same, highly restrained, standards are exercises of other governmental powers. To the extent the proposal depends on the counterintuitive – and counterfactual – notion that economic development projects, though pursued for public benefit, generally harm poor and working people, that is reason alone to reject it. Moreover, although Petitioners and *amici* catalogue the potential harms and dangers that improvident exercise of eminent domain can cause, the rule they propose is not addressed to those problems, and the dangers they identify are fundamentally no different from those posed under other powers whose exercise is entrusted to political process.

Finally, although Petitioners package their rule as a modest improvement, it is neither modest nor an improvement over current law. It would require courts to decide as matters of law

questions that are both technical and value laden – and would entrust that job to federal courts, making them the forum of choice for individuals who want to stop projects and reversing longstanding, highly salutary practice of resolving "public use" questions in State courts on State law grounds.

## ARGUMENT

### I. The Fifth Amendment, as Applied to the States through the Fourteenth, Does Not Disable State and Local Government From Taking Property for Economic Development Purposes, When Just Compensation Is Paid

#### A. Promoting Economic Activity For The Benefit of Its Inhabitants Is a Legitimate Object – and a Fundamental Responsibility – of State and Local Government

1. The federal Constitution and settled American political tradition confer on elected officials and their delegated agencies, rather than on courts, the power to define what public activities serve the public interest. *See U. S. ex rel. TVA v. Welch*, 327 U.S. 546, 551 (U.S. 1946) ("it is the function of Congress to decide what type of taking is for a public use").

Accordingly, this Court has never held that governments' eminent domain powers are limited to particular "categories" of governmental undertakings. Instead, it has interpreted the Fifth Amendment's reference to "public use" as no less "broad and inclusive" than "the public welfare," and has emphasized that the relevant constitutional inquiry is "whether [the eminent domain] power is being exercised for a public purpose." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Governments are free to select the means to fulfill purposes within their broad police powers, whether by taxation and public spending, regulation, or eminent domain, *see National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) ("the public use requirement of the Takings Clause is coterminous with the regulatory power"); *Hawaii Housing Auth. v. Midkiff*, 467 U.S.229, 240 (1984), and whether or not a "public end [is]* * *



better served through an agency of private enterprise than through a department of government," *Berman*, 348 U.S. at 33-34, is likewise for legislative determination.

Petitioners' *per se* rule of governmental disability is redolent of "a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *see Lochner v. New York*, 198 U.S. 45, 57 (1905) (question presented was whether New York statute regulating wages and hours of bakery workers was "within the police power of the state"). This Court long ago abandoned the practice of grading exercises of state police powers against its own view of the proper categories of governmental action, confirming that

> it is not only the right, but the bound and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conductive to its ends * * * [in relation to its] internal police * * * the authority of the state is complete, unqualified, and exclusive

*Nebbia v. New York*, 291 U.S. 502, 523 (1934)(citation omitted).

In light of this appropriately deferential inquiry, the *Midkiff* Court could accurately observe that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has *never* held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241 (emphasis added).

The object of the eminent domain exercise here – fostering economic development in an area of the State marred by a stagnant economy and underemployment – is, as dozens of this Court's precedents confirm, entirely legitimate, *Brown v. Legal Found.*, 538 U.S. 216, 231 (2003) (equating "public use" with requirement that government action be "legitimate"); *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("no

one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry");*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937); *New York Cent. R. Co. v. White*, 243 U.S. 188, 202 (1917); *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 567-69 (1911); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876).

2. Even if substantive review of legitimate ends of State government were authorized, however, Petitioners' remarkable suggestion that a government's legitimate objectives do not encompass power to promote economic activity, for the purpose of adding jobs to the local economy, increasing revenues available for municipal services, and revitalizing a declining (if not blighted) urban area would be plainly untenable.

In a very real sense, the promotion of economic activity – and prevention of economic degeneration – is not merely *one of* the concerns of State and local government; it is the first one, on which all other "public uses" depend. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("The Constitution * * * is not a suicide pact").[1]

a. Economic activity is a prime determinant of a city's vitality – and has a profound effect on the quality of life of its inhabitants and on the life chances of future generations. As the experiences of city after city across the Nation attest, economic stagnation and decline can lead to a painful downward spiral – the departure of jobs and job opportunities reduces the city's tax base, causing cutbacks in services, which induce further disinvestment, further fiscal duress, reductions in essential services, which leads to higher crime and diminished educational opportunity. New business do not form; institutions that can leave for suburbs and other cities do. *See, e.g.*, W.

[1] Local governments "expend tremendous energies maintaining and enhancing their economies." A. Bowman, *The Visible Hand: Major Issues in City Economic Policy* 7 (Natl. League of Cities Working Papers Nov. 1987). Of 326 mayors surveyed, 86% identified economic development as one of their top three priorities, and 36.5% ranked it highest. *See id.* at 8.



WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); CITY OF CAMDEN MULTI-YEAR RECOVERY PLAN, FISCAL YEARS 2001-2003 (Nov. 21, 2001) (describing plight of city that lost population, jobs, and tax base); A. Downs, *The Big Picture*, BROOKINGS REVIEW at 10 (Fall 1998).[2] This specter is especially serious in older cities, such as New London, which are small and unable to tax metropolitan wealth. *See, e.g.*, D. RUSK, CITIES WITHOUT SUBURBS (1993).

b. Petitioners and their *amici* fairly call attention to the genuine burdens borne by individuals displaced by new development, but the human toll of economic stagnation and urban decline is no less worthy of governmental concern. *See, e.g.*, A. Vassallo, *Solving Camden's Crisis: Makeover or Takeover?*, 33 RUTGERS L. J. 185, 190 (2001) ("'Camden leads the nation in statistics that measure the failure of life for children,' including poverty, babies born to a teen-ager, and unmarried mothers") (quoting P. Kerr, *Camden Forces its Suburbs to Ask, What if a City Dies?*, N.Y. TIMES A1 (Sept. 7, 1989); *see also* A. Goldsmith *et al. The Impact of Labor Force History on Self-esteem and its Component Parts, Anxiety, Alienation and Depression*, 8 J. ECON. PSYCH. 494 (1996) (periods of high unemployment associated with increased rates of suicide and increased spouse abuse); F. McKee-Ryan *et al.*, *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 J. APP. PSYCH. 53 (2005).

[2] Downs explains:

> Core-area poverty concentrations contribute to adverse neighborhood traits that "push" many businesses and middle- and upper income households of all races -- mainly households with children -- out of central cities into suburbs. * * * * A self-aggravating downward fiscal spiral weakens the ability of core-area governments to provide quality public services and results in grossly unequal environments across our metropolitan areas. Such disparities in neighborhoods in which children are raised make a mockery of the American ideal of equality of opportunity.

As the trial court in this case pointed out, although Respondents appear to be "abstract entities,"

> The people behind these abstractions have a dream also. The accomplishment of their dream presents no opportunity of personal gain or favor. Their dream is for their city buffeted for decades by hard times and until recently declining prospects. They hope by this development project and resistance to the plaintiffs' litigation to provide an economic and social uplift for their city--jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city that can be realized.

*Kelo v. New London*, 2002 WL 500238, * 4 (Super. Ct. 2002).

Their "bounden and solemn duty * * * to advance the safety, happiness and prosperity of its people," *Nebbia*, 291 U.S. at 523, requires State and local governments to confront the "social costs" that urban economic distress imposes.

3. Economic development efforts – including projects of the kind at issue in this case – seek to respond to and prevent these destructive dynamics, by broadening and diversifying the local tax base, creating employment opportunities, and revitalizing declining areas and neighborhoods. Although not every project will succeed, *see Midkiff*, 467 U.S. at 242 ("whether in fact the provision will accomplish its objectives is not the question"), *amici* can attest that the benefits can be real and substantial.

4. The size of such projects and the realities of urban land ownership often make them impracticable to accomplish without resort to eminent domain power. Thus, the revitalization of Times Square, the building of Lincoln Center, the construction of World Trade Center – symbols of New York City's resurgence and engines of an economy that benefit millions – could not have been accomplished without eminent



domain power. *See 64th Street Residence, Inc. v. City of New York*, 4 N.Y.2d 268 (1958) (rejecting challenge to Lincoln Center eminent domain); *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379 (1963) (rejecting challenge to condemnation for World Trade Center).

5. Eminent domain is never a first resort, *see infra*, but its availability ensures that no individual property owner can effectively overrule the determination that project – or "hold out" – in the hope of extracting narrow benefits from the condemning authority. *See* Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1081-86 (1995); Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986).

6. Beneficiaries of such projects, both direct, and indirect, are disproportionately – overwhelmingly – people of "modest means." Pet. Br. 12. By creating job opportunities for local residents, such projects attack what may well be the single greatest contributor to urban misery.[3] Such projects also boost tax revenues that support services such as public hospitals; public education, and affordable housing.[4] And they can have vast, indirect and intangible benefits, such as attracting and retaining residents, businesses, civic and cultural institutions. *See generally* T. BARTIK, WHO BENEFITS FROM STATE & LOCAL ECONOMIC DEVELOPMENT POLICIES? (1991) (concluding that metropolitan economic growth benefits African Americans, the

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[3] "The consequences of high neighborhood joblessness are more devastating than those of high neighborhood poverty. * * * Many of today's problems in the inner-city ghetto neighborhoods -- crime, family disolution, welfare, low levels of social organization, and so on -- are fundamentally a consequence of the disappearance of work." W.J. WILSON, WHEN WORK DISAPPEARS at xii.

[4] In FY2003, $10.4 billion of New York City's budget of about $45 billion was dedicated to social services; children's services; homeless services; programs for the aging, and youth and community development. Citizens Budget Commission, *City of New York Expenditures by Agency* (available at www.cbcny.org/pocket03.pdf).

less educated, and younger workers the most, thereby reducing income inequality).

B. Promoting Economic Development Is A Historic Power of Government

Although their fluidity has been a defining feature of States' lawful powers, *see Welch*, 327 U.S. at 552 ("departure from * * * judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision"), there is nothing novel or suspect about the use of eminent domain – as opposed to taxing, spending, or regulation – to pursue these economic benefits.

1. As Petitioners are constrained to recognize (Br. 18-19), State Legislatures have, throughout the Nation's history, authorized the use of the condemnation power to transfer property from one private owner to another, on the ground that the new owner's use of the land contributed to economic growth or conferred some economic benefit on the community. *See* Harrington, *Public Use and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245, 1247 (2002) ("American legislatures repeatedly used their power of expropriation to effect all manner of social and economic engineering, frequently transferring property from one private entity to another where it was thought that the transfer would effect some greater economic purpose").

Resort to eminent domain for economic development purposes was widespread in colonial times. *Cf. Midkiff*, 467 U.S. at 241 & n.5 (noting colonial antecedents for challenged measure). Indeed,

> Colonial lawmakers often regulated private landowners' usage of their land in order to secure public benefits, not merely to prevent harm to health and safety. Indeed, the public benefits pursued by such legislative action included some that consisted essentially of benefits for other private landowners. Legislatures often attempted to influence or control the development of land for particular productive purposes thought to be in the public good. Legislatures compelled owners of undeveloped land to develop it, beyond what was required by the original grants, and compelled owners of wetlands to participate in drainage projects. Owners risked losing preexisting mineral rights if they failed to conduct their mining with sufficient promptness. Owners of land suitable for iron forges risked losing their land if they declined to erect such forges themselves. In towns and cities, landowners were constrained by measures intended to channel the spatial pattern of development, to optimize the density of habitation, to promote development of certain kinds of land, and to implement aesthetic goals.

Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282-83 (1996).

Before the Revolution, numerous American colonies enacted measures requiring that vacant or sparsely developed urban land be developed, and providing for the mandatory transfer of the land to a more productive private owner if it was not. *See id.* (citing and discussing statutes). These laws were complemented by others that permitted appropriation of rural land to advance the agricultural (and later industrial) economy. For example, a 1746 Connecticut statute authorized owners of "'lands lying convenient to be improved as a common field" to compel participation by unwilling neighbors, *id.* at 1265 & n.82, and "Connecticut's copper-mine legislation * * * authorized the taking of private property that was already devoted to the desired use – mining – but was not being utilized as expeditiously as the Assembly desired." *Id.* at 1265.

Laws providing for the compulsory transfer of property to private parties for legislatively determined publicly beneficial uses remained common after independence. The relevant legislative finding in this case echoes the rationale articulated in the first case decided under the "public use" clause of the State's

Constitution, *Olmstead v. Camp*, 33 Conn. 532, 1866 WL 927 (Conn. 1866), which held that a private mill owner was permitted, on payment of compensation, to flood his neighbor's land. Acknowledging that the mill owner had no legal obligation to allow the public access to the mill, the court held the "public use" requirement satisfied, because the owner's use of the property was "productive of general benefit." 1866 WL 927 *9. The court explained that "any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community" – not just those for involving "possession, occupation, [and] direct enjoyment, by the public" – should be considered a a taking for public use."[5] "[T]akings of land by private parties for the building of mills or ferries were thought to be every bit as legitimate a use of the eminent domain power as takings to build forts or post offices." Harrington, 53 HASTINGS L. J. at 1298.

Later statutes delegated the States' eminent domain power to private interests for a wide variety of manufacturing projects designed to achieve desirable economic ends. *Id.* at 1254 n.28 (noting that because legislatures were "anxious to attract private investment," they did not attempt to regulate these enterprises as public utilities"). Such measures were upheld by State courts on the ground that "if the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public." *Jacobs v. Clearview Water Supply Co.*, 69 A. 870, 872 (Pa. 1908).

This Court has consistently rejected challenges to statutes authorizing condemnations for uses deemed to served the public

[5] 1866 WL 927, *9. The *Olmstead* court further reasoned that "such a limitation * * * of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel." Endorsing a dictionary definition of "use," the court continued, "'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit," a construction that had "uniformly been put upon the language by courts, legislatures and legal authorities." *Id.*



interest. *See, e.g., Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17 (1885) (upholding New Hampshire statute authorizing mill owner to flood upstream land upon payment of compensation, as public use, and citing many such state laws); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *Hairston v. Danville & W. R.R. Co*, 208 U.S. 598 (1908); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1906).[6]

Without a single decision of this Court to point to in support of their position, Petitioners (Br. 21-22 & nn. 18, 19) labor to classify these decisions *rejecting* "public use" claims into "categories" – and then argue that the allegedly defining features of these "categories" are "specific limits" that the decision of the Connecticut Supreme Court (and of the dissenting Justices, who agreed with the majority on this point) ignored.

Even on its own terms, this endeavor is unpersuasive. In an urban setting, a large, centrally located site can be no less a publicly beneficial amenity than was a water mill or a railroad in earlier times, and the "assembly" problems (Br. 21-22) posed by owners who refuse to sell needed parcels are no less real. Nor are the benefits at issue here more "indirect" or derivative than in the case of grist mills, railroad or irrigation ditches. In those cases, the public benefit did not occur upon condemnation, but rather depended on facilities first being built by private parties – and then used, and then those uses actually producing the desired positive spillover effects. *See, e.g., Jacobs*, 69 A. at 872 ("It is the experience of most water companies that the number of patrons at first is small. This is also true as to railroad companies. They frequently exercise the right of eminent

[6] In *Clark v. Nash*, 198 U.S. 361 (1905), this Court rejected the claim that a statute authorizing an "individual to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone" was beyond the legislature's powers. 198 U.S. at 367. Although the only conceivable *direct* benefit was to the defendant landowner, the only public benefit was unstated: interest in land being put to productive use.

domain through great stretches of territory, where there may not reside a single individual at the time to enjoy the public use; but it has never been held that on this account the use was not a public one.").

Petitioners' strained distinctions of *Berman* and *Midkiff* fare no better. To be sure, "'the analogy between a slum and a public nuisance cannot be overlooked,'" Pet. Br. 24 n.22 (quoting *Allydon Realty v. Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939)) – and this Court has recognized that "nuisance-like activity" has a "special status" in takings law, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987). But its "special" role is *not* to demarcate the outer bound of "public use." On the contrary, nuisance abatement represents the paradigm government purpose that justifies expropriation of private property *without compensation*. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Even more important, *Berman* expressly rejected the very "specific limit" Petitioners would impose on that decision, emphasizing that "[i]t is within the power of the legislature to determine that the community should be *beautiful as well as healthy*, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33 (emphasis added).

Likewise, Petitioners' claim that the public benefits in *Midkiff* were realized immediately upon completion of the taking (Br. 26) is belied by the Court's opinion, which (far from requiring "certainty") recognized that the Hawaii Act, "like any other, may not be successful in achieving its intended goals." 467 U.S. at 242. Indeed, in an important sense, the policy pursued in that case and the one at issue here are two sides of the same coin: in *Midkiff*, there were too few landowners; in situations such as this one, the *proliferation* of landowners makes eminent domain necessary; *see* Merrill, 72 CORNELL L. REV. at 75-76 (explaining that holdout problem is akin to monopoly); *Hodel v. Irving*, 481 U.S. 704, 712-13 (1987) ("encouraging the consolidation of Indian lands is a public



purpose of high order"). It would be an extraordinary and ill-advised rule of constitutional law that made power to pursue a policy depend on characterizing the object as combating the "evil" (of fiscal distress or unemployment, or "oligopoly") – or securing the "benefit" of revitalizing a city, increasing tax revenue, or distributing land more equitably. *Cf. Lucas*, 503 U.S. at 1024 ("the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder"); Hart, 109 HARV. L. REV at 1259 (some affirmative use requirements were couched in terms of the community benefit of active use, while others identified the "harm" of "failure to develop").

But whether or not any plausible distinction could be extracted, *Berman* and *Midkiff* were emphatic that the rules they were applying was *not* particular to the facts of the case: *i.e.*, that power was not "specific and limited," but "broad and inclusive," and that the narrow standards of judicial review – the familiar axioms of federal judicial restraint – were generally applicable.

## II. More Stringent Federal Review of Eminent Domain Is Neither Necessary Nor Appropriate

Claiming settled rules of judicial review are inadequate to curb abuses of the eminent domain power and appealing to the Constitution's "plain language," Petitioners and *amici* argue that compensated takings for "private economic development" should be subject to heightened scrutiny – and enjoined if a court is unpersuaded of the "certainty" that public benefits will materialize. These contentions are novel and meritless.

### A. Working Class and Minority City Residents Would Not Benefit From Constitutional Limits On Economic Development For The Public Benefit

As an initial matter, the basic empirical premise of Petitioners' plea for an abrupt departure from traditional judicial deference is unsupported. Without defending in any way the errors and discriminatory outrages of numerous 1950s and 1960s

urban renewal projects, *see infra* – or minimizing the hardship that displacement can cause, *Amici* strongly disagree with claims that the *benefits* of urban economic development projects inevitably flow toward the affluent and away from the people of modest means. The governmental initiatives Petitioners blithely denigrate are instead among the more important means of addressing some of this Nation's most intractable and pressing social ills.

1. Petitioners' bald assertion, Br. 17, that "the whole idea behind economic development projects is replacing lower-income residents with higher-income ones" is simply false. The "idea" of many (but not all) projects is to promote higher *density* uses – which can readily mean greater housing opportunity for low-income people. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *see also Cuyahoga Falls v. Buckeye Community* Found., 538 U.S. 188 (2003); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Southern Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

For example, the site of the Brooklyn Atlantic Yards project, which consists primarily of vacant and industrial land, currently has approximately 160 units of residential housing, while the proposed project will have some 4,000 units of housing, half of which will be rented out at below-market rates and fully 800 of which will be set aside for low-income individuals – with guaranteed units for all displaced residents and preferences for neighborhood residents.

As numerous judicial decisions attest, property owners often resist such efforts, typically asserting a need to preserve the "character" of the existing neighborhood – a rationale that not infrequently masks hostility to those who would occupy the housing. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *see also AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of industrial park plan adopted as



pretext to thwart affordable housing development).

2. Development projects often bring sorely needed employment opportunity to urban communities. The New London project is expected to result in between (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs; as previously noted, the Atlantic Yards project would far exceed those numbers, with estimates of 10,000 permanent jobs and 15,000 construction jobs.

With the demise of manufacturing employment in Northeastern cities, construction jobs provide the best and often the only realistic opportunity to earn a living wage through blue-collar work. In the area surrounding the Atlantic Yards site, where unemployment rates are high, especially for African-Americans and other members of minority groups. The benefits of employment transcend wages paid, of course, since jobs are a principal engine of virtually all forms of social stability. *See* pp. 8-9, *supra*.

3. Projects bring substantial benefits to residents of immediately affected and surrounding neighborhoods. In sparsely populated areas where vacant land and unused industrial buildings are replaced, the influx of larger numbers of people can improve public safety, transportation, shopping opportunities, and the quality of public services, including public schools for the surrounding area, *see* R. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2002) (educational benefits of mixed-income schools), and can be a catalyst for long-needed environmental remediation.

4. Petitioners' scorn for the benefit of increasing municipal tax revenue is completely unwonted. *See* pp. 10-11 & n. 4, *supra*. The services that such revenues provide are expended overwhelmingly for the benefit of poor and middle-income people: public hospitals, public transportation, public education, services for homeless and people with AIDS, and affordable housing initiatives. Broadening the tax base makes municipal

governments less vulnerable to vicissitudes in the business cycles and permits them to keep tax rates low enough to attract other employers. For all these reasons, many community residents and activists – often including residents and owners of directly affected property – support development projects, as do many (but by no means all) of their elected representatives.

5. To be sure, there will be other long-time residents who oppose the same projects – many based on an entirely sincere preference for the existing character of the neighborhood. But as *Amici* can attest, the ranks of project opponents are by no means limited to long-time residents – and include new arrivals, absentee property owners, and those who oppose the project for ideological reasons or because the project's success will adversely affect their own commercial interests. It is a great vice of Petitioners' rule that a tiny minority of property owners could overrule the majority of neighbors, and indeed that *every* property owner (including a would-be developer whose opposition is a matter of narrow self-interest) able to persuade a court that benefits were not "reasonably certain" would be empowered to permanently enjoin a broadly supported project. As developers and project opponents alike well know, delay and uncertainty can defeat meritorious projects.

6. *Amici* do not – and could not – dispute the evidence that racial animus was behind many 1950s and 1960s highway construction and urban development projects, but we challenge the assumption that that experience in any way supports Petitioners' legal argument. The notorious evidence set out in the briefs of Petitioners' *amici* did not arise in the context of economic development condemnation, but rather in condemnations effectuated for highway construction and under blight designations – exercises of the eminent domain power that, under Petitioners' theory, raise no special concern and that their proposed rules do not even purport to reach.[7] Indeed, if

[7] Moreover, in the same jurisdictions where the eminent domain power was perverted for racial purposes, so too were zoning, regulatory, and spending powers – with similarly tragic efficacy. *See Thompson v. HUD*, 2005 WL 27533 (D. Md. 2005) (cataloguing long history of purposeful racial discrimination in mortgage insurance and site selection).



there were any substance to Petitioners' claims that economic development projects are inevitably harmful, the rule they seek here – one categorically limiting development to blighted areas – would, by definition, intensify the extent of disproportionate impact on poorer, predominantly minority communities.

7. Without glossing over this deplorable history or underestimating the seriousness of present-day racial discrimination and inequality, *Amici* believe it important to acknowledge the many ways in which the world has changed since – and often in response to – those notorious failures. The federal statutes under which those public development projects were pursued no longer exist, and the federal spending that underwrote them has long vanished. Congress has enacted statutes, *e.g.*, 42 U.S.C. § 4622, that evince concern for the problem of displacement.

Even if today's government officials and administrators were no more enlightened than their predecessors, urban politics has changed fundamentally, because of demographic shifts and the civil rights movement and the Voting Rights Act, meaning that elected officials are far more accountable to poor and minority constituents. *Cf. New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 700 n.7 (1989) (invalidating rules that gave Staten Island residents roughly six times as much representation on governing body as Brooklynites).[8] Perhaps even more important, experience, sometimes bitter, has led community residents and civic leaders to greater awareness of

[8] "Today * * * public-development officials operate in a far more constrained environment ** * * And in the new world of urban-development politics, the traditional build-and-grow coalition of government and business can no longer control the process. Too many interest groups exist, and they are able to gain power and voice, however temporary, by exercising procedural rights of review and leveraging the political system. L. Sagalyn, TIMES SQUARE ROULETTE 469 (2001).

and active engagement in land use decision-making.

B. Principles Supporting Restrained Judicial Review Apply To "Public Use" Claims

The arguments of Petitioners and *amici* that the dangers of "eminent domain abuse" require more searching judicial scrutiny give short shrift to the principles underlying judicial deference to the legislature. Indeed the dangers they identify do not support – and in significant respects argue against – the rule they ask the Court to impose. That rule, of course, would be require a *direct* repudiation of many of this Court's precedents.[9]

1. While Petitioners and *amici* repeatedly emphasize – likely correctly – that *homeowners* suffer substantial uncompensated costs from takings, *see, e.g.*, Pet. Br. 1-2, 33-34, that complaint argues for reconsideration of *Just Compensation* law, *see Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), not the "public use" doctrine – and it does not remotely support a rule of special scrutiny for "economic development" takings, as

[9] This Court has in terms rejected heightened judicial scrutiny for privately executed development projects and any suggestion that a "reasonable certainty" requirement be read into the Fifth Amendment. *Berman* explained (348 U.S. at 33-34) that a legislature's conclusion that a "public end may * * * better served through an agency of private enterprise than through a department of government" was not to be gainsaid, and *Midkiff* explicitly disclaimed (467 U.S. at 242) interest in the likelihood or "certainty" that the public benefit sought by the challenged law: "But 'whether in fact the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if * * * the * * * [state] Legislature rationally could have believed that [the law] would promote its objective'") (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)); *see also National R.R.*, 503 U.S. at 422 (Constitution is "satisfie[d]" without "need [for] a specific factual determination whether the condemnation will accomplish its objectives"); *Nebbia*, 291 U.S. at 537 ("With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal").



against all others, let alone a "reasonable certainty" requirement.

It is by no means self-evident why an older, longstanding homeowner should or would feel less aggrieved by a (presumably inadequate) compensation award if her home were taken for some noncontroversial governmental use, such as a sewage treatment plant, than if it were put to use for a development project that sought large (but uncertain) benefits – let alone that she would prefer a project that delivered small, but demonstrable benefits. Petitioners' rule – and the entitlement to enjoin takings that do not meet the "reasonable certainty" standard -- is not limited to homeowners (indeed, Petitioners include a partnership that owns multiple parcels of property).[10]

2. Likewise, although Petitioners and *amici* make broad assertions about disproportionate burdens on people of modest means and members of racial minority groups, *but see* p. 10, *supra*, there is no claim of racial discrimination or disparate impact in this case, nor do the rules they seek limited to poor or minority groups homeowners, nor would their rule, if adopted, attach any significance to the racial distribution of benefits or burdens of a given project. *Compare, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) (denying private right of action under disparate impact regulations).

Petitioners and *amici* offer no explanation why the impact alleged is specific to exercises of eminent domain for "economic development" purposes, their submissions suggest the opposite – and this Court's cases make clear that such impacts are not unique to the eminent domain power. *See Washington v. Davis*, 426 U.S. 229, 248 (1976) (disparate impact standard "would * * * perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"); *see also*

[10] In the case of a longstanding resident who *rents* an apartment, Petitioners' rule leaves his landlord with unfettered discretion to sell to the developer, "social costs" notwithstanding.

*Sandoval, supra*; *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (mem.) (zoning limited minority residents to urban renewal area); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (inequitable use of regulatory power to issue environmental permits).

3. The dangers featured in the briefs on Petitioners' side do not meaningfully distinguish the eminent domain power from powers – to tax, spend, and regulate – that governments wield subject only to traditional, restrained judicial review.

a. As this Court's decisions make clear, deferential review is not premised on the assumption that electorally accountable officials necessarily make wise choices, *see, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 17-18 (1992) ("California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society"), or even that they are especially likely to correct poor choices, *id.* ("ordinary democratic processes may be unlikely to prompt [law's] reconsideration or repeal"), or that the harms imposed by exercises of those powers are insubstantial. *See, e.g., HUD v. Rucker*, 535 U.S. 125 (2002) (sustaining eviction of elderly public housing tenant); *Hahn*, 505 U.S. at 18 (noting arguments that challenged measure "frustrates the 'American dream' of home ownership for many younger and poorer California families").

b. Petitioners' charges are less a case against "eminent domain abuse" than a brief against the *very notion of electorally accountable local government*. After all, governments intent on benefitting the privileged – and indifferent to the interests of its residents of modest means – could have the run of their taxing, zoning, spending, and regulatory powers long before they would need to consider eminent domain.

4. Eminent domain differs from these other powers in ways that would tend to make its improvident exercise *less* likely. First, although compensation may not extend to the full personal costs of dislocation, *see supra*, the requirement that government



pay market-value for taken property provides both a substantial means of mitigating individual burdens, *see Armstrong*, 364 U.S. at 49, and a substantial deterrent to actions that not are not publicly beneficial (indeed, fiscal constraints prevent many takings that would be beneficial).

5. Because condemnees are typically entitled to judicial hearings, and because States afford procedural protections – and impose legal constraints – substantially beyond those under federal constitutional law, condemnations are more costly and uncertain, and therefore less common, than Petitioners' accounts assume. *See generally* Merrill, 72 CORNELL L. REV. at 77-78 (explaining that "the decision whether to use eminent domain should be, from an economic perspective, self-regulating"). These costs are not the only or even the principal deterrents. Experience confirms what theory would predict: the concentrated and visible character of the burdens of eminent domain – as against the diffuse and inchoate public benefits – makes it easier to muster opposition (and controversy, adverse publicity, and litigation) than support for even the most manifestly beneficial projects.

C. Restrained Review Is Supported By the Text, Structure and Original Intent of The Constitution

1. Claims that the "plain language" of the Fifth Amendment calls out for stringent review suffer from a threshold difficulty: the language of the Amendment does not suggest that "public use" is intended as a substantive limitation on government power. These arguments depend on reading the Fifth Amendment *as if* it said "private property shall not be taken **[except]** for public use **[nor]** without just compensation," – and then speculating as to what the Framers understood "public" and "use" to mean. But the actual wording of the Amendment suggest that "public use" is meant as a description of the takings for which compensation must be paid, rather than an independent, substantive limitation on governmental power.

2. Scholarly review of the historical record suggests that this

natural reading is the originally intended one, *i.e.*, that the Framers did not intend the words "public use" in the Fifth Amendment to operate as a substantive, judicially enforceable limitation on the Legislature's eminent domain power. *See* Harrington, 53 HASTINGS L. J. at 1247 ("the idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause"); *id.* at 1248 (concluding that "[i]n using the term 'public use' in the Fifth Amendment, the drafters * * * intended to distinguish a certain type of taking which required compensation * * * from those which did not"); *see also* Hart, 109 HARV. L. REV. at 1297 ("the history of colonial land use legislation strongly supports the Court's controversial conclusion that a state's eminent domain power is essentially as broad as its police power").[11]

3. So reading the Fifth Amendment does not mean that "purely private takings" are constitutional or deprive "public use" of independent significance. But it does make clear that there is no warrant for breaking with precedent and imposing stricter scrutiny.

a. Restrained review of "public use" claims does not detract from what has long been identified as the core requirement and primary purpose of the Clause: to mandate compensation so that "some people alone [are not forced] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment) ("The [Takings]Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge"); *Brown v.*

[11]As Harrington explains, 53 HASTINGS L. J. at 1267-68, modern assumptions that appropriation of property through legislatively authorized eminent domain is *in*voluntary does not take account of widespread understanding that a property owner's "representatives" were agents, authorized to "consent" to a sale to "the public." *See id.* (giving examples from Blackstone's Commentaries, John Locke, and early State Constitutions).



*Legal Found.*, 538 U.S. 216, 235 (2003) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation'") (citation omitted) *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 (1987) (Clause was "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking"); *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236 (1897).

b. The Constitution does not permit "takings from A to give to B," in any event. This Court and others recognized that legislatures are without power to effect purely private takings in decisions rendered before the Fifth Amendment was "incorporated" against the States, *see, e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896), arising under a state constitution that had no compensation clause, *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D. Pa. 1795), and construing the "public use" language as descriptive, rather than proscriptive, *see Baltimore & O.R.R. v. Van Ness*, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830)); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.). *See generally* J. Rubenfeld, *Usings*, 102 Yale L. J. 1077 (1997).

c. As Professor Rubenfeld explains, this Court's Takings jurisprudence is broadly consistent with giving "public use" its apparently intended meaning, *i.e.* as a limitation on the obligation to compensate, rather than on the power to take property for the public good. Thus, decisions denying compensation for certain governmental deprivations of property often turn on the absence of "public use." *Compare United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952) (no compensation for property deliberately destroyed by soldiers to prevent its falling into the hands of opposing forces) *with Mitchell v. Harmony*, 54 U.S. 115 (1852) *and United States v. Russell*, 80 U.S. 623 (1871) (mem.) (compensation for property *used* by soldiers). *Compare also United States v. Pewee Coal*

*Co.*, 341 U.S. 114 (1951) (compensation due when mine ordered operated as war-time necessity) *with United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (no compensation for owner whose mines were ordered closed, as wartime measure).

D. Considerations of Federalism Strongly Support Adherence To Deferential Standards of Federal Constitutional Review

Petitioners' assurances that the "sky will not fall," notwithstanding, embracing the rule they propose would have far-reaching, adverse consequences.

1. Although Petitioners emphasize that only a small number of States have adopted economic development condemnation powers on all fours with Connecticut's, they overlook that fact's most obvious significance: it disproves the unrelenting pessimism about the political process that permeates Petitioners' submission. Contrary to the predictions of political and economic theorists that economic development condemnations are irresistible, most States have yet to find it necessary or wise to confer the *power* at issue (let alone exercise it abusively). Petitioners would deny the legislatures of those states the freedom to decide whether to adopt such a rule.

2. Even more serious is the potential to alter the respective roles of State and federal law – and State and federal *courts* – in deciding "public use" disputes.

a. Federal court review has never been the primary limitation on State eminent domain power. Until ratification of the Fourteenth Amendment, the federal Constitution imposed no limitation whatsoever on that power, and his and other federal courts have a consistent record of rejecting "public-use" claims, invoking principles of judicial restraint. *See* pp. 25-27, *supra*. Accordingly, those concerned about reining in the eminent domain power have looked to State courts and State Legislatures for relief. There is no indication such pleas have gone unheard: few States have granted the authority that Connecticut has, and many State courts have read state constitutional limitations more



stringently than this Court has the Fifth Amendment.

b. Almost every "public use" decision discussed by Petitioners and *amici* carried with it closely related, antecedent questions of statutory law. Here, for example, Petitioners made colorable claims that the Connecticut Legislature did not authorize condemnation in the delegation to the NLDC; had the courts ruled for them on those grounds, constitutional decision would not have been necessary. *See Aposporos v. Urban Redev. Comm'n*, 790 A.2d 1167 (Conn. 2002) (reversing condemnation on statutory grounds); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002). When decisions adopt a broad or narrow understanding of legislative authorization, they are subject to debate and revision (or ratification) through the political process.

c. In such litigation, federal constitutional questions arise only after myriad issues of State substantive, procedural, administrative and constitutional law are resolved – all in favor of the exercise of eminent domain. Even when the issue of federal constitutionality is finally joined, matters of state law play an unusually central role. What constitutes "property" is primarily a question with State law, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and whether a compensable "taking" has occurred and whether for a "public use" can likewise be bound up with local law and local conditions. *See Lucas*, 505 U.S. at 1016 n.7; *Clark*, 198 U.S. at 369 ("the people of a state, as also its courts, must, in the nature of things, be more familiar" with facts bearing on "public use" issue).

d. A rule that entitled every property owner to a determination of "reasonable certainty" as a matter of *federal constitutional law* would make federal court § 1983 suits the first resort for property owners who oppose a particular project. Indeed, because State law claims could not be basis for relief in federal court, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), plaintiffs would couch their challenges in exclusively federal constitutional terms

E. Petitioners' specific heightened scrutiny proposal, which would read a "reasonable certainty" requirement for economic development takings into the Fifth Amendment, is especially unattractive. Such a rule is not even suggested by the constitutional language. It is hard to see why an action taken for the purpose of securing public benefits should fail if a federal judge is unpersuaded – in disagreement with the responsible government officials – of the "certainty" that the benefits sought will accrue. *See Keystone*, 480 U.S. at 511 n.3 (Rehnquist, C.J., dissenting) ("[O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation").

Judgments about the certainty of future benefits are precisely the kind courts are least equipped to make, *see, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 308-09 (1997), and while Petitioners do not spell out the proposed rule's operation in any detail, it is hard to see how it could not be biased against projects with longer time horizons and in more marginal areas – *i.e.*, those which are most needed and bring the greatest benefits – and it would necessarily require (federal) courts, *see supra*, to decide questions that are both value-laden and highly technical. *See Midkiff*, 467 U.S. at 243 (courts are not the place for "empirical debates over the wisdom of takings").

To raise just the most obvious hypothetical: would the Fifth Amendment authorize an injunction if a court found a project's future employment benefits genuine but its tax revenue projections too uncertain? What if it found both to be sufficiently "certain," but of lesser magnitude than a city's estimates? Under such a regime, proceedings before State and local bodies would invariably be consigned to the role of rehearsal for the main event: a federal court battle of the experts.

**Conclusion**

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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# In The Supreme Court of the United States

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*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## BRIEF *AMICUS CURIAE* OF CALIFORNIA REDEVELOPMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment forbid an economically distressed city from employing its eminent domain power to condemn, and pay just compensation for, private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, and to realize immediate structural and environmental benefits for the city, as long as the proposed condemnation is rationally related to the accomplishment of those goals?

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## INTEREST OF AMICUS CURIAE

*Amicus curiae* California Redevelopment Association ("CRA") is a California nonprofit corporation whose members include redevelopment agencies and private sector firms and individuals interested in redevelopment in California.[1] Currently, 324 redevelopment agencies and 264 private sector firms are members of CRA. CRA's members are involved in carrying out redevelopment plans throughout the state. California's Community Redevelopment Law (California Health & Safety Code §§ 33000 – 34160) was adopted in 1945. Since that time, approximately 414 cities and counties have established redevelopment agencies and have adopted approximately 772 redevelopment plans. All but a few of those redevelopment plans authorize the use of eminent domain to acquire some or all of the property within the redevelopment project area in order to eliminate conditions of blight.[2]

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[1] All parties have given written consent to the filing of this brief and copies of the consent letters are on file with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that counsel for the parties did not author this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] California redevelopment agencies are authorized to exercise the power of eminent domain by California Health and Safety Code section 33391. The California legislature has declared it to be the policy of the state: "That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated." Cal. Health & Safety Code § 33037(b).

## SUMMARY OF ARGUMENT

For the reasons set forth in Respondents' Brief, CRA firmly supports Respondents' contentions that: (1) economic development is a public use for which the power of eminent domain may be constitutionally exercised, and (2) there is no basis in the Constitution for applying a more stringent standard of judicial review to takings for economic development purposes.

Although the constitutional question presented by this case does not appear to impact takings by redevelopment agencies for the purpose of eliminating blight, CRA feels impelled to call to the Court's attention the serious implications that Petitioners' arguments may have for takings of non-blighted properties within blighted areas. Petitioners' assertion that "there is nothing in the act of condemning non-blighted properties that constitutes a public purpose" (Petitioners' Brief at 26) overlooks this Court's holding in *Berman v. Parker*, 348 U.S. 26 (1954). Berman clearly held that blight is determined on an area basis – not a parcel-by-parcel basis – and that a blighted area may include non-blighted properties which are necessary to effectively redevelop the area as a whole. Moreover, Berman held that the power of eminent domain may be used to acquire non-blighted property within a blighted area. This holding of Berman is critical to the ability of redevelopment agencies to continue to deal effectively with eliminating conditions of blight which threaten the physical, social and economic health of California's communities.



## ARGUMENT

### I. The Condemnation of Non-Blighted Property Within a Blighted Area Pursuant to an Adopted Redevelopment Plan Is a Public Use

#### A. Blight Is an Area Concept

While Petitioners do not controvert that the removal of blight is a public use, their assertion that "there is nothing in the act of condemning non-blighted properties that constitutes a public purpose" (Petitioners' Brief at 26) overlooks this Court's holding in Berman that the concept of blight applies to a redevelopment project area as a whole and not to individual properties. Under Berman, individual, parcel-specific determinations of blight are unnecessary. Regardless of the character of the specific parcel condemned, when the purpose of the agency's condemnation is blight removal in a designated redevelopment project area, the taking is for a public use. As this Court explained:

> Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot

by lot, building by building. *Berman, supra*, at 35-36.

The public policy reasons for dealing with blight on an area-wide basis have been explained in the legislative findings accompanying the California Community Redevelopment Law. The California legislature has found that "conditions of blight are chiefly found in areas subdivided into small parcels, held in divided and widely scattered ownerships, frequently under defective titles, and in many such instances the private assembly of the land in blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs." Cal. Health & Safety Code § 33036(c).

The conditions found in most urban centers make it virtually impossible for a private developer acting without the assistance of a redevelopment agency possessing the power of eminent domain to assemble a site large enough for modern development. Descriptions of these conditions are found throughout California case law dealing with the redevelopment of blighted areas. *See, e.g., Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 782-84, 266 P.2d 105, 109-12 (Cal. App. 1954) ("*Hayes*"); and *In re Redevelopment Plan for Bunker Hill*, 61 Cal. 2d 21, 33-35, 45, 389 P.2d 538, 545-48, 553-54, (1964). Dealing effectively with these conditions would be impossible if the owners of a few non-blighted parcels within a redevelopment project area could refuse to sell their property or hold a project hostage by demanding an inflated price. (For a more detailed discussion of the "hold-out problem" *see* Respondents' Brief at section II B.) For this reason, using the power of eminent domain to acquire non-blighted property within a



redevelopment project area is critical to the success of redevelopment efforts.

### B. Requiring Parcel-By-Parcel Findings of Blight Would Severely Undermine California's and Other States' Urban Redevelopment Efforts

California's Community Redevelopment Law permits the condemnation of non-blighted parcels in a predominantly blighted area for the purpose of redevelopment.[3] The authorizing statute provides that a project area may include property which is not detrimental to the public health, safety or welfare, but whose inclusion is necessary for the effective redevelopment of the area. Cal. Health & Safety Code § 33321. California courts have consistently applied both this statute and the holding in *Berman* to sustain the taking of non-blighted parcels in a designated redevelopment project area. *See Redevelopment Agency v. Rados Bros.*, 95 Cal. App. 4th 309, 315, 115 Cal. Rptr. 2d 234, 239 (Cal. App. 4th Dist. 2001) (holding that the trial court improperly applied a blight concept to the property owner's individual parcel) ("*Rados Bros.*"); *Fellom v. Redevelopment Agency of San Francisco*, 157 Cal. App. 2d 243, 247, 320 P.2d 884, 887 (Cal. App. 1st Dist. 1958) (holding that California Redevelopment Law as applied to non-slum-type blighted areas is constitutional); *Hayes*,

[3] *See also* 2A NICHOLS ON EMINENT DOMAIN § 7.06[27] n. 25 and 26 (2004) (listing the following states as finding that non-blighted properties may be taken to prevent slums and clean up blighted areas: California, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and Wisconsin).

*supra*, 122 Cal. App. 2d at 800, 266 P.2d at 120 (holding that California Redevelopment Law is constitutional as applied to non-slum-type blighted areas or to undeveloped, vacant land areas).

Requiring parcel-by-parcel findings of blight or imposing a higher level of scrutiny on the taking of non-blighted property in a redevelopment project area would severely undermine state redevelopment efforts throughout the country. Numerous states have followed this Court's holding in *Berman* and found that redevelopment of blighted areas need not occur on a piecemeal basis. *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 889 (Fla. 1980) (holding that the condemnation of buildings that do not contribute to the slum or blight of an area is constitutional for the purpose of community blight removal); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (2003), *cert. denied*, 124 S. Ct. 1603 (2004) (holding that redevelopment encompasses an entire area, not just individually blighted sections); *Wilson v. Long Branch*, 27 N.J. 360, 381, 142 A.2d 837, 849 (1958) ("Denial of the right of the municipality to draw within a blighted area certain houses or buildings which are in good condition, would be in some instances to defeat the overall legislative purpose, namely, the redevelopment of blighted areas."); *Charleston Urban Renewal Auth. v. Courtland Co.*, 203 W. Va. 528, 532, 509 S.E.2d 569, 573 (1998) (" . . . the issue is not whether an individual property is 'slum' or 'blighted' property. The issue is whether an 'area,' typically composed of many individual parcels of property, is a slum or blighted area."); *Sigma Tau Gamma Fraternity House Corp. v. Menomonie*, 93 Wis. 2d 392, 409, 288 N.W.2d 85, 92-93 (Wis. 1980) ("If the area in which plaintiff's property is located is blighted, and if the



acquisition of plaintiff's property is reasonably necessary for the elimination of that blight, then the city may lawfully condemn plaintiff's property, despite the fact that that property itself has been properly maintained and is presently in satisfactory condition.").

## II. As Demonstrated by California Community Redevelopment Law, States Adopt Procedural and Substantive Safeguards That Protect Against Abuses of the Eminent Domain Power

State and local officials adopt procedural and substantive safeguards that protect against abuses of the eminent domain power. As envisioned under the separation of powers doctrine, courts diligently enforce these provisions and assure that local agencies heed these legislative protections. These procedural and substantive constraints balance the legitimate interests of local agencies to pursue projects that enhance the general health and welfare of the community with the private individual interests of those affected by such projects. Because amicus is most familiar and qualified to discuss California Redevelopment Law, this section focuses on the constraints found on the use of eminent domain in the California Community Redevelopment Act. However, substantive and procedural limits in varying forms are imposed in urban renewal statues throughout the country.[4]

[4] More pointedly, procedural and substantive constraints also exist in Connecticut's General Statutes controlling the exercise of eminent domain for economic development. *See* Respondents' Brief at Summary of Facts and Section II B. (City of New London held numerous neighborhood meetings before adopting the Municipal Development Plan, the plan required specific details regarding the

(Continued on following page)

### A. California's Community Redevelopment Law Contains Both Procedural and Substantive Provisions Designed to Protect the Interests of Property Owners in Redevelopment Project Areas

In recognition of the authority vested in redevelopment agencies and the potential for the abuse of that authority, the California Community Redevelopment Law contains provisions designed to protect the interests of property owners. In connection with the adoption of the redevelopment plan, the elected legislative body is required to make findings that the redevelopment project area is a blighted area based on the existence of specifically identified conditions of both economic and physical blight. Cal. Health & Safety Code § 33367. Blight is rigorously defined as a combination of enumerated conditions,[5] which are so prevalent and so substantial that it causes a reduction of, or lack of proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment. *Id.* § 33030.[6] Land does not qualify as being blighted merely because it is not being put

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needs for development and the benefits of the proposed plan and also imposed both city and state oversight on development.)

[5] Such conditions include unsafe or abandoned buildings, high crime rates, incompatible uses of adjacent properties, depreciated or stagnant property values or impaired investments, abnormally high business vacancies and a lack of necessary commercial facilities. *Id.* § 33031; *Rados Bros., supra,* 95 Cal. App. 4th at 314, 115 Cal. Rptr. 2d at 239.

[6] Additional findings that must be made include the necessity of condemnation, economic feasibility of the redevelopment plan, adequacy of the relocation plan, and the fact that the project area is predominately urbanized. *Id.* § 33367.



to its optimum use or may be more valuable for other uses. *Sweetwater Valley Civic Assn. v. National City*, 18 Cal.3d 270, 277-78, 133 Cal. Rptr. 859, 863 (1976).

Procedural safeguards guide the redevelopment process in general and the exercise of eminent domain in particular. California law provides that both the redevelopment agency and legislative body conduct public hearings prior to approving the redevelopment plan. Cal. Health & Safety Code §§ 33348, 33360. If the redevelopment plan would subject any property in the project area to acquisition by purchase or condemnation, the agency must send a statement explaining this to each property owner with the notice of hearing. *Id.* § 33350. The description of the goals and objectives of the redevelopment plan and notice of authority to condemn property, if any, must be in non-technical, easily understood language. *Id.* §§ 33349, 33350. Specific procedures must be followed if written objections to the plan are submitted. The legislative body must address objections in detail and give reasons for not accepting specified objections and suggestions, using a good faith reasoned analysis in its response, supported by factual information. *Id.* § 33363.

If the proposed redevelopment plan contains the authority to acquire residential property, and substantial numbers of low- or moderate-income persons reside within the project area, or the project will displace a substantial number of people, an independently elected "project area committee" including representatives of property owners must review the redevelopment plan prior to its adoption and make a recommendation to the legislative body. *Id.* §§ 33347.5, 33385. If the project area committee recommends against adoption of the redevelopment plan, the

redevelopment plan may only be adopted by an extraordinary majority vote of the legislative body. *Id.* § 33366.

The ordinance adopting the redevelopment plan and the validity of the findings and conclusions of the legislative body must be supported by substantial evidence in the record of proceedings and are subject to legal challenge and referendum. Cal. Health & Safety Code §§ 33501, 33365; *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335, 1343-45, 16 Cal. Rptr. 2d 132, 137-38 (Cal. App. 4th Dist. 1993).

After the redevelopment plan is adopted, the agency must record in the land records of the county in which the redevelopment project is situated, a description of the land within the project area and a statement that proceedings for the redevelopment of the project area have been instituted. *Id.* § 33373. Purchasers of property in the redevelopment project area after the redevelopment plan is adopted are thereby given constructive notice that the property they are acquiring may be subject to acquisition by eminent domain for redevelopment purposes.

Each redevelopment plan is required to "provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan. . . ." *Id.* § 33339. Redevelopment agencies must also extend reasonable preferences to persons engaged in business in the project area to reenter in business within the redeveloped area if they otherwise meet the requirements prescribed by the redevelopment plan. *Id.* § 33339.5.

Before a redevelopment agency may condemn property, it must make every reasonable effort to acquire the



property voluntarily, including having the property appraised and offering to purchase the property for not less than the appraised fair market value. Cal. Gov't Code §§ 7267.1, 7267.2. If the property owner refuses the redevelopment agency's offer, before proceeding to condemnation the agency must adopt a resolution declaring the public use and necessity of the taking. Cal. Civ. Proc. Code § 1245.220. The property owner must receive notice of the adoption of this "resolution of necessity" and have an opportunity to appear and refute the required findings. *Id.* § 1245.235. The resolution of necessity may only be adopted by a vote of two-thirds of all the members of the governing body. *Id.* § 1245.240.

Finally, an agency is prohibited from acquiring property to remain in its current condition merely to effect a change in ownership. Cal. Health & Safety Code § 33394.

This detailed statutory scheme has built a substantive and procedural fence around the use of eminent domain by redevelopment agencies that provides an extraordinary level of protection to property owners from the abuse of that power.

### B. Courts Will Invalidate Takings That Violate Legislatively Imposed Procedural and Substantive Safeguards

Courts enforce the legislative protections discussed above. Courts have rejected redevelopment plans where there is no substantial evidence in the record that the project area is predominately blighted. *See Sweetwater Valley, supra*, 18 Cal. 3d at 278-79, 133 Cal. Rptr. at 864 (finding that the property in a redevelopment project area, which included a golf course and vacant land, was neither

an economic nor a social liability substantiating a finding of blight); *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 139 Cal. Rptr. 196 (Cal. App. 2nd Dist. 1977) (record failed to show project area was blighted); *Emmington v. Solano County*, 195 Cal. App. 3d 491, 497-98, 237 Cal. Rptr. 636, 640 (Cal. App. 1st Dist. 1987) (courts role is to ensure that the factors to be considered in determining whether an area is blighted are taken into account and not just "rubber stamp" local government findings.)[7]

For example, in *Barbara Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 95 Cal. Rptr. 2d 265 (Cal. App. 2d Dist. 2000) the court concluded that the proposed redevelopment project failed to establish blight due to a lack of substantial supporting evidence in the administrative record. The court held that in order to establish blight, reports must discuss specific defects in specific parcels and not just recite the statutory language.

[7] Two Federal District Court cases cited by Petitioners, *99 Cents Only Stores, Inc. v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003) and *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) made an "end run" around state condemnation procedures, probably based in part on a perception that property owners would fare better in federal court on challenging a right to take. (Petitioners' Brief at 14, 16.) Both cases involved redevelopment agencies' condemnation of allegedly non-blighted property within a redevelopment project area and rested in part on allowing a challenge to the agencies' determinations of blight. In both cases, the district courts expressly declined to address the blight findings made pursuant to California Redevelopment Law and neither case cited nor acknowledged the holding in *Berman* permitting the taking of non-blighted properties for the purpose of redevelopment. Compare these cases with *Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir. 2004) holding that the district court abused its discretion when it declined to abstain and permit a state eminent domain action to go forward.



Recently, in *Graber v. City of Upland*, 99 Cal. App. 4th 424, 121 Cal. Rptr. 2d 649 (Cal. App. 4th Dist. 2002) the court reinforced earlier precedent finding inadequate evidence of blight and criticized the use of overbroad definitions which prevented the city council from determining whether the project area could truly be characterized as having the blight conditions required by statute.[8]

Similarly, in *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (Cal. App. 2d Dist. 1985), the court rejected a resolution of necessity where the contents of the resolution were affected by a gross abuse of discretion by the legislative body.[9] In *Norm's Slauson*, the court found that the adoption of the resolution of necessity to acquire the property for a redevelopment project was a "sham" because the city had already irrevocably committed itself to condemnation of the parcel. *Id.* at 1127, 219 Cal. Rptr. at 369. Prior to the hearing on whether the city council should adopt the resolution of necessity, the agency had contracted to sell the property and issued bonds to finance development (without notifying the property owner). *Id.* at 1127, 219 Cal. Rptr. at 369.

[8] *See also Friends of Mammoth, et al. v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 98 Cal. Rptr. 2d 334 (Cal. App. 3d Dist. 2002) (rejecting a redevelopment plan on the grounds that the project did not meet the predominantly urbanized requirement).

[9] A resolution of necessity to condemn a particular piece of property must contain the following four findings: (1) the public interest and necessity require the project; (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; (3) the property sought to be acquired is necessary for the project; and (4) the agency has made the offer of just compensation required by Government Code section 7267.2 or the offer was not made because the owner could not be found with reasonable diligence. Cal. Civ. Proc. Code § 1245.230.

The court explained that before a local legislative body determines that it is necessary to take a particular parcel of property, it must "conduct a fair hearing and make its determinations on the basis of evidence presented in a judicious and nonarbitrary fashion." *Id.* at 1129, 219 Cal. Rptr. at 370.

In *Redevelopment Agency v. Herrold*, 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621 (Cal. App. 5th Dist. 1978) the court held that the 60-day statute of limitations to challenge a redevelopment plan did not bar a claim alleging illegal implementation of the plan. At issue was whether the agency violated section 33394 of the Health and Safety Code which prohibits a redevelopment agency from taking property that will remain in the same condition merely to effect a change in ownership. The court overruled the trial court's determination that the claim was time-barred. The court explained, "[the statute of limitations] cannot be used to immunize an agency which adopts a redevelopment plan legal on its face, then after the 60-day period has elapsed deviates from its resolved purpose and seeks to violate the public use requirement of [the] California Constitution. . . ." *Id.* at 1029, 150 Cal. Rptr. at 625.

As evidenced by the above, while courts give great deference to legislative declarations of public use, they enforce the procedural and substantive safeguards that protect against abuses of the eminent domain power. This separation of powers provides the proper balance between legislative findings of public use that authorize the exercise of eminent domain to implement comprehensive redevelopment projects benefiting the general health and welfare of the community, while at the same time ensuring



judicial protection of individual property interests should an agency misuse such authority.

## CONCLUSION

For the reasons set forth above, CRA urges this Court to re-affirm its holding in *Berman* that non-blighted property located within a blighted area may be taken by eminent domain in order to alleviate conditions of blight which exist in the area as a whole and reject any standard of review that would impose the need for parcel-by-parcel determinations of blight.

Respectfully submitted,

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In The
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF AMICUS CURIAE OF PROFESSORS DAVID L. CALLIES, JAMES T. ELY, PAULA A. FRANZESE, NICOLE STELLE GARNETT, JAMES E. KRIER, DANIEL R. MANDELKER, JOHN COPELAND NAGLE, JOHN NOLON, J.B. RUHL, SHELLEY ROSS SAXER, A. DAN TARLOCK, LAURA UNDERKUFFLER, AND EDWARD F. ZIEGLER IN SUPPORT OF PETITIONERS

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## INTEREST OF THE AMICI CURIAE

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## STATEMENT OF THE CASE

The Petitioners all own homes or rental properties in the Fort Trumbull neighborhood of Respondent City of New London, Connecticut. In 1998, New London approved

[1] Counsel for the parties did not author this brief in whole or in part. All parties have consented to the filing of this brief. Copies of the consent are filed with the Clerk. Jeff Kumer, who is not a party to the case, provided a contribution towards the printing and submission of this brief.

a redevelopment plan that enabled Respondent, New London Development Corporation to condemn Petitioners' lots and lease the condemned property to a private commercial developer. New London made no finding that the Petitioner's property was crime-ridden or otherwise "blighted" as required by Connecticut's slum-renewal laws, chapter 130 of Connecticut's statutory code, *see* Conn. Gen. Stat. Ann. §§ 8-124 to -69w (West 2001 & 2004 Supp.). Instead, Respondents invoked the authority of chapter 132 of Connecticut's statutory code, the municipal-development chapter. *See* Conn. Gen. Stat. Ann. §§ 8-186 to -200b (West 2001 & 2004 Supp.). That chapter gives local development agencies broad powers to "acquire by eminent domain real property" whenever cities allow them to do so. *Id.* § 193(a). Respondents' only justification for condemning Petitioners' land was – and remains – that it would be economically advantageous for New London to redistribute their land to private developers. The city council found that transferring the title of Petitioners' property to a private developer would create jobs, increase tax revenues, and encourage economic growth throughout New London. *See Kelo*, 843 A.2d at 508-11.

Petitioners sued, alleging that New London had taken their properties for a private use, in violation of public use limitation of the Fifth Amendment, which states, "[N]or shall property be taken for public use. . . ." U.S. Const. amend. V. Petitioners asserted that the speculative economic benefits to be gained by upscaling a neighborhood do not count as "public uses" and that there can be no public use when "private parties retain control over the parcels' use." *Kelo*, 813 A.2d at 519. The Connecticut Supreme Court ("the court below") rejected Petitioners' claims. The court held that the public use limitation should be given a "purposive formulation" and that legislative declarations of



public use should be granted broad deference. *Id.* at 523. Specifically, it concluded,

> "Public use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.

*Id.* at 522 (italics removed). This Court granted certiorari.

## SUMMARY OF THE ARGUMENT

The Connecticut Supreme Court's decision was in keeping with *Hawai Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which provides that legislative assertions of public use should be subjected to rational basis review. The application of such broadly deferential review in public use cases is inappropriate. Application of rational basis review to the exercise of eminent domain in cases such as this effectively eviscerates the Fifth Amendment's public use limitation. Moreover, lower courts' responses to the exponential increase in the use of eminent domain for generalized "economic development" has resulted in a hodgepodge of decisions variously upholding and striking down such condemnations on similar facts. These cases make clear that many state courts are uncomfortable with granting governmental entities *carte blanche* authority to condemn property for speculative "economic development" projects.

This case offers the Court an important opportunity to revisit the application of rational basis review in public use cases and to articulate a more appropriate intermediate

standard of review that will reinvigorate the protections guaranteed by the Fifth Amendment's Takings Clause. An appropriate standard would protect the prerogatives of legislatures to establish the appropriate *ends* of government action (*e.g.*, to decide that certain areas of New London, Connecticut should be redeveloped). It would merely require that a government justify a decision to resort to eminent domain as the *means* of achieving those goals.

## ARGUMENT

In *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), the City condemned unblighted, economically viable residential lots for private commercial development as part of a plan for the "economic revitalization" of a similarly unblighted area. *See Id.* at 26-54, 843 A.2d at 519-536. These condemnations were upheld below under this Court's broadly-stated rational review standard for public use as articulated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). *See Kelo*, 268 Conn. at 28, 843 A.2d at 520. Application of rational basis review to the exercise of eminent domain in cases such as this one effectively eviscerates the Fifth Amendment's public use limitation. Moreover, lower courts' responses to the exponential increase in the use of eminent domain for generalized "economic development" has resulted in a hodgepodge of decisions variously upholding and striking down such condemnations on similar facts. In revisiting its jurisprudence on public use, this Court needs to either expand on its existing rational basis review standard or to provide a different, intermediate standard of review so as to reinvigorate the



protections guaranteed by the Fifth Amendment's Takings Clause.

### I. The Division in the Lower Courts Reflects Discomfort with the Total-Deference Approach to Eminent Domain

Under current federal standards, courts could approve virtually every exercise of eminent domain. True, the Court has never suggested that the government has limitless power to take property by eminent domain. As Justice O'Connor observed in *Midkiff*, 467 U.S. at 239, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." The Court concluded in *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954), and again in *Midkiff*, 467 U.S. at 240, that a court's role "is an extremely narrow one." Specifically, the Court indicated that an exercise of eminent domain was subject to rational basis review. *See Midkiff*, 467 U.S. at 241 (citations omitted); *Berman*, 248 U.S. at 26. That is, an exercise of the eminent domain power will not be invalidated so long as it is "rationally related to a conceivable purpose" or "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241 (citations omitted). The application of rational basis scrutiny effectively renders the public use limitation meaningless because there is always some *conceivable* justification for condemning property. *See* Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 891 (1987) ("[I]t is said that the public use requirement has been rendered effectively unenforceable"). For example, if rational basis review governs, courts should always approve the taking of property for "economic development." Surely such takings might serve some *conceivable* public purpose, no

matter how speculative. *See Midkiff*, 467 U.S. at 241 (citations omitted).

Interestingly, lower courts purporting to apply rational basis review sometimes find a taking irrational. Other courts interpret state public use provisions to require heightened scrutiny. This resistance to the application of rational basis review in public use cases suggests profound discomfort with the logic of the *Midkiff* decision. It also renders the application of public use provisions random at best. The two most recent state supreme court decisions, reaching opposite conclusions on similar facts, are simply the most recent examples.

The Michigan Supreme Court recently overruled its earlier *Poletown* case, *see Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004), holding that a generalized economic benefit to the public was not a public use "simply because one entity's profit maximization contributed to the health of the general economy." *Id.* at 481, 684 N.W.2d at 786. Indeed, the court took great pains to strike at the heart of the Poletown opinion holding that "*Poletown*'s conception of a public use – that of alleviating unemployment and revitalizing the economic base of the community -- has no support in the Court's eminent domain jurisprudence. . . ." *Id.* at 482, 684 N.W.2d at 787 (footnote omitted). Therefore, the condemnation of nonblighted land for an airport technology park for economic development purposes was unconstitutional. *Id.*

*Hathcock* is in stark contrast to the Connecticut Supreme Court's recent decision in *Kelo*. There, the court concluded that construction of commercial and residential



development associated with a nearby global research facility in order to create jobs and increase taxes and other revenues in New London was sufficient public use to justify the condemnation of several residences on the project site: "We conclude that economic development projects created and implemented [pursuant to statutory authority] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitution." *Kelo*, 268 Conn. at 26, 843 A.2d at 520. Although the two state supreme courts came to different conclusions on adequacy of public use, both condemnations would probably pass constitutional muster under the relaxed, deferential rational basis standard of review which this Court used in *Midkiff*. *See Midkiff*, 467 U.S. at 241 (citations omitted). Neither is "impossible" or "palpably without reasonable foundation." *Id.* But surely this Court could not have envisioned, let alone predicted, the extent to which state and local governments would stretch the limits of *Berman* and *Midkiff* to find a public use in the mere economic revitalization (read "upgrading") of perfectly viable stand-alone residential neighborhoods and businesses. In both *Kelo* and *Hathcock*, the project area is blight-free. *See Kelo*, 268 Conn. at 26, 843 A.2d at 520; *Hathcock*, 471 Mich. at 499, 684 N.W.2d at 796. The condemned parcels do not represent islands of viable use in a sea of blight, as in *Berman*. *See Berman*, 348 U.S. at 35.

While the *Hathcock* and *Kelo* opinions represent polar extremes on sufficiency of public use to support condemnation for the purpose of economic revitalization, there are other egregious examples.

The remainder of this Part provides summaries of cases illustrating the division in the lower courts. State

and federal courts (applying state law) have found sufficient public use in:

*J.C. Penney Corp. v. Carousel Center Co.*, 306 F. Supp. 2d 274 (N.D.N.Y. 2004). The court held that Syracuse Industrial Development Agency's condemnation of plaintiff's lease in a shopping center in order for the shopping center's owner to redevelop the shopping center was not merely for private use, because "advancing the general prosperity and economic welfare of both the residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, promoting employment in the City, and increasing the tax base as well as tax revenues" was for a public use. *Id.* at 280.

*City of Shreveport v. Shreve Town Corp.*, 314 F.3d 229 (5th Cir. 2002). The court held that the City of Shreveport's condemnation of Shreve Town Corporation's lot for the purpose of building a parking lot for a new convention center showed a public purpose, as "the public purpose requirement was satisfied because the expropriation resulted in an economic benefit to the community." *Id.* at 234 (citing *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962, 973 (La. Ct. App. 2001)).

*General Building Contractors, L.L.C., v. Board of Shawnee County Commissioners of Shawnee County*, 275 Kan. 525, 66 P.3d 873 (2003). County filed eminent domain petition to attract economic development by establishing an industrial park. *Id.* at 526, 66 P.3d at 875. GBC's business sold services or products outside the traditional market area of county, but county wanted employers who would bring in new dollars, jobs, and demand for services. *Id.* at 528, 66 P.3d at 876. GBC's property was slated for a



new building and county knew a major employer would require control of adjoining property. *Id.* The court held that public purpose, public use, and public welfare, are all terms that must be broad and inclusive. *Id.* at 540, 66 P.3d at 883 The fact that the possibility for a private party to make a profit exists does not divest the act of its public use and purpose. *Id.*

*Minneapolis Community Development Agency (MCDA) v. OPUS Northwest, LLC*, 582 N.W.2d 596 (Minn. 1998). Opus owned the parcels to be condemned and bid on the Minneapolis Community Development's project. *Id.* at 598. City wanted to put a mid-priced retail store, parking complex, extended skyway access, and office building in the area so it contracted with Ryan Corp for the development and eventual ownership of project. *Id.* Retail store would be owned and operated by Dayton Hudson, which would place a Target in the building. *Id.* Opus's bid was rejected in spite of it offering to build a $120 million office building without government subsidies because Opus could not secure a mid-priced retailer. *Id.* The Court's review of condemnation is very narrow and heightened scrutiny for a condemnation that benefits private interests was "out of touch with the national trend." *Id.* at 599 (citation omitted). Condemnation to create jobs and improve tax base have sufficient public purpose. *Id.* (citation omitted).

*In re West 41 Street Realty LLC v. New York State Urban Development Corporation*, 298 A.D.2d 1, 744 N.Y.S.2d 121 (2002). Six property owners challenged the condemnation of land across Eighth Ave. from the Port Authority Bus Terminal because the benefit inured to the New York Times (plan was to build a high rise for a new Times headquarters, provide an additional 700,000 sq. ft. of office space for other tenants, build condos, new

subway entrance, 350-seat auditorium, gallery and retail space). *Id.* at 3, 744 N.Y.S.2d at 123. The court held that public use only requires "an evident utility on the part of the public" and the public benefit is broadly defined. *Id.* at 6, 744 N.Y.S.2d at 125 (quoting *Bloodgood v Mohawk & Hudson R.R.*, 18 Wend. 9, 14 (N.Y. 1837). So long as the project is rationally related to a conceivable purpose, it is constitutional. *Id.* at 6, 744 N.Y.S.2d at 125 (citations omitted).

*Vitucci v. New York School Construction Authority*, 289 A.D.2d 479, 735 N.Y.S.2d 560 (2001). Landowner's truck repair and selling business was condemned for the construction of a new school. *Id.* The school was not built and the defendants determined that the area would benefit from the creation of an urban renewal project. *Id.* It chose to expand a neighboring food production business. *Id.* Court explained that public use and public purpose are broadly defined as encompassing virtually any project that may further the public benefit, utility, or advantage. *Id.* at 480, 735 N.Y.S.2d at 562 (citing 51 N.Y. Jur. 2d Eminent Domain § 22 (2003)). "If a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain." *Id.* at 481, 735 N.Y.S.2d at 562 (citing *Sunrise Props. v. Jamestown Urban Renewal Agency*, 206 A.D.2d 913, 614 N.Y.S.2d 841 (1994)).

*City of Toledo v. Kim's Auto & Truck Service, Inc.*, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003) (unpublished decision). City wished to attract a new Jeep plant so City Council directed Planning Commission to develop an urban renewal plan to alleviate slum and blight conditions and allow for economic development. *Id.* at *1. Appellant's automobile service station was in the urban renewal area. *Id.* Appellant argued the City manipulated the blight by



purchasing lots and allowing lots to deteriorate and be stripped by vandals, and that the land was taken to benefit a private corporation, not the public, and the Jeep plant resulted in a new loss of 800 jobs and its tax abatement resulted in loss of tax revenue. *Id.* at *2. Judicial review of a municipality's determination to taken land is limited; if it is rationally related to a conceivable public purpose the taking is allowed. *Id.* at *4 (citing *Midkiff*, 467 U.S. at 241). In Ohio "public use" should be read as synonymous with "public welfare." *Toledo*, 2003 WL 22390102 at *4. Appellant contended that the public benefit here was incidental due to the loss of taxes and jobs. *Id.* "However, appellee apparently determined that, despite these losses, keeping the Jeep manufacturing jobs in Toledo and eliminating blight in the neighborhood was conducive to the public welfare." *Id.* "Necessary" includes what is reasonably convenient or useful to the public. *Id.* at *5.

On the other hand, state and federal courts (applying state law) have found public use wanting in:

*Daniels v. The Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002). The court held that the defendant Area Plan Commission of Allen County's vacation of plaintiff landowner's restrictive covenant (which limited the uses in the area to single family dwellings), so that a developer could build commercial establishments in the area and incidentally remove vacant houses, did not show a "public use," because (1) mere economic redevelopment was deemed insufficient by the Indiana legislature and (2) the developer was not bound to build anything that would benefit the public, therefore rendering the purpose of the vacation private. *Id.* at 465.

*99 Cents Only Store v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). The court held that the City of Lancaster and the Lancaster Redevelopment Agency's ("Lancaster's") condemnation of a store in order to accommodate an adjacent store's, Costco, expansion did not evidence a public purpose, since "the only reason [Lancaster] enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco[,]" *id.* at 1129, and the prevention "future blight" thereby is not a valid public purpose, as it is unsupported by any authority or factual findings, *id.* at 1130.

*Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 95 Cal. Rptr. 2d 265 (2000). Lack of evidence that a redevelopment project area was blighted required invalidation of redevelopment plans. *Id.* at 391, 95 Cal. Rptr. 2d at 268. Redevelopment area was an affluent suburb with high median income, mid-high home values, and low crime. *Id.* at 392, 95 Cal. Rptr. 2d at 268. However, City's general plan explained that retail commercial uses generated "significantly more municipal revenues as compared to costs." *Id.* The court held that there was insufficient evidence of blight, potential blight was not sufficient, the entire record failed to connect any alleged blight to the proposed remediation, mere generalities in the City's finding were not taken at face value. *Id.* at 403, 95 Cal. Rptr. 2d at 276. "The CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements." *Id.* at 407, 95 Cal. Rptr. 2d at 279.

*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 98 Cal. Rptr. 2d 334 (2000). The court overturned trial court's determination that the administrative record supported Town's finding that the Project Area was blighted. *Id.* at 521, 98 Cal. Rptr. 2d at 339. "The touchstone of redevelopment is the elimination of blight on developed lands, not the instigation of economic development on forested lands." *Id.* at 544, 98 Cal. Rptr. 2d at 355. Just because an area could be more profitable if redesigned does not mean it sufficiently prevents economically viable use. *Id.* at 555, 98 Cal. Rptr. 2d at 362.



*Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 768 N.E.2d 1 (2002). On a rehearing from previous order in favor of the Southwestern Illinois Development Authority ("SWIDA"), court held that SWIDA did not have the authority to take property from NCE and convey it to Gateway International Motorsports ("Gateway"). *Id.* at 242, 768 N.E.2d at 11. Gateway had a successful car racetrack, needed more parking space, and asked SWIDA to condemn neighboring land. *Id.* at 228, 768 N.E.2d at 4. Neighboring landowner NCE had been at that location since 1975 and employed 80 to 100 people. *Id.* at 229, 768 N.E.2d at 4.

SWIDA argued the public purpose served via the condemnation was threefold (condemnation would foster economic development, promote public safety, and prevent or eliminate blight) and that any distinction between public purpose and public use has evaporated. Court held the terms were not indistinguishable. *Id.* at 237, 768 N.E.2d at 8. The court was not persuaded that the condemnation would serve a sufficient public use even though the new parking lot would make lines for parking shorter and pedestrian access to the track safer. *Id.* at 239, 768 N.E.2d at 10. Economic growth from an increase in Gateway's business was not a public use. *Id.* The court weighed the benefit to the public derived from the taking against

Gateway's benefit, and held that the "condemnation clearly was intended to assist Gateway in accomplishing their goal in a swift, economical, and profitable manner." *Id.* at 240 10.

*Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 727 A.2d 102 (1998). Property owners argued the primary purpose of the condemnation was to achieve a private benefit. *Id.* at 344, 727 A.2d at 103. Trump proposed a $28.6 million hotel redevelopment project and requested that the Casino Reinvestment Development Authority ("CRDA") use eminent domain powers to acquire parcels Trump had not been able to acquire independently. *Id.* at 348, 727 A.2d at 106. These parcels had homes and businesses on them. *Id.* Court held CRDA acquired the property to allow Trump to use it for any purpose so long as it fits within the definition of "hotel development project and appurtenant facilities." *Id.* at 349, 727 A.2d at 106. This was analogous to giving Trump a blank check with respect to future development on the property for casino hotel purposes. *Id.* at 358, 727 A.2d at 111.

*City of Virginia Beach v. Christopoulos Family, L.C.*, 2000 WL 33595021 (Va. Cir. Ct. Aug. 10, 2000) (unpublished decision). City sought to condemn Family's property to build a parking garage. *Id.* at *1. City had contracted with a developer to build a four-star hotel and accompanying park and the garage was needed because of that development. *Id.* Family argued that this use of eminent domain power too greatly benefited private development. *Id.* at *2. The court held that the contract divested the City of control over "the terms and manner of enjoyment . . . independent of the rights of the private owner appropriated to the use" and the developer's use of the property



exceeded incidental benefit because the developer could dictate how the City was to exercise its power over a public parking garage. *Id.* at *10.

*See also, Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003) (federal court found federal jurisdiction, then granted temporary restraining order against condemnation, which was based on an improper finding of blight and lacked public use); *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ariz. Ct. App. 2003) (condemnation of brake shop for hardware store for purposes of economic development lacked public use); *Ga. DOT v. Jasper County*, 355 S.C. 631, 586 S.E.2d 853 (2003) (condemnation for private marine terminal that would provide significant local economic benefit not for public use).

So state courts (or federal courts applying state law) have thus found such condemnations void for lack of adequate public use in Arizona, California, Georgia, Illinois, Indiana, Michigan, Missouri, New Jersey and Virginia; other courts in Connecticut, Kansas, Louisiana, Ohio, Minnesota and New York have upheld such condemnations for general economic revitalization purposes on similar facts.

## II. The Court Should Subject "Public Use" Claims to Intermediate-Level Scrutiny

As the foregoing examples illustrate, rational basis review as presently conducted by state courts (and federal courts applying state standards) leads to conflicting results, often upholding the exercise of eminent domain for

a vaguely-articulated public use the benefits of which accrue most specifically and directly to private owners. Courts should – and a few do – examine cases with more care than the rational basis test suggests. *See Midkiff*, 467 U.S. at 241 (citations omitted). This Court should either reinterpret or explain its rational basis test in a way that forecloses the use of eminent domain for the all-but-impossible public uses illustrated in the previous section or direct that courts instead undertake some sort of intermediate scrutiny beyond rational basis, as the Court has done with respect to land development conditions in *Nollan v. South Carolina Coastal Council*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

The Court's application of rational basis scrutiny to "public use" claims flows naturally from its conclusion in *Berman* that the eminent domain power is coterminous with the police power. *See Berman*, 348 U.S. at 31 ("We deal, in other words, with what has traditionally been known as the police power."); *see also Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.") Having made this conclusion, the Court concluded without difficulty that an exercise of eminent domain is merely one possible means to achieve the entire range of permissible governmental ends. *See Berman*, 348 U.S. at 32 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."); *accord*, *Midkiff*, 467 U.S. at 240 (quoting *Berman*).



This conclusion is flawed as a matter of both history and logic. *First*, there is widespread agreement across the academic spectrum that the public use clause was intended to delimit a range of acceptable "ends" that could be achieved through an exercise of eminent domain. *See, e.g.*, Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 939 (2003) (surveying literature); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 162-81 (1985) (arguing that the Fifth Amendment's Takings Clause was designed to enable the government to condemn land for public uses, not to seize land to advance the broadly defined public interest.); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 N.W. L. Rev. 1561, 1569 (1986) ("The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends."); Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 891 (1987) ("The public use requirement traditionally meant that property had actually to be used by the public. But gradually the requirement was expanded to refer to any plausible justification"). *See also* Brief of Claremont Institute Center for Constitutional Jurisprudence, *Kelo v. City of New London* (No. 04-108) (surveying early cases interpreting the public use limitation).

Even assuming that the departure from this narrower interpretation of the *ends* which can be achieved through the exercise of eminent domain is water under the constitutional bridge, it is illogical to state that the eminent domain power and police powers are coterminous. *See Midkiff*, 467 U.S. at 240. As Professor Merrill has observed:

> This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between *non-compensable* regulation and compensable takings of property. . . . Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation anytime its actions served a 'public use.' This approach would seemingly overrule the entire takings doctrine in a single stroke.

Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986). This obvious distinction between the police power and the eminent domain power undercuts the rationale for applying rational basis review in the public use context. "Hands-off" rational basis scrutiny generally is justified by the need to guarantee that the legislature, not the courts, determines which policies to pursue. *See Midkiff*, 467 U.S. at 242-243. But, judicial scrutiny of the exercise of eminent domain would not limit the range of policies that a government may pursue. Rather, a more searching inquiry in public use cases would merely serve to draw a line – a line that logically *must* exist – between two permissible *means* of achieving the broad set of government *ends* authorized by the police power. As Professor Merrill observes, judicial review of the *ends* of government action requires courts to make judgments about "the legitimate functions and purposes of the state." Thomas W. Merrill, Article, *The Economics of Public Use*, 72 Cornell L. Rev. at 65. On the other hand, "a more narrowly focused and judicially manageable inquiry" would ask "where and how government should get property, not what it may do with it." *Id.* at 66.



## III. Rational Basis Review Is Inappropriate Because Eminent Domain Exercised for a *Specific* Purpose

Rational basis review requires a court merely to satisfy itself that the government action advances some *conceivable* public purpose. *See FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Nor is the government required to articulate a justification for its action. *Id.* at 315. But, the eminent domain power is not exercised for *conceivable* purposes. The eminent domain power always is exercised to advance specific purposes. In fact, established rules governing the forced taking of private property universally require an *ex ante* statement of the "ends" justifying the condemnation. In most states, and for all takings by the federal government, eminent domain is a judicial proceeding. After satisfying the necessary prerequisites, the condemning entity files an action against the persons whose property it seeks to take. 6 Nichols on Eminent Domain § 24.05[1] (2004). And, the condemning entity must submit pleadings which, *inter alia*, describe the land to be taken, and, importantly, set forth the public use for which it is being taken. *Id.* at § 26A.02[1] (excerpting state statutes). *See also* Fed. R. Civ. P. 71A(c)(2) (directing that "the complaint [for condemnation of property] shall contain a short and plain statement of . . . the use for which the property is to be taken").

The fact that the government must already justify every exercise of eminent domain with an *ex ante* statement of purpose undercuts *Midkiff*'s insistence that a proper respect for the prerogatives of the political branches requires courts to speculate about *conceivable* justifications for an exercise of eminent domain. *See*

*Midkiff*, 467 U.S. at 240 (citations omitted). The Court has held that such speculation is inappropriate when the government has *articulated* the purpose of its policy. In several equal protection cases, the Court has rejected the "conceivability" test under circumstances present with *every* exercise of eminent domain – that is, where the government stated, with particularity, the purpose of its action. For example, in *Allegheny Pittsburgh Coal v. County Commission*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), the Court considered an equal protection challenge to a county's practice of reassessing property for tax purposes only when title changed hands. The Court invalidated the assessment scheme because similarly situated property owners bore drastically different tax burdens. *Id.* at 341. Three years later, in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992), the Court rejected an equal protection challenge to California's Proposition 13, which had a nearly identical effect. In distinguishing the cases, the Court relied upon the fact that the county in *Allegheny Pittsburgh Coal* had asserted that its assessment scheme was "rationally related to its purpose of assessing properties *at true current value*." *Id.* at 15. (Which, as a matter of logic, it could not be.) The Court then implied that, when the government articulates a purpose for its action, it will be held to it: "The Equal Protection Clause does not demand for purposes of rational basis review that a . . . governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. . . . [But] the Court's review does require that a purpose may conceivably or may reasonably have been the [decisionmaker's] purpose and policy." *Id.* at 15 (citations omitted). The Court cited as authority for this proposition *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 69 S. Ct. 1291, 93



L. Ed. 1544 (1949), observing that "[a]fter the Court in *Wheeling Steel* determined that the statutory scheme's stated purpose was not legitimate, the other purposes did not need to be considered because 'having declared their purpose, the . . . statutes left no room to conceive of any other purpose for their existence.'" *Nordlinger*, 505 U.S. at 16 n.7 (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959)).

## IV. The Court Should Resolve the Confusion in the Lower Courts by Adopting Intermediate Means-Ends Scrutiny in Public Use Cases

The confusion in the lower courts – and the widespread resistance to the application of rational basis review – is itself a signal that the total-deference rule is not appropriate. One reason that lower courts may have a particularly difficult time is that the traditional public use inquiry demands, like substantive scrutiny of economic regulations enacted pursuant to the police power, an inquiry into the appropriate *ends* of government action. (The court must decide, for example in this case, "is economic development a public use?" or "is economic development in the public interest?") For the reasons discussed above, courts understandably wish to avoid this ends-oriented inquiry. A more judicially manageable inquiry would focus instead on whether eminent domain is the appropriate *means* by which a government may pursue desired policies. A focused means-oriented inquiry would also have the salutary effect of resolving the confusion in the lower courts. It is apparent that many judges facing real-life abuses of the eminent domain power are demanding more than a "conceivable" justification for a condemnation. While some have simply concluded that "economic

development" alone is not a public use, others demand that the condemning entity justify their decision to resort to eminent domain to advance the goal of economic development.

One possible model for discerning an appropriate means-oriented test for eminent domain can be found in the regulatory takings context. In *Dolan*, 512 U.S. 302, state courts were similarly divided on the appropriate standard of review for regulatory "exactions." The Court considered several different state-court-developed tests for reviewing exactions and then concluded that the test that most closely approximated the correct federal standard required "the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development." *Id.* at 391. It expressed concern, however, that the phrase "reasonable relationship" might be confused with lax rational basis review and chose the "rough proportionality" standard as its rough equivalent. *Id.* The Court defined the rough proportionality formula as follows: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development." *Id.*

The *Dolan* compromise requires a relatively narrow means-based inquiry; it does not preclude the government from pursuing their regulatory goals, but it does limit how those goals may be pursued. The fact that the government has choices about how to acquire land to advance the public interest permits courts to formulate a similar test to review an exercise of eminent domain. When the government decides that it needs property to advance the public interest, it can purchase it on the market, condemn it, or,



in some cases, demand it as an exaction. If the government decides to proceed with a condemnation, it makes additional choices about how to exercise the power of eminent domain: Should it avail itself to "quick take" procedures? If the property is to be transferred to a private party following the condemnation, should the government simply delegate its power of eminent domain to the ultimate beneficiary? Should that beneficiary be required to guarantee that the property will be used for the purpose for which it is to be condemned?

Because the government can, and does, make decisions about how to acquire land, a court reviewing a public use challenge could require a showing similar to that demanded in an exactions case: Can the government link the means by which and purpose for which it seeks to acquire land? That is, can the government demonstrate that a given exercise of eminent domain was "reasonably necessary" for, or "related in nature and extent" to, the public purpose for which the condemnation power was invoked? *See Nollan*, 483 U.S. at 834 ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'") (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). This inquiry would continue to reflect the prevailing view that the legislature, rather than the judiciary, is better able to determine what projects are in the public's interest. It would reject, however, the conclusion that the court need only satisfy itself that "the exercise of eminent domain power is rationally related to a *conceivable* public purpose." *Midkiff*, 467 U.S. at 241 (citations omitted). Instead, the courts would ask the government to establish a link

between the exercise of eminent domain and the *particular purpose* for which it was condemned.

While this represents a departure from current constitutional standards, it would map rather easily onto standard eminent domain procedures. The established procedures for taking property, discussed above, simplify means-ends analysis by requiring, *ex ante*, a statement of the "ends" justifying the condemnation. The purpose used to justify the taking in these pleadings, which must be stated with particularity in many states could easily serve as the "ends" portion of the public use equation, just as the "impact of the proposed development" is used for rough proportionality review of exactions, *Dolan*, 512 U.S. at 391.

Such a test might be applied in several different fact-dependent ways. First, a court might ask whether the exercise of eminent domain substantially advances the government's policy goals. Generalized statements about the necessity for a taking, are inadequate. The government might instead be required to prove its case – to demonstrate that the project cannot go forward without the property and that the property is unavailable except through coercive means. Additionally, an application of a reasonable necessity test might take a form of means-ends scrutiny familiar in other areas of constitutional law – inquiry into whether the government's actions are "over-inclusive" (or, at least theoretically, "under-inclusive"). A court seeking to determine whether a condemnation is "related in nature and extent" to the public purpose justifying it might ask whether the government is acquiring too much land or whether the government needs the particular parcel of land at issue. Some state courts already entertain such challenges, permitting property owners to



argue that the size of the taking is excessive. An over-inclusive/under-inclusive analysis might follow the dissent's suggestion below that the city should be required to prove that their need for the land is not purely speculative that the proposed use of the land is reasonably certain to come to pass, etc. Finally, means-ends scrutiny in a public use case might entail a court evaluating the procedural details of an exercise of eminent domain. For example, the government's decision to exercise "quick-take" powers or to delegate the power of eminent domain to a private beneficiary might trigger heightened scrutiny.[2]

Whatever the precise formulation adopted by the Court, the government should be required to make some sort of individualized determination of the need for the particular parcel in question before condemning private property. At a bare minimum, "a condemnor should be expected to establish that the public at large will be benefited by the exercise of eminent domain, and that less intrusive means of acquiring property are not availing. Generalized statements as to the necessity for a taking, sometimes veering toward mere speculation, should not be regarded as adequate." James W. Ely, Jr., *Can the Despotic Power be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, A.B.A. Prob.& Prop. (Nov./Dec. 2003),

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[2] Quick-take statutes permit the government to obtain title and possession of property prior to a final judgment in an eminent domain action. *See* Declaration of Taking Act, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C. §§ 3114-3116 (supp. 2003)); 6 Nichols on Eminent Domain § 24.10. The Court previously has rejected facial challenges both to quick take procedure and to the delegation of eminent domain powers. *See Cherokee Nation v. S. Kan. Railway Co.*, 135 U.S. 641, 10 S. Ct. 965, 34 L. Ed. 295 (1890). The Court need not revisit these holdings in order to adopt our suggestion that a resort to these procedures should be carefully scrutinized.

*available at* http://www.abanet.org/rppt/publications/magazine/2003/nd/ely.html (last visited Nov. 28, 2004).

Just as the Court required project-specific findings of nexus and proportionality to support dedications of land as conditions for land development permits in *Dolan*, the Court should now require the government to make a specific, individualized determination to ensure that "a controlling purpose of the condemnation is the removal of blight or slums that endanger the public health, morals, safety or welfare." *Hathcock*, at 796 (Weaver, J., concurring in part and dissenting in part). *See also Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlain, Diarmuid F., concurring in part and dissenting in part) ("Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit – perhaps something like *Nollan*'s "essential nexus" – between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.")

## CONCLUSION

This Court should remand and direct the lower court to reconsider Respondents' decision to resort to eminent domain under the appropriate intermediate scrutiny standard. The lower court's approval of the condemnations proceeded under the broad deferential standard articulated in *Midkiff*. A remand is especially appropriate in light of the inherently speculative benefits of "economic development" projects,[3] *see, e.g.*, INSTITUTE ON TAXATION AND ECONOMIC POLICY, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 35-41 (summarizing fifteen state audits that show economic development incentives are generally ineffective), and the uncertain role that that Petitioners' land will play in advancing the goal of redevelopment.



Respectfully submitted,

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[3] The speculative nature of the "economic development" goal should be contrasted with the more immediate need to eliminate "blight." As discussed previously, Respondents did not find that Petitioners' properties were blighted.

(14)

No. 04-108

Supreme Court, U.S.
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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF CASCADE POLICY INSTITUTE, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, GRASSROOT INSTITUTE OF HAWAII, JAMES MADISON INSTITUTE, JOHN LOCKE FOUNDATION, ILLINOIS POLICY INSTITUTE, INDIANA POLICY REVIEW FOUNDATION, OREGONIANS IN ACTION LEGAL CENTER, PIONEER INSTITUTE, SUTHERLAND INSTITUTE, and TENNESSEE CENTER FOR POLICY RESEARCH, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

All the *amici* are non-profit organizations which have, as one of their prime public policy objectives, the protection of private property rights. They are therefore all keenly interested in the outcome of this case. The *amici* are:

Cascade Policy Institute is a non-profit public policy research organization based in Portland, Oregon. Its mission is to explore and advance public policy alternatives that foster individual liberty, personal responsibility, and economic opportunity, including the protection of private property rights.

American Association of Small Property Owners is a nonpartisan, nonprofit corporation that has been working since 1993 for the right of small property owners to prosper freely and fairly – to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

Grassroot Institute of Hawaii is a state-based free-market think tank that works to protect individual rights, including the right to private property.

James Madison Institute is a Florida-based research and educational organization engaged in the battle of

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

ideas. The Institute's ideas are rooted in a belief in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility.

John Locke Foundation is a nonprofit, nonpartisan think tank that studies public policy issues at the state and local government. Key areas of interest include state fiscal policy, education, regulation, transportation, and property rights.

Illinois Policy Institute is a state based free market oriented think tank in Springfield, Illinois. The Institute's mission is to preserve and strengthen critical societal institutions in Illinois.

Indiana Policy Review Foundation's mission is to marshal the best thought on governmental, economic and educational issues at the state and municipal levels. It seeks to accomplish this in ways that exalt the truths of the Declaration of Independence, especially as they apply to the interrelated freedoms of religion, property and speech.

Oregonians In Action Legal Center, based in Tigard, Oregon is a nonpartisan, non-profit, public interest law center focusing on litigation to protect the constitutional rights of landowners from excessive and increasingly burdensome federal, state, and local regulations. The Legal Center successfully represented the Petitioner in the United States Supreme Court case *Dolan v. City of Tigard*, and recently filed a Petition For a Writ of Certiorari with the United States Supreme Court in *Rogers Machinery Company, Inc. v. City of Tigard and Washington County*.



Pioneer Institute is an independent, non-profit organization that specializes in the support, distribution, and promotion of research on market-oriented approaches to Massachusetts public policy issues.

Sutherland Institute is a non-profit, non-partisan, Utah-based public policy research institute whose goal is to encourage public policy solutions that allow private initiative to flourish, and that support private property rights and personal responsibility.

Tennessee Center for Policy Research is an independent, nonprofit, and nonpartisan research organization dedicated to providing concerned citizens, public leaders, and government officials with expert empirical research and timely free market solutions to public policy issues of the day. The Center encourages solutions to public policy issues grounded in individual liberty, competition, personal responsibility, and the social capital of community bonds to achieve a freer and more prosperous Tennessee.

## SUMMARY OF ARGUMENT

This Court's standard of review in regulatory takings cases should be applied in eminent domain cases. The reasons that call for heightened scrutiny when a regulatory taking is alleged apply with equal force when the government seeks to condemn private property through its eminent domain powers. While the public purposes that might be served by eminent domain are the same as those that might be served through the general police power, the eminent domain power is limited by the public use

requirement of the 5th Amendment. This limitation serves to protect property owners from being singled out, recognizes that fair market value will often not make property owners whole, assures that the fundamental right to exclude will not be violated without a compelling public purpose, and guards against the abuse of public authority and the corruption of our democratic process.

Reliance on heightened scrutiny in eminent domain cases will not significantly handicap the government in the pursuit of its legitimate purposes. Numerous states have applied heightened scrutiny on the basis of their reading of either the 5th Amendment or of the comparable provisions of their own constitutions. Notwithstanding their heightened scrutiny in public use cases, all of these states have been able to promote economic development, protect their environments, and pursue other public purposes in competition with the other states in the Union.

In reviewing the claims of property owners under the public use limitation of the 5th Amendment, this Court should demand that governments utilize the least burdensome means available. In the instant case, this Court should find that the City of New London has exceeded its legitimate authority in condemning the petitioners' property for immediate lease to private developers. Individual lives and livelihoods should not be so easily sacrificed to the profits of other private parties and the abstract prospect of economic development and increased tax revenues.



## ARGUMENT

### I. HEIGHTENED SCRUTINY OF PUBLIC USE CLAIMS IN EMINENT DOMAIN CASES WILL BETTER MEET THE JUDICIAL RESPONSIBILITY TO PROTECT INDIVIDUAL LIBERTIES WHILE RESPECTING THE CONSTITUTIONAL PREROGATIVES OF THE LEGISLATIVE BRANCH.

#### A. PUBLIC USE AND JUST COMPENSATION CLAIMS WARRANT THE SAME HEIGHTENED STANDARD OF JUDICIAL REVIEW.

Judge Diarmuid O'Scannlain suggested in *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1167 (9th Cir. 1997), that, in light of this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court might take the opportunity to reconsider what has come to be understood as a total deference standard articulated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). While the instant case can and should be decided for Petitioners by simply clarifying that the deference required by *Midkiff* is with respect to legitimate state purposes, not means of achieving those purposes, this Court has an opportunity in this case to provide a clear and concise explanation of the limitations on the eminent domain power imposed by the "public use" requirement.

In *Midkiff* this Court stated that the "[public use] requirement is coterminous with the scope of a sovereign's police powers." 467 U.S. at 230. This suggests that any end the state may promote pursuant to the police power is an end the state may seek to achieve through the means of eminent domain. But this is demonstrably not the case.

For example, the state clearly has the power to redistribute wealth among its citizens in the interest of alleviating poverty (as it does through a progressive income tax), but few would suggest that an American state or the United States can engage in forced purchases of private land to be subdivided and granted to the poor as home sites; or that city center condominiums can be acquired by eminent domain for the purpose of giving them to the homeless. And if such actions to benefit the poor cannot be accomplished through eminent domain, surely the government does not remedy the constitutional shortcoming by selling the taken land to those who can afford it in the interest of promoting economic development.

The eminent domain power is coterminous with the police power in the sense that it can only be used for ends within the police power. But this does not mean that the eminent domain power can be used for every end within the police power. The compensation requirement of the 5th Amendment is one of several limits (e.g., due process and equal protection) on the means that may be employed in pursuit of the ends inherent in the police power. That is, where the government takes property as a means to achieve its legitimate police power ends, it must pay just compensation. The public use requirement of that same amendment must be understood as a limit on the use of compensated takings. Otherwise the "public use" language is superfluous. As Judge O'Scannlain states in questioning the "conceivable public purpose" test of *Midkiff*, 467 U.S. at 230, "[i]f the Clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use." *Richardson*, 124 F.3d at 1168.



Judge O'Scannlain observes in *Richardson* that the state can pursue its legitimate ends through regulation, eminent domain and acquisition of properties from willing sellers. 124 F.3d at 1167. In a free society, we should prefer that all property acquisitions by government be the result of arms length market transactions. But where government needs to acquire numerous parcels (as in the case of a public road) or where a specific parcel is needed (as in the case of the preservation of an historic structure), the public good can be thwarted by property owners who hold out for a price far in excess of fair market value. The eminent domain power exists to counter this "holdout problem." But the necessity of resorting to the extreme power of eminent domain where individual property owners would otherwise take unfair advantage of their fellow citizens and taxpayers does not justify the use of that power in the pursuit of every public purpose. Indeed, the fact that it is a coercive act by government should result in the taking of extra precautions in its use. That is the purpose of the "public use" limitation of the 5th Amendment.

Because the eminent domain power has deep roots and has been widely used for the entire history of our Constitution, it is all too easy to see it as unexceptional and not extreme. Indeed it is often suggested that a property owner is made whole when fair market value is paid for taken land. But a moments reflection reminds us that, although commonly employed, eminent domain is among the most coercive powers available to our governments. A fair market price is not everyone's price. Some may come out ahead, in the sense that they would have been willing to sell for less. Some will find that the price paid is fair. But others will be paid less than they were

willing to sell for. "Whether because of a sentimental attachment to his property or a conviction that the property is actually worth more than what the market will currently bear, a landlord might choose not to sell, even at the 'fair market value.'" *Richardson*, 124 F.3d at 1168. Similar variations exist in every market, but, absent eminent domain, those whose price is too high do not sell. It is often the case with property, particularly residences, small businesses and family farms, that owners will not sell at any price others are willing to pay. This behavior, which some economists might describe as irrational, may reflect the importance of family roots and an attachment to place. To force such owners to sell at fair market value is a deep personal affront – a taking of what may be the most important thing in their lives.

This does not mean that eminent domain is never appropriate, nor does it deny that it will be difficult to distinguish the holdouts from those who truly would not sell at fair market price. But it does mean that we should minimize the risk of eminent domain being used against some individuals to benefit other individuals rather than the general public. The "public use" requirement serves that end by restricting the use of eminent domain to public acquisition for public ownership or clearly public purposes.



## B. HEIGHTENED SCRUTINY FOR THOSE SINGLED OUT[2]

The "public use" limitation on eminent domain serves individual liberty and constrains the abuse of government power by assuring that voters (and taxpayers) will bear the costs of government property acquisitions. When the public does bear the costs of government action it is appropriate for the courts to be deferential to the democratic process for the reasons suggested many years ago by Justice Stone in *United States v. Carolene Products*, 304 U.S. 144, 152, fn4 (1938).[3] But where, as in the instant case, government acts as an intermediary in the forced transfer of property from one private owner to another, there will be no cost to the voters who will therefore be less attentive to their democratic responsibilities. In such cases, property owners become like the discrete and insular minorities protected in other areas of constitutional law by heightened scrutiny.

Yet the *Midkiff* ruling has come to represent minimum scrutiny, if any scrutiny at all, in contrast to the heightened scrutiny this Court has applied in recent cases brought under the "just compensation" clause of the 5th Amendment. Judge O'Scannlain explains in *Richardson* why "[i]t may be time for . . . [this] Court to reconsider *Midkiff*." "The underlying thrust of the *Nollan-Lucas-Dolan* decisions

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[2] The "singling out" problem exists when "the government singles out a private party, in the sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual. . . ." Saul Levmore, *Takings, Torts, and Special Interests*, 77 VIRGINIA L. REV. 1333, 1344-45 (1991).

[3] For an elaboration of the *Carolene Products* theory of heightened judicial scrutiny see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

– increasing the scrutiny of regulations to determine if they go 'too far' (enough to require compensation) – is inconsistent with Midkiff's sweeping deference." There is, notes Judge O'Scannlain, a "tension between these two lines of authority." 124 F.3d 1150 at 1167.

The *Carolene Products* rationale for varying levels of scrutiny helps explain this Court's reliance on heightened scrutiny in the *Nollan, Lucas* and *Dolan* cases. A central point made in each of these cases is that individual property owners ought not have to bear the costs of widely shared public benefits.[4] When this appears to be the case, the courts will demand that the state demonstrate an "essential nexus" between a legitimate state interest and the regulation, *Nollan*, 483 U.S. at 837, and a regulatory impact "roughly proportional" to the impact of the regulated property use, *Dolan*, 512 U.S. at 395-96. Without such nexus and proportionality, it is determined to be unfair to impose the costs on one or a few property owners. Where the costs are widely spread among those who will also benefit from the government's action, there exists what Justice Holmes called "reciprocity of advantage,"

[4] "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Nollan*, 483 U.S. at 841. "Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' in a manner that secures an 'average reciprocity of advantage' to everyone concerned. (Citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) *Lucas*, 505 U.S. at 1018-1019. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (Citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) *Dolan*, 512 U.S. at 384.



meaning that costs are approximately offset by benefits. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). In these reciprocity of advantage cases (like much general zoning or building code regulation), it is also reasonable to defer to the democratic process since costs as well as benefits are widely distributed.

The just compensation and public use requirements of the takings clause should receive parallel interpretations. Where the public will share the costs as well as reap the benefits of government action, as in public acquisition and reciprocity of advantage cases, a deferential standard of review is appropriate. But where the costs will be borne by a few while the many enjoy the benefits, as in the instant case and regulations like those in *Nollan, Lucas* and *Dolan,* a proper respect for individual rights requires a higher standard of review.

### C. THE FUNDAMENTAL RIGHT TO EXCLUDE

The "public use" limitation further serves individual liberty and constrains the abuse of power by underscoring the difference between a regulation that reduces property value by limiting its permitted uses and a government mandate that a property owner can no longer exclude others. As this Court found in *Dolan*, it is no less an unconstitutional taking for government to mandate public access to private property as it is for the government to occupy the property as its own. Even if there is no measurable economic loss for the property owner, there is, in both cases, a loss of the fundamental right to exclude. "[This] Court emphasized [in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)] that the servitude took the landowner's right to exclude, 'one of the most essential

sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

Government can achieve many if not most of its legitimate purposes through regulation that may or may not require compensation depending on the case by case analysis required by this Court's takings jurisprudence. Where compensation is required the government will have effectively acquired one or more of the sticks in the property rights bundle, but the property owner will generally retain ownership including the right to exclude. The "public use" clause requires that government or public use be necessary to achieving a public purpose before resorting to the more extreme measure of eminent domain. Regulation, though often burdensome and sometimes requiring compensation, is less burdensome on property owners than is the forced sale of eminent domain. This Court has often held that where legitimate government action impacts on individual rights, the government is required to resort to a less burdensome means if one is available.[5] The "public use" clause should be understood as requiring the government to pursue the less burdensome means of regulation where actual public use is not required to achieve a public purpose. By insisting on this interpretation of the "public use" clause, this Court is not second guessing the legislature on what constitutes a public

[5] E.g., *Hodgson v. Minnesota*, 497 U.S. 419, 455 (1990) (minor's welfare can be protected by "less burdensome means" than a two parent notification requirement for abortion); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) ("state interest may be served with lesser burden on constitutionally protected activity"); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (state must show that no alternative would avoid substantial infringement on 1st Amendment rights).



purpose. Rather, this Court would simply limit the government to constitutionally permitted means, just as it does in interpreting the equal protection and due process clauses of the same Amendment.

### D. PROTECTING AGAINST ABUSE AND CORRUPTION

The heightened review of *Nollan, Lucas* and *Dolan* serves to protect against the unfair or inappropriate use of the regulatory process to benefit politically influential individuals or interests. Because virtually every regulation results in winners and losers, an essential function of judicial review must be to assure that these gains and losses are the incidental result of political give and take, and not the intended result of influence or corruption. The majority in *Richardson* saw "nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." 124 F.3d at 1158. Judge O'Scannlain agreed that "there is less reason to be suspicious of a fully compensated taking than an uncompensated one, [but] more deference is not absolute deference." "The public use requirement, . . ." he went on to say, "[forces] the government to prove that it is upholding the public welfare and not merely transferring wealth to a class of persons with a stronger political voice." 124 F.3d at 1168.

Dissenting in the decision below, Justice Zarella argued that the majority decision "represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be

used to favor purely private interests." *Kelo v. City of New London*, 843 A.2d 500, 575 (Conn.2004). Professor Nicole Stelle Garnett suggests that "[b]y demanding that a condemning entity link the means by which it seeks to acquire land, a court may well uncover 'ulterior' purposes for the exercise of eminent domain."[6]

These ulterior motives have surfaced in some of the cases in which courts have questioned the total deference understanding of *Midkiff*. Costco sought to have the Landcaster Redevelopment Authority condemn the space owned by 99 Cents Only Stores. The Authority complied because they were fearful of Costco's relocating to another city. *99 Cents Only Stores v. Landcaster Redevelopment Authority*, 237 F.Supp.2d 1123, 1126 (C.D.Cal. 2001). New Jersey has followed suit in refusing to allow Donald Trump to use condemned property for a limousine holding lot. *Casino Reinvestment Development Authority v. Banin*, 727 A.2d 102,103 (N.J. Super.Ct.Law Div. 1998). Here the court reaffirmed the established principle that where the real purpose of the condemnation is other than the stated purpose, the condemnation may be set aside. *Township of West Orange v. 769 Associates*, 800 A.2d 86, 94 (N.J. 2002) citing *Banin*, 727 A.2d at 104.

In a world of intense competition among cities and states for business development, the risks of unfair influence or corruption of democratic processes are very real. The instant case also evidences the influence that private interests can have on legislative outcomes to the detriment of other, less influential, private parties. Large developers

[6] Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEORGE WASHINGTON L. REV. 934, 963 (2003).



and businesses can easily exercise undue influence on governments desperate for employment opportunities and a larger tax base. Individual property owners have only the courts to protect them from these powerful forces. As Professor Cass Sunstein has written,"[t]he careful scrutiny of the means-ends connections operates to 'flush out' impermissible ends."[7]

## II. STATES WHOSE COURTS APPLY HEIGHTENED STANDARDS OF REVIEW IN EMINENT DOMAIN CASES UNDER THE 5TH AMENDMENT OR THEIR OWN CONSTITUTIONAL PUBLIC USE REQUIREMENT HAVE SUCCESSFULLY MET THEIR RESPONSIBILITIES TO PROPERTY OWNERS AND TO THE GENERAL PUBLIC WELFARE.

The experiences of several states in different regions of the country demonstrate that a heightened standard of review in eminent domain cases does not prevent government from achieving its legitimate purposes. Several states, and a few lower federal courts, have limited the use of eminent domain to public acquisition of property for public retention and use or where the act of condemnation itself will achieve a legitimate public purpose. In other words, they have interpreted "public use" to mean public use, not "public purpose."

"Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext." *Cottonwood Christian*

[7] Cass Sunstein, *Lochner's Legacy*, 87 COLUMBIA L. REV. 873, 878 (1987).

*Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1229 (C.D. Cal.2002). Delaware, Florida, Illinois and Montana courts have agreed with this thinking and imposed a heightened standard of review in 5th Amendment eminent domain cases. The Delaware Court first expressed "very gravest doubt[s]" as to whether the state could condemn because property was "not used in the most efficient or economical manner." *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 484-485 (Del.1987). The same court later imposed heightened scrutiny to determine whether the asserted public purpose is primary or incidental to the use of eminent domain. *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987). Florida, Illinois and Montana courts also review eminent domain challenges to determine if the public purpose is primary or incidental to the condemnation itself. If public benefit could not exist but for the private use, then the private purpose is primary and the public purpose is incidental. In the words of the Florida Court, the "tail cannot wag the dog." *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451, 456 (Fla. 1975). If public benefit is incidental then it is not sufficient to sustain a finding of a public use. *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E. 2d 1, 10-11 (Ill. 2002). In assessing whether condemnation for private use exceeds the eminent domain power, the Montana Court does not defer to the legislature but weighs the public and private costs. *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995).

Arkansas, Maine, Massachusetts, Michigan, New Hampshire, South Carolina and Washington courts have all found the 5th Amendment protections, as set forth in *Midkiff*, inadequate and have interpreted their respective state constitutions to require greater judicial scrutiny. Arkansas, Maine, South Carolina and Washington hold that if the public benefit would not exist but for the private use, then the private use is primary and the public purpose incidental. *City of Little Rock v. Raines*, 411 S.W.2d 486, 494 (Ark. 1967); *Opinion of the Justices*, 131 A.2d 904, 907-908 (Me. 1957) (beneficial "in a broad sense" does not mean there is any direct public use); *Georgia Department of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Petition of Seattle*, 638 P.2d 549, 556-557 (Wash.1981) ("If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked."). Washington went even further in finding that although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a "public benefit," this public benefit does not constitute a public use. *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 196 (Wash.2000).



Similarly, the South Carolina Constitution prohibits the state from condemning land solely for purposes of developing commercial or residential areas. *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). Like Montana, Massachusetts and New Hampshire employ a balancing test to compare public and private benefits. *Opinion of Justices*, 250 N.E. 2d 547, 558 (Mass. 1969); *Appeal of City of Keene*, 693 A.2d 412, 416 (N.H. 1997); *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H.1985) ("If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use."). In *Merrill* the loss of open space that benefitted the public health outweighed any possible economic incentives. *Id.* at 217-218.

In all of these states, the New London plan to condemn private property for the express purpose of promoting economic development by the resale of the property to a private developer would require the courts to give heightened scrutiny in determining whether or not the plan is a public use for the purposes of the 5th Amendment. All of these states distinguish condemnation for the removal of blight or other public nuisances from the encouragement of private economic development that will incidentally benefit the public. All of these states have concluded that the public use requirement of the 5th Amendment takings clause, or the comparable provision of their state constitution, is not satisfied by the sole public purpose of economic development.

The most significant state court decision in recent years is *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court overturned *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *Poletown* had been widely relied upon by other courts and commentators on the 5th Amendment for the proposition that courts should give total deference to legislative determination of what constitutes a public use for the purposes of the 5th Amendment and the many identical and similar state constitutional provisions.

In *Poletown*, the Michigan Court stated that "[t]he United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.'" 304 N.W. 2d at 459 (quoting from *Berman v. Parker*, 348 U.S. 26, 32 (1954). This same language was quoted by this Court in *Midkiff*, 467 U.S. at 239, in concluding that *Berman* was correct in finding that the judicial role "in reviewing a legislature's judgment of



what constitutes a public use . . . is 'an extremely narrow' one." 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Upon reconsideration in 2004, the Michigan Supreme Court came to a conclusion more consistent with the history and purpose of the public use limitation on the power of eminent domain.

Writing for a Court that was unanimous in overruling *Poletown*, Justice Young observed that "*Poletown's* 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity." 684 N.W.2d at 482. Rather than accept that the "public use" clause of the 5th Amendment imposes virtually no limits on the eminent domain power, while not also concluding that private property could never be condemned for private use, the *Hathcock* Court articulated three exceptions to a general prohibition against condemnation for such private use.

> (1) where "public necessity of the extreme sort" requires collective action [e.g. highways, railroads, canals, and other instrumentalities of commerce]; (2) where the property remains subject to public oversight after transfer to a private entity [e.g. a highly regulated industry like a utility]; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred [e.g. slum clearance or removal of blight]. 684 N.W.2d at 783 (quoting from *Poletown*, 304 N.W.2d at 478 and 480, Reyerson, J. dissenting).

These exceptions to a general requirement of public use, as distinct from public purpose, are consistent with the theories set forth in Part I *supra*. Condemnations rooted in public necessity will normally affect numerous

land owners and are thus more likely to be scrutinized for public legitimacy in the democratic process. The private beneficiaries of such condemnation are also generally of the category noted in the second exception – private entities subject to public oversight. This public oversight assures that the condemned property will continue to be used for public purposes and not diverted to private ends. The third exception covers situations where private property owners are imposing significant costs on the public through neglect or poor management. The imposition of these costs on the public, like a public nuisance, warrants appropriate public response which in some cases will be condemnation.

This Court should review its *Midkiff* decision with the same critical eye the Michigan Court brought to the even older *Poletown* case. By being somewhat less deferential to legislative determinations of public use, this Court can achieve a better balance between the state's ability to serve the public interest and the interests of private property owners who are the foundation of American freedom and prosperity.

There is little doubt that the State of Michigan will continue to prosper economically notwithstanding the overruling of *Poletown*. Indeed there is good reason to believe that the expanded protection of private property resulting from the new rule of *Hathcock* will have net benefits for the economy of Michigan. Secure and clearly defined property rights are critical to private investment in the maintenance and development of land and other natural resources. This Court's decisions in *Nollan, Lucas* and *Dolan* reflect a recognition that government interference with property rights is not only unfair but a disincentive to private investment and initiative. These disincentive



effects result from straightforward calculations of risk, but also from what Professor Frank Michelman has described as "demoralization costs."[8] Professor Garnett demonstrates that these demoralization costs are not limited to uncompensated takings.

> For a number of reasons, compensation does not always eliminate these demoralization costs in the eminent-domain context . . . the measure of damages awarded in an eminent-domain proceeding – namely, the fair market value of the property – frequently fails to make property owners "whole," especially with respect to subjective losses. (At 944-945)

Professor Garnett also notes that many non-subjective costs are also not included in fair market value compensation. "[T]he fair-market-value award may also fail to make displaced property owners whole with respect to relocation expenses, good will associated with a business's physical location, or, importantly, the cost of replacing the condemned property." (At 948)

As the Michigan Supreme Court has recognized in its *Hathcock* opinion, these realities call for heightened judicial review of eminent domain actions – review that can be accomplished without interfering with the legislature's exclusive determination of the public interest. As Justice Holmes reminded us in his oft quoted language from *Pennsylvania Coal*: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

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[8] Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

cut than the constitutional way of paying for the change." 260 U.S. at 416. Surely Justice Holmes' admonition has application with respect to every constitutional protection of individual rights. Heightened scrutiny to assure that individual liberties receive due respect in the face of the immense powers of the state should be the rule in eminent domain cases as it is in regulatory takings cases.

## CONCLUSION

As part of an ambitious development plan for the Fort Trumbull neighborhood, the City of New London has condemned homes and small businesses that are the life and lifeblood of their owners. The condemned land is to be owned by the New London Development Corporation and leased for ninety-nine years to private developers. This Court should agree with Petitioners that this taking of their land for transfer to other private interests is a violation of their rights under the public use clause of the 5th Amendment. The City of New London will remain free to promote economic development by other constitutional means, but use of the eminent domain power to coerce the effective sale of property by one private party to another infringes the most fundamental principles of the United States Constitution and should be invalidated by this Court.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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SUSETTE KELO, *ET AL.*
*Petitioners,*

v.

CITY OF NEW LONDON, CONNECTICUT, *ET AL.*
*Respondents.*

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**On Writ Of Certiorari To The Supreme Court Of Connecticut**

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## BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is condemned, not to eliminate slums or blight, but for the sole purpose of economic development that will perhaps increase tax revenues and improve the local economy?

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## BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the proposition that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, the annual *Cato Supreme Court Review*. Counsel of Record for this brief is Professor Richard A. Epstein, a leading constitutional law scholar. The instant case raises squarely the question of the limits on state governments' power under the Takings Clause and is thus of special interest to the Cato Institute and its Center for Constitutional Studies.

### STATEMENT OF FACTS

This lawsuit arises out of a protracted dispute over whether local governments and the municipal corporations they create use their eminent domain power for "public use" when they take private homes and businesses under a comprehensive urban renewal plan that "perhaps" will reverse decades of decline in an economically distressed city.

In 1998, the City of New London, Connecticut (hereinafter "New London"), and the New London

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

Development Corporation (hereinafter "NLDC"), a private nonprofit corporation, instituted condemnation proceedings to create a 90-acre development park in the Fort Trumbull section of New London, located along the Thames River. *See, e.g., Kelo v. City of New London*, 843 A.2d 500, 508 (Conn. 2004) (hereinafter "*Kelo II*").[2] The project stands next to the New London Mills site on which Pfizer, Inc., a private for-profit corporation, had at the time intended to build a global research facility—completed in fact in 2001. *Id.* at 508-09. That 90-acre site included approximately 115 privately owned land parcels; a 32-acre parcel on which stood the United States Naval Undersea Warfare Center, no longer in operation; and a regional water pollution control facility. *Id.* at 509. NLDC claimed that its Fort Trumbull Municipal Development Plan (hereinafter "NLDC Plan" or "plan") would "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's water front, and eventually 'build momentum' for the revitalization of the rest of the city, including its downtown area." *Id.*

The NLDC Plan contains seven different parcels dedicated to a mix of public and private uses. The main elements of the project—including the proposed new hotel, the marina, and much of the office space—were slated to be undertaken on property that was *immediately* available.[3] But the respondents have nonetheless delayed the project in an effort to obtain the property of private homeowners.

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[2] Due to unavailability of the joint appendix, all citations to the record refer to the reported opinions of and the page numbers of the record certified in the courts below.

[3] For a map of parcel ownership and location, *see* Kate Moran, *With Vacant Lots and Cash Needs, NLDC Reaches a Crucial Juncture*, The Day, January 18, 2004, at A1 & graphic (graphic illustrating NLDC and/or state ownership of all but parcels 3, 4A, and 5C) (hereinafter "*Vacant Lots*"). For intended uses of each parcel, *see Kelo II*, 843 A.2d at 509-11.



The crux of the controversy has focused on two parcels—parcels 3 and 4A—on which these private owners reside.[4] Parcel 3 was designated as the proposed site for an ostensible 90,000 square foot complex devoted to high tech research, office space, and parking, and was intended to complement the new Pfizer facility, which was built several hundred feet to the south of the parcel. Resps.' Opp. to Pet. Cert. at 5. Located in the center of parcel 3 is the Italian Dramatic Club, a private organization. *Kelo II*, 843 A.2d at 509. It was spared from demolition while petitioner Brelesky's home, which abuts it, was slated for immediate destruction even though *no* plans for its redevelopment have been made. *See, e.g., id.* at 566 (discussing differential treatment of club and homes); *id.* at 573 (under NLDC plan, the "office buildings will not be constructed [on parcel 3] unless a market develops for them").

Several of the plaintiffs are located on parcel 4A, which is separate and apart from the large plots of land already in public hands. Resps.' Opp. to Pet. Cert. at 6. The original development plan called for the *immediate* destruction of those homes, without any designation for that land's future use apart from the vague suggestion the parcel will further "park support." *Id.* at 5.

The original project costs included $73 million appropriated by the state of Connecticut.[5] Under the plan, the NLDC proposed a 99-year ground-lease with a developer, Corcoran Jennison. *Kelo II*, 843 A.2d at 554. Covering these parcels, the proposed lease stipulated a rent of $1 per year and obligated the firm to develop and market the project in accordance with the overall plan. *Id.* The original agreement with Corcoran Jennison did not include any

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[4] Together the homes at issue cover approximately 1.5 acres of the entire 90 acre site. *See, e.g., Kelo II*, 843 A.2d at 553 (four homes on parcel 3 occupy three-quarters of an acre); *id.* at 570 (homes on parcel 4A occupy .76 acres).

[5] *See* Moran, *Vacant Lots*, The Day, January 18, 2004, at A1.

particular timetable for the development of any portion of the project; in fact, it allowed the developer to control the pace of development and the selection of tenants. *See, e.g., Kelo II*, 843 A.2d at 551 & n.76. Today, the project scope and timetable remain unsettled, and any proposal for the four-star hotel has been shelved until July 2005 at the earliest.[6] That proposal may yet be abandoned because in the meantime Pfizer has found other hotel sites.[7] Nor has work begun on the proposed office buildings, parking lots, private homes, or river walk (which must be completed, at a cost between $500,000 and $700,000, for the hotel to be built.)[8]

The NLDC has contended that the plan would "generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs." Resps.' Opp. to Pet. Cert. at 6. It also has claimed, with no time specification, that the plan would raise between

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[6] Kate Moran, *City to Assess State of Fort Trumbull Development; Eminent Domain Lawsuit Not the Only Source of Frustration*, The Day, September 30, 2004, at A5 ("Under the terms of the settlement [reached between Corcoran Jennison and NLDC in September 2004], Corcoran Jennison . . . has to submit plans for the hotel to the Planning and Zoning Commission by July 2005.") (hereinafter "*Source of Frustration*").

[7] Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment*, The Day, June 12, 2004, at C4 ("By July 2002 . . . Pfizer had been open in New London for a year, and it had found other hotels in the area . . . . With that demand met, and with the corporate landscape altered, the company [informed] Corcoran Jennison that the justification for the hotel was 'no longer apparent.'") (hereinafter "*Hotel Plan Not Viable*").

[8] Moran, *Vacant Lots*, The Day, January 18, 2004, at A6. Corcoran Jennison and NLDC spent much of the last two years squabbling. Kate Moran, *Fort Trumbull Developer Declares NLDC in Default of Contract*, The Day, June 15, 2004, at C1 (detailing NLDC allegations that Corcoran Jennison "had defaulted on its contract to build a hotel, offices and rental housing on part of the 90-acre peninsula"; and Corcoran Jennison's counter-charges that NLDC had "lagged in some of its responsibilities . . . having failed to complete a walkway along the Thames River that must . . . accompany the hotel") (hereinafter "*NLDC in Default*").



$680,000 and $1,250,000 in tax revenues, which were needed, in part, because some fifty-four percent of the land within the city limits was exempt from local property taxation. *Kelo II*, 843 A.2d at 510. One objective of the program was to replace the jobs lost by the closing of the Naval Warfare Center in 1996. *Id.* at 510-11.

The NLDC approved this ambitious plan in early 2000, but only after rejecting more modest plans running the gamut from no action to smaller office, commercial, and retail projects. *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789, at *219 (Conn. Super. Ct. March 13, 2002) (unpublished op.) (hereinafter "*Kelo I*"). Pursuant to an October 2000 City Council vote, in November 2000 the NLDC instituted condemnation proceedings against those homeowners within the district who had refused to sell under chapter 132 of the General Statutes of Connecticut, § 8-186. Resps.' Opp. to Pet. Cert. at 7. Shortly thereafter, the petitioners brought their lawsuits, which claim (1) that these condemnations were not authorized under the Connecticut statute, and (2) that the proposed takings are not for "a public use" under the Takings Clauses of both the United States and Connecticut Constitutions.

The trial court held that the NLDC was entitled to the private homes located on parcel 3, but had exceeded its powers in condemning the properties located on parcel 4A. *Kelo I*, 2002 Conn. Super. LEXIS 789, at *229-30, *265. The Connecticut Supreme Court, by a four to three vote, affirmed the judgment in favor of New London and the NLDC with respect to parcel 3, and reversed the determination with respect to parcel 4A as an "abuse of discretion," thereby allowing the entire project to go forward in its original form. *Kelo II*, 843 A.2d at 573. With respect to the substantive issue raised by petitioner, the Connecticut Supreme Court held that the project did not run afoul of the Takings Clause of the Fifth Amendment to the United States Constitution, which provides: "nor shall private property be taken for public use without just compensation." *Id.* at 528

(applying "broad and deferential" standard to uphold the NLDC development plan).

In particular, the court held that the legislature and the NLDC, its lawful delegatee, were entitled to a broad level of deference in their factual findings, even though, concededly, none of the development specifics was in place at the time of the condemnation proceedings. *Id.* at 528 (municipality's determination that taking is for a valid public use deserves "substantial deference," so long as "the appropriate legislative authority rationally has determined [the taking] will promote municipal economic development"). As the dissent wrote, the court's standard of deference was well-nigh unlimited: "[t]he majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." *Id.* at 602 (Zarella, J., dissenting). In the court's view, the plan had to be considered as a whole, obviating the need to make reference to any specific uses intended for the tracts owned by these plaintiffs. *Id.* at 537 n.50 ("an appropriate public use analysis necessarily requires evaluation of the development plan as a whole—the end result of the sum of its parts"). The three dissenting justices agreed that the plan was devised for a public use, and not for the benefit of Pfizer, but they concluded that nothing in the record showed that the plan would in fact be executed within a reasonable period of time. *Id.* at 600 (Zarella, J., dissenting) (concluding, from review of the record, that "there is no realistic prospect of a future public benefit").

## SUMMARY OF THE ARGUMENT

Throughout this litigation, the respondents, whose views were adopted wholesale by the Connecticut Supreme Court, have failed to offer a sound analysis of the "public use" question under the Takings Clause of the Fifth Amendment, for two related reasons. First, their holistic approach to the project did not examine its many components on an individual basis—regarding either the type of property taken



or the purpose to which it would be put. Rather, their above-the-fray approach simply asks whether the NLDC Plan meets some undefined standard of "public benefit"—language far broader than the constitutional language, "public use."

Second, the respondents pair that expansive legal standard with a superficial analysis of the underlying transaction, one that ignores all of its costs while treating its ostensible benefits as though they were guaranteed—when from the outset they have been subject to massive political and economic risk. Indeed, respondents' "public use" test is so broad that no major government initiative fails to meet it, for every large-scale project could be justified in the name of "economic development" even if the plan is a dead loser from the moment of its conception. If government takes the property of A and gives it to B, the transaction is for a *private* use. On its face, the Constitution blocks such a taking, even with compensation. Here the NLDC has proposed no public use, or no use at all, for the plaintiffs' homes.

A sensible disaggregation of the decided cases reveals four separate categories of "public use," of which generalized economic development is surely the most problematic. *See, e.g.*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The first two categories map closely the standard economic definitions of nonexcludable, or public, goods. The second two categories, which encompass the definition offered by respondents, do not.

The first category of public uses includes private property taken, owned, and operated by the state for standard public functions, such as military facilities, public highways, public schools, and public hospitals. Public use in such cases is sufficiently straightforward to survive the strictest level of judicial scrutiny. The second category includes cases in which property is taken for subsequent use by other private parties who make it available to the public at large. The common carrier obligations incumbent on railroads, grist mills, and public utilities are usually (but not invariably) subject to direct state regulation on matters of access and

price and are commonly understood as activities for public use, even if privately conducted.

Those two categories are easily distilled into a principle that allows some transfers to private persons, but only in the limited circumstances in which the individual owner has no subjective attachment to the land and the private transferee of the property would face acute holdout problems without the state power of condemnation.

The third category of takings purported to be for public use are those intended to alleviate various forms of "blight" and slum-like conditions. The property taken for such reasons is slated (as in category two) to be reconveyed to private parties, albeit without any restriction on its subsequent use. Rather, the rationale is simply the need to remove the property from its current run-down condition. Takings for such purposes have been explicitly approved by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), and by the recent decision of the Michigan Supreme Court, *County of Wayne v. Hathcock*, *supra*, overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Although the "blight" rationale is not before this Court, it is our view that it unduly undermines the public use limit on government's condemnation power. The term "blight" suggests that the property has deteriorated into a nuisance-like condition. But if that were the case, then the blight could be eliminated under the traditional police power (through condemnation of dilapidated structures) without the need to pay any compensation at all. *Berman* and *Hathcock*, however, rejected that option. Yet, neither opinion has explained in a satisfactory way why outright transfer of broad swaths of property to another individual who is under no duty to alleviate the blighted conditions should be considered the legally preferred solution to the problem. Nor would any such explanation be remotely convincing: Put simply, the blight rationale opens the gate to state abuse that targets the most vulnerable members of the population.



The state is on still thinner ice in the fourth and final category, which allows the condemnation and destruction of perfectly suitable private homes and businesses, and the permanent displacement of property owners, to make way for grander projects initiated to revitalize an "economically depressed" community. This rationale is deeply problematic. The finding of public use is not subject to any easy judicial verification as in categories one and two. Nor is the range of government action constrained in choosing the objects of condemnation, as in category three. Rather, governments can simply gin up pro forma findings that some benefits are expected from the project in question. Indeed, that's exactly what happened in this case.

The NLDC findings are massively misleading. First, given that the key elements of this project could go forward without using the land of these homeowners, the project's defenders wildly exaggerate the holdout risk. Nor have these homeowners sought to extort money from public bodies. They want simply to be left alone, to preserve their homes against state takeovers that would leave them financially ruined and psychologically devastated. In "economic development" cases, like the case at bar, the appropriate balance is struck if the state is allowed to take vacant land for public use only when *serious* assembly problems exist. Put another way, the state's takings power is at its highest when the holdout problem is the greatest and the risk of undercompensation is the least. It is at its low ebb on facts like these, where the threat to subjective value is great and the holdout issue is trivial.

Second, the respondents assert that their claim that the project will produce some net social benefit deserves substantial deference. Yet, deference to respondents' cursory economic analysis would be wholly inappropriate. Respondents fail to identify and quantify the relevant *costs* associated with the improvements, for instance. Those costs and risks properly include massive state subsidies needed to make the project viable; the uncertainty that the project will be completed in its original form; the possibility of failure;

and the full financial and psychological costs—inadequately valued under current law—to the private owners driven from their homes and businesses. Respondents' lopsided analysis of costs and benefits must be categorically rejected. Petitioners are entitled to keep their homes.

## ARGUMENT

### I. THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT MUST BE READ IN LIGHT OF THE OBJECTIVES OF THE TAKINGS CLAUSE.

The public use language is an essential part of the Takings Clause, which reads: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. That clause represents a coherent compromise between the private owners' right to retain or dispose of their property at will, and the state's need to supply the public with collective goods that ordinary markets cannot provide. The clause gives the state the extraordinary power to take private property from ordinary people against their will, but checks that power in three critical ways. First, the taking in question should be done only for a public use. Thus, the state may not insert itself in the middle of a transaction whereby it uses its power against one of its citizens in order to advance the private interests of another. "[T]he Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Second, the taking cannot be made *simply* on a showing of public convenience or necessity, but must always be accompanied by compensation. By properly pricing the takings process, state actors will not engage in public projects whose net benefits exceed their costs. *See Pennell v. City of San Jose*, 485 U.S. 1, 22-23 (1988) (Scalia, J., dissenting) (noting that the just compensation requirement ensures that state actors will not be able to hide behind "off-budget" financing but rather must make their deliberations in



response to an open political process). Third, states possess an alternative means of protecting public and private rights: the traditional state police power, which allows the state to limit the use of private property in order to protect others against harmful actions such as ordinary nuisances. If this three-part scheme is rightly applied, the state will initiate only those projects that work for long term public advantage, while ensuring an equal division of the overall gains.

### II. THE PUBLIC USE REQUIREMENT PERMITS TAKINGS ONLY FOR TRADITIONAL GOVERNMENT FUNCTIONS AND IN CASES WHERE HOLDOUT COSTS EXCEED THE DIMINUTION IN SOCIAL VALUE THAT RESULTS FROM THE TAKING.

It is critical to put this case in context by first determining how "public use" applies in circumstances that differ from those at issue here. Accordingly, our analysis proceeds in incremental fashion, starting with the easiest public use cases and then moving to more difficult cases.

#### A. The Public Use Requirement Is Satisfied In Cases In Which The Government Owns And Operates Property For The Public At Large.

The paradigmatic cases for public use involve the taking of private property for facilities that are then owned by the government and operated for the benefit of the public at large. Such cases include the full range of government facilities, offices, and military bases. The list also includes public highways and parks open to the public, whether with or without a fee. In some of these cases the government acquires needed land or facilities by voluntary transactions because the land is relatively compact and the number of usable sites is very large. In such cases, the eminent domain problem is circumvented because it is easier and cheaper for both the government and the private parties to rely on voluntary transactions that avoid the delay and expense typically associated with condemnation proceedings.

In some instances, chiefly those that deal with the acquisition of key sites for military purposes, or land needed for public highways or utilities, the voluntary route, although desirable, is often not attainable. The success of a network operation depends on combining property held by many different persons under a single owner. No one could assemble the land for a transcontinental highway if each individual landowner in the project's way could hold up the project until the government met his asking price for his land. The eminent domain power negates that holdout problem by allowing the government to take the land by force (a power that in many cases will induce parties to transfer the land by settlement.) Here the adoption of a just compensation system (on which more later) protects against the risk that the individuals whose properties lie in the path of a development program will bear more than their proportionate share of the burden. That furthers the overarching purpose of this clause: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As long as the compensation is rightly determined, the Takings Clause guards against both private holdouts *and* government expropriation.

### B. The Public Use Requirement Is Met When Certain Condemned Private Property Is Transferred To Common Carriers For Use By The Public At Large.

The second category of takings for public use introduces a complication because the property taken does not remain with the government but is transferred to some private party or, alternatively, condemned by that party acting under government authorization. Here the Takings Clause guards against an automatic rule that private property taken by eminent domain must remain in public hands. The operative phrase is "public use," which is distinct from, and broader than, the phrase "public ownership." That difference allows for private ownership that facilitates use by the public. It reflects a profound appreciation for the holdout and assembly



problems in network industries, no matter who runs the integrated operation. It would be a major mistake to insist that all railroads, canals, and utilities be publicly owned in order to invoke the state's eminent domain power to overcome the holdout problems that block the formation of a unified network. Why risk inefficient operations when a better system is available—namely, private operation, where the property taken is open to the public at large on a reasonable and nondiscriminatory basis. As was noted in *Hathcock*, if a railroad "must lay track so that it forms a more or less straight path from point A to point B," the takings power must be available to deal with any landowner who "holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value." 684 N.W.2d at 781-82.

### C. The Public Use Requirement Allows Condemnation In Additional Limited Cases Where The Holdout Problem Is Acute But Owners' Subjective Values Are Not Compromised.

The public use language has been extended beyond common carrier situations to cover some limited cases where the assembly problem is likely to be acute even if the property acquired is not uniformly subject to state regulation on access and rates. This situation is best illustrated by the nineteenth century cases that ask whether condemnation of private property for the operation of privately owned grist mills counted as a taking for a public use. In these cases, the critical obstacle was one of coordination. The water power for a grist mill came from raising a "head" of water behind a dam, forming a lake. That lake would routinely exceed the standard size of an efficient farm, and therefore necessarily flood lands owned by other individuals. In addition, setting up a grist mill in one location necessarily precluded building similar facilities upstream or downstream from that site. Someone therefore had to decide the location to be exploited.

The degrees of freedom here were narrowly constrained by the topography, and the solution approved in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885), allowed a local commission to accept or reject applications for a grist mill so as to avoid the overbuilding problem. That commission also determined the height of the dam, which in turn limited the amount of flooding. The statute in that case also required the chosen mill owner to pay any flooded landowner a sum fifty percent *above* the market value of the property taken. New Hampshire Mill Act (hereinafter "Mill Act"), 1868 N.H. Laws ch. 20, § 3, quoted in 113 U.S. at 9-10 & note. That land was typically ordinary farmland (and never, to our knowledge, private homes or businesses.) The New Hampshire statute in *Head* also treated grist mills like traditional public utilities by requiring their owners to process the grain of all comers on a nondiscriminatory basis "at tolls fixed by law." *Head*, 113 U.S. at 19.

This last provision satisfied the narrow definition of public use because the owner of the grist mill was denied the right to exclude that is generally regarded as the hallmark of private property. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Yet even if that requirement had been dropped—as it was in some cases in which the mill owner was "under no legal obligation to permit the public to have access to [the mill], or to grind for them if he chose to decline to do so" (*Olmstead v. Camp*, 33 Conn. 532 (1866), discussed at 1866 Conn. LEXIS 532, at *8-9 (1866) (findings of statutory committee))—the statute could have been sustained on grounds far narrower than needed to salvage the NLDC Plan. For, in practice, the absence of a legal obligation to serve did not ordinarily deny uniform service to the public at large. And the difficulties of assembling property were compelling.

Exactly this pattern is observed in some of the early decisions of this Court. Thus, in *Clark v. Nash*, 198 U.S. 361 (1905), this Court held that the public use requirement was satisfied by a taking of land for an irrigation ditch that was "absolutely necessary" to service a plot of land that was



otherwise arid and valueless. *Id.* at 370. And a year later the same result was reached, and for the same reason, when this Court held that an aerial right-of-way could be condemned to take ore from a mine to a railway. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906). In those and other cases the subjective value of the land taken was virtually zero, while the location of the mine or the farms dictated the property that had to be taken. In neither *Clark* nor *Strickley* did this Court assume that it would be proper to authorize takings beyond the "particular" circumstances at issue, *Clark*, 198 U.S. at 369; rather, the Court stressed the need for "great caution" when assessing the "exceptional times and places" to exercise this power. *Strickley*, 200 U.S at 531.

The gist of this entire line of cases suggests how it is possible to apply the text of the Takings Clause to real world circumstances without doing damage to the purposes of the clause and to the balance it achieves. The words "public use," on their face, appear to be concerned with the ends to which the property is put, not the means that must be invoked to execute the purposes of the clause. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 67 (1986). But the textual argument that "public use" means only use by or for the public-at-large has not prevailed in large measure because of the holdout problem so clearly raised in the Mill Act cases. Any single owner in the affected area on the river could block the construction of the mill by seeking to extract all or most of the gain that comes from its operation. Because potential mill owners had to locate on scarce riverfront sites, the ability to obtain any large social gain required use of state coercion. But that coercion was regulated by the independent commission that determined the height of the dam and, thereby, the lands that could be flooded. In addition, the New Hampshire statute went a long way to protect the subjective value of the original owners by offering them a fifty percent premium over market value. That eased any constitutional doubts about the plan by allowing the parties subject to the coercion to share in the overall social gain, thereby blunting the ethical

objection to allowing those who invoked coercion to garner all the profit from its use. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ch. 12 (1985). Of course, courts adjudicating outside the domain of such statutes did not require such a steep premium, so long as the money paid left each owner of flooded land as well off as he was prior to the invocation of the power of the state.

To state the matter more generally, however, the public use requirement may be satisfied in those cases in which the invocation of state power promises large social gains without disadvantaging the individuals who are forced to surrender their property for the public benefit. Professor Thomas Merrill puts the proposition in the following fashion: government activities should be invalidated under the public use doctrine in cases where the state trenches on property with high subjective value and state power is not needed to overcome a coordination or assembly problem, especially if the gains (if any there be) are given to a few select individuals without the prospect that they will be distributed to the public at large. *See* Merrill, *Economics of Public Use*, *supra*, at 83-86.

### D. Condemnation For Blight Does Not Meet The Standard For Public Use.

Whereas the nineteenth century invocation of "public use" was sharply limited in the fashion suggested by the grist mill cases, during the twentieth century the scope of public use has so expanded that many writers have concluded that the requirement is met so long as the state purpose in question does not run afoul of any other constitutional provision. *See* Bruce A. Ackerman, *Private Property and the Constitution* 190 n.5 (1978). *See also* Note, *The Public Use Limitation on Eminent Domain*: *An Advance Requiem*, 58 Yale L.J. 599, 613-614 (1949). One case of this Court that has been cited in that regard is *Berman v. Parker*, 348 U.S. 26 (1954), which stands for the general proposition that slum clearance or the elimination of "blight," undertaken as part of some larger urban renewal project, satisfies the "public use"



requirement. *See also Hathcock*, 684 N.W.2d at 783 (citing and following *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951) (slum clearance a proper public use)).

That proposition reflects current law, but even if *Berman* survives this Court's decision in this case, the decision below should be reversed because none of the New London petitioners' properties is blighted. Nonetheless, we think that *Berman* is incorrect in principle and believe it important to say why. The power of the state to abate a nuisance in order to protect ordinary citizens and nearby properties from harm has long been accepted. In fact, in *Berman*, Justice Douglas upheld—under the state's *police* power—a comprehensive slum clearance program that took over the plaintiff's department store, located within the designated area, even though that structure was not in a dangerous condition. An elaborate set of legislative findings was said to justify the action under the police power, all reminiscent of the canned findings that were viewed with skepticism by this Court in *United States v. Lopez*, 514 U.S. 549, 562 (1995).

At bottom, these slum clearance cases tend to conflate the police power and the eminent domain power. The standard invocation of the police power limits individual liberty and private property in order to advance the health, safety, morals, and general welfare of the public at large. *See* Ernst Freund, *The Police Power*: *Public Policy and Constitutional Rights* iii (1904) (defining the police power "as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property"). If individual properties exhibited the characteristics of ordinary nuisances, then the state could force the private owner to correct the situation without having to pay any compensation at all. The law in Connecticut specifies, for example, that the subject property be "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." Conn. Gen. Stat. § 8-125(b). But while the police power would allow the state to enjoin the nuisance, without compensation, it would *not*

allow it to take title to the property once the nuisance had been eliminated. Thus, the police power is at once stronger than the eminent domain power (in that it proceeds without compensation) and weaker (in that it does not justify taking title and transferring the property to another private owner for private use). Yet *Berman* in no way addressed this difference. Indeed, the police power and the eminent domain power were at times conflated by the Court, *see, e.g.*, *Berman*, 348 U.S. at 32. At other key junctures the constitutional phrase "public use" was never used; instead, the term "public purpose" (*id.* at 32, 33, 34, 35) was substituted in order to justify a highly deferential standard of judicial review.

The "blight" cases after *Berman* moved far beyond the grist mill cases by allowing condemnation in the absence of any holdout or coordination problems, and without any inquiry into the potential for political abuse from so vast a power. And they repeated *Berman*'s unquestioning acceptance of canned legislative findings. *See, e.g.*, *id.* at 28-29, 33 (accepting, at face value, the pro forma, canned statutory finding of the District of Columbia Redevelopment Act, [D.C. Code Ann. §§ 5-701, 5-719 (1945)], namely, that certain regions of the District of Columbia were dangerous to public health). *Compare Lopez*, 514 U.S. at 562 (refusing to accept at face value findings that certain activities substantially affected interstate commerce).

Broad deference under a lax standard invites powerful local businesses to persuade "neutral" public bodies to declare as "blighted" the property they need for their own business expansion. That is exactly what happened in *West 41st St. Realty LLC v. N.Y. State Urban Dev. Corp.*, 298 A.D.2d 1 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003), where the court allowed the condemnation of six contiguous plots of land located on Times Square, which were thereafter leased to the *New York Times* (among other private businesses). There, the aggrieved owners alleged that the City had frustrated their plans to improve their property in order to facilitate its own redevelopment plan. *Id.* at 7.



The New York appeals court nonetheless allowed that taking on the ground that the landowners had not negated the finding of blight. *Id.* The case thus suggests the possibility that the state can *create* the very blight that is said to justify the need for condemnations, and then use that blight to justify a taking designed to satisfy more powerful political interests. *See also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 465 (7th Cir. 2002) (striking down a taking when the commercial buyer was released from a restrictive covenant that applied to the condemnee).

The current broad constitutional standards do not require that any code violations be shown; nor do they suggest that, if such are found, any time has to be given to allow for their corrections. The stability of possession that is so central to any sound system of private property is too often compromised when blight is in the eyes of the beholder. In light of these risks, we can think of no case in which virtually unquestioned deference should be given to a legislature's determination that a taking is constitutional.

## III. THE PUBLIC USE LANGUAGE OF THE TAKINGS CLAUSE PROHIBITS THE TAKING OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT.

The difficulties that arise from the broad reading of the public use requirement in the urban blight cases are mightily compounded when the state seeks to use its power to condemn land for the ostensible purpose of economic development. At that point, *no* property is free from the overhang of state condemnation, which creates massive uncertainties for property owners and discourages private investment that could spur the economic improvements that routinely elude flat-footed public planners. Current law goes far beyond using the takings power to overcome holdout and coordination problems like those found in the grist mill cases. And far from providing any economic benefit, most urban development plans authorize huge economic sinkholes. We now address those two points in order.

### A. The Loss Of Subjective Value Far Outweighs Any Holdout Problem Both Generally And On The Facts Of This Case.

The "economic development" cases fall far short of coherence on two key elements. First, they do not pay heed to the subjective losses that are sustained by ordinary individuals. Second, they are not a response to holdout problems. Those issues are inherent in all projects of this sort, and they manifest themselves in the sorry history of the NLDC Plan. We first consider the issue in general terms and then turn to specifics.

The Connecticut Supreme Court paid lip service to the importance of subjective values when it wrote: "The trial court was not, and we are not, blind to the social costs of the development plan in the present case. In the words of the trial court: 'An old New London neighborhood with all of its memories, in effect, has been destroyed. People like the plaintiffs have been or might yet be removed from homes they love and in some cases from homes where their families have lived for generations.'" *Kelo II*, 843 A.2d at 540 n.57. But at no point does the Connecticut court give this concern the slightest actual weight.

One sensible way to take these subjective interests into account is to alter the compensation rules to ensure that the individuals who are displaced from their homes are not made to suffer in consequence. That view is not novel. It dates back at least to William Blackstone who, in addressing the obligation to compensate, wrote as follows:

> [T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases, the legislature alone can, and frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by



> giving him *a full indemnification and equivalent of the injury thereby sustained.* The public is now considered as an individual, treating with an individual for an exchange.

W.W. Blackstone, 1 *Commentaries on the Law of England* 135 (1765) (emphasis added).

This passage is well worth pondering because it sets out a standard for compensation that requires the individual to be left at least as well off after the property is taken as he was before. After all, just that result would take place in a voluntary exchange. Yet, unfortunately, subjective values, which are at their highest in cases of this sort, do not matter at all in setting just compensation in takings cases. *See, e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (just compensation ignores "personal and variant standards as value to the particular owner"). In addition, the modern takings law systematically disregards all other forms of consequential damage such as moving expenses and legal and appraisal fees. *See, e.g.*, *Dohany v. Rogers*, 281 U.S. 362 (1930) (attorney fees); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979) (appraisal fees); *Kimball*, 338 U.S. at 5 (good will).

These restrictive compensation rules work two forms of mischief. First, they result in a systematic unfairness to the individuals who are forced to sacrifice their property to some fuzzy vision of public good—thus leaving unfulfilled the promise of just treatment set out in *Armstrong v. United States*, *supra*. Second, the rules introduce massive distortions into legislative and administrative decisions by setting an explicit set of takings prices that systematically fall below the full costs that are inflicted on the private owner. That leads to two indefensible consequences. First, the individual owner is not left indifferent between the subpar compensation received and the property surrendered, which in turn leads, as here, to strong resistance to takings that might otherwise be accepted. Second, also evident here, the low prices induce government agencies to undertake

excessive condemnation because they do not have to bear the full social costs of their legislative or administrative decisions.

The upshot is too many condemnations with too much social waste and too much government irresponsibility. There is *no* public-regarding reason why economic development has to proceed in blunderbuss fashion just because so-called experts have decreed it to be the policy *de jour*. There is no reason to give any deference to legislative and administrative bodies that act under systematically perverse incentives.

The situation is no better when examined from the side of the government and developers. Where are the holdout risks? Grist mills have to be located on specific sites, but renewal and economic development can take place, and have taken place, anywhere. In many instances it takes place in increments as pioneers buy up old buildings for renovation on a block-by-block basis. The generic nature of the holdout problem is far less, and there is no reason to respond to mere incantations of difficulty unless developers, possessed of a real plan, can demonstrate that recalcitrant landowners are blocking their project. As the Michigan Supreme Court observed in *Hathcock*, "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain . . . for their formation." 685 N.W.2d at 783-84.

The dangers of moving too quickly are manifest in light of the uncompensated dislocations that are routinely caused. The dangers of moving too slowly are small indeed. The proposed development may never take place at all—a manifest risk in this case. Rather than a rush to condemn willy-nilly, the local government should have a concrete plan, so that private property will not be taken for *no* use at all. Watchful waiting reduces the need for abusive coercive action, because the passage of time may clarify whether some holdout problem persists in fact.



These general considerations are amply confirmed on the grim facts of this case. One look at the various maps of the Fort Trumbull area indicates that holdouts are a complete nonproblem. Located on the site are two large, contiguous properties, now in public hands, that may be used for any purpose under the sun. *See* Plffs.' Exhibits TT, VV (illustrating current and planned uses, and acreage, for the Naval Undersea Warfare Center and adjacent publicly-owned land). Considered either alone, or together, they can accommodate all of the hotel and office space, complete with offsite parking.[9]

Nonetheless, the Connecticut Supreme Court refused to exclude the properties of the individual private owners (spanning about 1.5 acres) from the condemnation plan. "We decline to address the plaintiffs' parcel-specific claims in this context because an appropriate public use analysis necessarily requires evaluation of the development plan as a whole—the end result of the sum of all of its parts." *Kelo II*, 843 A.2d at 537 n.50. But that approach surely is perverse—especially when considered in light of sensible planning procedures. The correct social judgments can be made only if all tradeoffs are made *at the margin*. If ninety-nine percent of the benefits of any economic redevelopment project could be obtained *without* taking these homes, then how is it conceivably rational to insist on taking the remaining private parcels, when that additional government action is the source of untold mischief and yields virtually no benefit at all?

The Connecticut court, relying on expert testimony that "development would be more difficult if these residences were allowed to remain," insisted that the bulldozer adds flexibility to overall planning and development. *Id.* at 555. The ostensible problem adduced by the experts is the

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[9] Under current plans, the hotel will be located on parcel 1; 140,000 square feet (less than four acres) of office space will be located on parcel 5; and an additional 90,000 square feet (a little over two acres) of office space and parking will be located on parcel 3. *Kelo II*, 843 A.2d at 509. The Naval Undersea Warfare Center alone spans 32 acres. *Id.*

difficulty posed by building around existing structures, which putatively interfere with the creation of a uniform whole. But the experts' argument is falsified, in three ways.

First, the homes located on parcel 4A, subject to condemnation for "park support" (Resps.' Opp. to Pet. Cert. at 5), are not slated for development as part of a unified plan, which explains why the trial judge refused to allow the condemnation to proceed with respect to those petitioners' homes. *Kelo I*, 2002 Conn. Super. LEXIS 789, at *230-31 (noting, with respect to parcel 4, that "the uses here are . . . vague, shifting and noncommittal").

Second, the Italian Dramatic Club (and its exclusive clientele) was spared. *See, e.g., Kelo II*, 843 A.2d at 566. We are asked to believe that the same developers who could build around that structure could not build around the Brelesky home located immediately to the east, further from the center of the plot (*see* Plffs.' Exhibit TT), or indeed around any of the other homes located in that area.

Third, the mass condemnation in question here is clearly premature. The only way to determine if these owners had any holdout power is to know the nature of the proposed plans, none of which has been developed at this time. These takings might be fathomable if some current plan required the use of these parcels. But all the homes located on parcels 3 and 4A are acquired, as it were, "on spec." Given the absence of any concrete plan for these parcels, these properties have held up nothing at all.

This framework for evaluating the NLDC Plan shows that any conceivable public project does not require the condemnation of these homes. Sparing these homes *now* does not preclude the NLDC from seeking to condemn them later on. But there is no sensible reason to force a confrontation today that needlessly sacrifices subjective values (left uncompensated) to head off an assembly problem that will "perhaps" arise (if at all) in the future. Stated otherwise, the individuals in this case are holding out because they do not want their homes taken and their lives ruined if



forced from their homes after receiving paltry compensation that will not allow them to replicate their lives elsewhere. Faced with such impositions, everyone *should* hold out. The problem is not plot assembly. It is derisory compensation.

### B. There Is No Net Public Benefit That Conceivably Justifies The Taking Of Petitioners' Homes In The Name Of Public Improvement.

Once their holdout argument fails, respondents will retreat to higher ground by claiming that the public use requirement may be satisfied by the prospect of large economic and social gain from economic development in general and this project in particular. The Connecticut Supreme Court evidently agrees: "We conclude that the public benefit of the taking in the present case is the dramatic economic benefit that the development plan is expected to have for the public in the New London community, namely, the massive projected growths in employment and tax and other revenues." *Kelo II*, 843 A.2d at 552. The projections were those referred to above: "(1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs" (*id.* at 510), as well as between $680,000 and $1,250,000 in tax revenues. *Id.*

A casual look at these numbers, apparently plucked from thin air, suggests that the projections are grossly inflated. Nowhere do respondents substantiate how the sites will be developed or what revenues they will generate. Nothing in the respondents' papers below or in the Connecticut Supreme Court explains what will galvanize the demand for these facilities when and if they are built. Although new jobs are treated as a benefit, they are better treated as costs associated with land acquisition, demolition, infrastructure, project management, and the like, which largely have been funded by a huge influx of public funds (some $73 million collected from individuals all across

Connecticut[10]), and are to be parlayed into a $1 per year ground lease given to the developer. *See Kelo II*, 843 A.2d at 554. Corcoran Jennison has yet to build any private projects, even though it has spent additional millions of its own in preliminary work. Moran, *NLDC in Default*, The Day, June 15, 2004, at C1; Moran, *Source of Frustration,* The Day, September 30, 2004, at A5. These public costs were incurred years before the associated project will have generated any income at all.

The taxation projections are drawn from thin air, too. Totally missing from this evaluation is the dimmest recognition of the time-value of money. The carrying costs of the invested money are ignored. The future and contingent nature of any possible revenue stream is ignored. The words "discounted to present value" appear nowhere in the decision of the Connecticut Supreme Court. The most rudimentary considerations of financial analysis are wholly disregarded in this most sorrowful of performances. Take them into account, and millions are added to the cost side (the carrying costs of $73 million are in the neighborhood of $2 or $3 million per year, for example.) And of course no mention is made of the huge private losses to the displaced people, as if they don't count in the grand social calculus. Yet even if the projected tax revenues fail to materialize, the loss of current tax revenues is certain.

In reply, of course, it will be said that great deference is needed when reviewing complex issues that legislatures and expert agencies have considered. That might be appropriate within the narrow confines of the grist mill cases, but it makes no sense to grant deference to a public body that has considered *none* of the financial and business costs and risks relevant to a minimally competent private planner. There may be nothing that this or any other court can do to protect Connecticut citizens from a scandalous waste of public funds. But there is much that any court could and should do

[10] Moran, *Vacant Lots*, The Day, January 18, 2004, at A1.



to make sure that these property owners are not forced to sell their property at rock bottom prices to support a program that will likely never deliver on its promises.

The situation looks only worse when the current history of this matter, available from newspaper accounts, is introduced. The initial assumption was that a luxury hotel would be built first to service the Pfizer facility next door. Moran, *Source of Frustration*, The Day, September 30, 2004, at A5 (hotel "was supposed to be the first phase of the project"). But Pfizer needed hotel accommodations the day it opened, not when some developer got around to building a hotel. And once Pfizer established alternative arrangements, the demand for the new hotel evaporated. Moran, *Hotel Plan Not Viable*, The Day, June 12, 2004, at C4.[11] As a result, the entire hotel venture has been put on hold until the summer of 2005, without any assurance that any hotel will be constructed at that time. Moran, *Source of Frustration*, The Day, September 30, 2004, at A5. In the interim, Corcoran Jennison continues to squabble with NLDC over the slow process of the entire plan. *See generally* Moran, *NLDC in Default*, The Day, June 15, 2004, at C1. And huge expenditures of funds will likely exhaust the revenues for the next phase of the project, so that $4 million of local monies may be needed to keep this sputtering project alive. Moran, *Vacant Lots*, The Day, January 18, 2004, at A1. Yet it is an open question whether the esplanade and marina, on which the success of any hotel is said to depend, will be constructed. *Id.* at A6 (noting agency has "jettisoned" marina plans "for lack of funds").[12] Ironically, it is also now

[11] While NLDC has blamed litigation for the stalled hotel plans, it is evident that the failure is a product of an unsound development plan and attendant cost over-runs. *See generally* Moran, *Vacant Lots*, The Day, September 30, 2004, at A6 & graphic (discussing NLDC's exhaustion of its $73 million budget and detailing major expenditures).

[12] *See also* Moran, *NLDC in Default*, The Day, June 15, 2004, at C1 (NLDC has "failed to complete a walkway along the Thames River that

an open question whether the strapped development budget contains funds needed to pay (at bargain prices) for the homes of the petitioners who are resisting this bulldozer. *Id.* ("With . . . council dollars tagged for roadwork and the riverwalk, the NLDC could have deficient funds to relocate tenants and tear down their homes."). The entire episode is a public disgrace.

As Justice Young sensibly noted in *Hathcock*, "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a [for profit] private entity . . . might contribute to the economy's health is to render impotent our constitutional limitations on the . . . power of eminent domain. *Poletown*'s 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." 684 N.W.2d at 786. The respondents' position is inconsistent with the public use language as it would be interpreted either by those "versed in the law" (*see id.* at 787), or, for that matter, ordinary users of the English language.

The ultimate question, therefore, is whether the government action in this case will be blessed under the rational basis test, as the Court did in *Hawaii Housing Authority v. Midkiff, supra.* If *Midkiff* controls, this Court must acquiesce to the state government's action. But *Midkiff* is distinguishable: It did not involve changing patterns of use, as here, but rather a "land oligopoly," which involves issues of market structure that are in no wise implicated in this case. 467 U.S. at 241-42. *Midkiff* itself relied on *Cincinnati v. Vester*, 281 U.S. 439 (1930), which held that condemnations of excess land do not qualify as a permissible public use. *Midkiff*, 467 U.S. at 241 (citing *Vester*, 281 U.S. at 447). *Vester* makes it clear that some immediate purpose is needed to justify the taking. "Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained

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must, according to the building permits obtained by Corcoran Jennison, accompany the hotel").



on a bare recital." *Id.* That is what is at stake when there are at most inchoate plans for new buildings, and in the case of parcel 4A, for nothing in particular at all.

Yet, while this case is distinguishable from *Midkiff*, *Midkiff* itself should be overruled precisely because its broad test transforms "public use" into any "conceivable public purpose"—allowing all sorts of inconceivable and improper schemes to slip through the judicial net. For example, the Hawaii statute at issue in *Midkiff*, Haw. Rev. Stat. § 516 (1976), used a set of pro forma findings about an oligopolistic industry to usher in the forced transfer of land from landowners to tenants at bargain basement prices. *See Midkiff v. Tom*, 471 F. Supp. 871, 883-84 (D. Haw. 1979) (invalidating portions of the compensation formula found in Haw. Rev. Stat. § 516-1(14) (1976)). Yet, ironically, no one claimed that the leasehold rents were set at above competitive levels, as the claim of oligopoly implies.

The forced buyouts authorized in *Midkiff* did not respond to any holdout or assembly problem, unless every contractual negotiation for a lease buyout or renewal is said to be so afflicted. Likewise, the statutory finding that the forced acquisition of land "will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State" (Haw. Rev. Stat. § 516-83(5) (1976)) was pure boilerplate, wholly unintelligible and incompatible with any economic theory: After all, political struggle and high administrative costs, without any allocative improvement, only reduce social welfare. Worse still, the state in *Midkiff* turned itself into a pawn for the lessees, who had to provide the money for the property up front or supply iron-clad guarantees before the Housing Authority would order condemnation. *See* Haw. Rev. Stat. § 516-33(a)(4) (1976). The entire scheme was a transparent effort to dress up a transfer of property from A to B with some high-sounding public purpose. Yet, ironically, the only way to reduce high prices was to expand the supply of housing (which these same sitting tenants would oppose!) by releasing for development some portion of the large tracks of

Hawaiian land bottled up under the state's restrictive system of land use regulation. That restrictive system, in turn, was made possible in part by this Court's decision in *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), with its deferential approach to zoning.

The romantic assumption that legislatures act only for the common good leads to travesties like this New London project. This Court should follow the lead of the Michigan Court in *Hathcock* and overrule *Midkiff* insofar as it holds that any assertion of a generalized public benefit should be routinely blessed under the rational basis standard of review.

## CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be reversed.

Respectfully submitted.

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In The

# Supreme Court of the United States

SUSETTE KELO, *ET AL.*,

*Petitioners*,

v.

CITY OF NEW LONDON and
NEW LONDON DEVELOPMENT CORPORTATION,

*Respondents*.

On Writ of Certiorari
to the Supreme Court of Connecticut

## Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

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## QUESTION PRESENTED

1. Whether the original meaning of "public use" in the Public Use Clause requires the public actually to use the property it takes.

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## INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy ("the Institute") is a non-profit educational foundation dedicated to restoring the principles of the American Founding to their rightful and preeminent authority in our national life. Through its Center for Constitutional Jurisprudence, the Institute appears as *amicus curiae* in important constitutional cases. Through its Center for Local Government, the Institute defends property rights against abuses of the power of eminent domain, as happened to Susette Kelo and the other petitioners in this case.

This case raises deep questions about the direction of this Court's eminent domain law and especially about the original meaning of the Public Use Clause. As the Institute will show, one cannot appreciate the original meaning of "public use" and other relevant terms without understanding that they are all part of an intricate design to protect the natural right to property. Scholars affiliated with the Institute have published considerable scholarship on eminent domain or on the natural-rights basis of constitutional property rights. *See, e.g.*, Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 37-70 (1997); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549 (2003); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569 (2003).

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[1] All parties have consented to the filing of this brief by The Claremont Institute Center for Constitutional Jurisprudence. The letters granting consent have been filed with the Clerk's office. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

## STATEMENT OF THE CASE

Suzette Kelo and the other petitioners ("the petitioners") all own homes or rental properties in the Fort Trumbull neighborhood of respondent city New London, Connecticut ("New London"). In 1998, New London approved a proposal by respondent New London Development Corporation ("the development corporation") to condemn petitioners' lots and transfer them to commercial developers. There are no findings in the record below that New London subjected these developers to any duty of public access or any other duty typically owed by cable companies, telephone companies, and other common carriers. New London redistributed petitioners' lots to purely private buyers. *See Kelo v. New London*, 843 A.2d 500, 508-09 (Conn. 2004).

New London did not and could not claim that it condemned the petitioners' lots because they were crime-ridden or otherwise "blighted." The New London city council had originally authorized the development corporation to proceed against petitioners under Connecticut's slum-renewal laws, chapter 130 of Connecticut's statutory code, *see* Conn. Gen. Stat. Ann. §§ 8-124 to –69w (West 2001 & 2004 Supp.), but the city council did not cite alleged "blight" to condemn the petitioners' lots. *See Kelo*, 843 A.2d at 508, 511.

Instead, the development corporation and the city proceeded against petitioners solely on the ground that it would be economically advantageous for New London to redistribute their land to private developers. The corporation and city invoked the authority of chapter 132 of Connecticut's statutory code, the municipal-development chapter. *See* Conn. Gen. Stat. Ann. §§ 8-186 to -200b (West 2001 & Supp. 2004). That chapter gives local development agencies broad powers to "acquire by eminent domain real property" whenever cities allow them to do so. *Id.*. § 8-193. The chapter is open-ended: It encourages those development agencies to "transfer by sale or lease at fair market value or fair rental value . . . the whole or any part of the real property . . . *to any person*." *Id.* (emphasis added). The law imposes no statutory standards to insure that private land is taken only for the use of the public. Far from it; the statute permits local governments to condemn and redistribute land for any reason they want as long as they do so "in accordance with the project plan." *Id.* The city council found that, if petitioners' land were owned by private developers, the developers would create jobs, increase tax revenues, and encourage economic growth throughout New London. Those findings, the council believed, provided the factual basis it needed to condemn petitioners' lots and resell them to developers. *See Kelo*, 843 A.2d at 508-11.



Petitioners sued, alleging that New London had taken their properties for a private use, in violation of the incorporated Fifth Amendment, which states, "[N]or shall property be taken for public use . . . ." U.S. Const. amend. V. Petitioners also argued that diffuse local economic benefits do not count as "public uses," and that there can be no public use when "private parties retain control over the parcels' use." *Kelo*, 813 A.2d at 519.

In the decision below, the Connecticut Supreme Court ("the court below") held otherwise. It gave the Public Use Clause "a broad construction," embraced a "purposive formulation" of public use doctrine, and took a "deferential approach to legislative declarations of public use." *Id.* at 523. Specifically, it concluded,

> "Public use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.

*Id.* at 522 (italics removed). This Court granted certiorari.

## SUMMARY OF ARGUMENT

This Court should correct the "broad," "purposive," and "deferential" reading of the Public Use Clause propounded by the court below, and restore the Clause's original public meaning: "Public use" requires the public to "use" the property, either by owning it or by controlling how it is used. The alternative, that "public use" means "public usefulness," "purpose," or "advantage," confounds the Constitution's structure, for it makes the term "use" basically repetitive of the term "necessary" in the Necessary and Proper Clause. The relevant evidence of original meaning confirms what text and structure already make clear. The term "public use" marks off a principled distinction: Government violates the terms of the social compact when it redistributes one private owner's land to another. By contrast, government stays within the social compact if it takes property in such a manner that citizens enjoy the taken property on the same terms that partners enjoy property acquired by their partnership.

This Court can enforce the Public Use Clause's original meaning by applying a simple test. Government takes property for a public use if it retains ownership of the property, or if it assigns the property to a private party subject to common carrier duties of public access. But if the government transfers property to private party not subject to common carrier duties, the taking is for a private use and violates the Public Use Clause.

To restore the original meaning of the Public Use Clause, this Court should also limit excessive language from *Berman v. Parker*, 348 U.S. 26 (1954), which suggested that governments may circumvent the Public Use Clause merely by citing the police power. Police-power analysis is relevant to the question whether a taking has occurred, not to whether that taking is for public use. The latter question should be judged only by whether the government owns the property taken or controls how it is used.



## ARGUMENT

### I. This Court Should Ascertain and Follow the Original Meaning of "Public Use."

This Court holds that takings, public use, and just compensation principles apply to the States by incorporation of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The proper way to interpret these clauses is to ascertain their original public meaning. The Court should strive to do what Justice Thomas did for Commerce Clause doctrine in his concurring opinion in *United States v. Lopez*: Construe its public use "jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original meaning of that Clause." 514 U.S. 549, 584 (U.S. 1995). To that end, this brief examines the original meaning of the Fifth Amendment, relying primarily on "the text, structure, and history" relevant to the phrase "public use," and the early cases that conscientiously tried to carry into effect constitutional guarantees with the same meaning as the Public Use Clause. *Id.* at 585.[2]

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[2] Strictly as a matter of original public meaning, public use principles may not apply by incorporation; they may flow directly from the guarantees of the Fourteenth Amendment—from its Due Process Clause, *see Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896); or from its Privileges or Immunities Clause, *see Saenz v. Roe*, 526 U.S. 489, 521, 522-27 (1999) (Thomas, J., dissenting); *The Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 83-101 (1871) (Field, J., dissenting). In this brief, however, the Institute follows this Court's current precedent and focuses on the Fifth Amendment as incorporated by the Fourteenth.

## II. The Public Use Clause Requires that Taken Property Be Owned or Controlled by the Public.

### A. The Plain Meaning of "Public Use" Requires that the Public Use the Property It Takes.

Strictly as a matter of plain textual meaning, "public use" of property means government ownership of, or government control over the employment of, the property. This definition most closely approximates the plain meanings of the terms "public" and "use" when the Fifth Amendment was proposed and ratified.

At that time, the primary definition of the adjective "public" was "belonging to a state or nation; not private." 2 Samuel Johnson, A Dictionary of the English Language (8th ed. 1786). The primary meaning of "use" as a noun was "the act of employing any thing to any purpose." *Id.* This definition tracked the primary meaning of "use" as a verb: "to employ to any purpose." *Id.* Although the term "use" sometimes meant "convenience" or "help," *id.*, this was merely a secondary meaning, not the most common meaning of the word. Adopting the definition that did most closely approximate the primary meaning of "use," the phrase "public use" requires the government to *employ* the asset in question, and do so for *ends chosen by the government*. Equally important, this phrase has a meaning conceived in opposition to and in exclusion of "private use," which occurs when a private owner employs the asset, and does so for ends she chooses on her own without state supervision or control.

### B. The Structure of the Constitution Confirms that the Public Must Use the Property It Takes.

Furthermore, the Constitution's structure virtually requires what plain meaning analysis strongly suggests. On the one hand, the Constitution employs the term "use" consistently with its primary meaning: "employment for one's own purpose." Article I, section 10 anticipates that certain



state taxes "shall be for the Use of the Treasury of the United States." U.S. Const. Art. I, § 10, cl. 2. The U.S. Treasury is clearly meant to "use"—to own or direct the employment of—the tax levies. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531, 542 (1995). *Accord* U.S. Const. Art. I, § 8, cl. 12 (restraining "appropriation[s] of money to th[e] *use*" of supporting armies) (emphasis added).

On the other hand, the Constitution's structure makes it extremely awkward for the term "use" to mean "usefulness," "convenience," or "benefit" in the context of the Public Use Clause. If "public use" had such a broad meaning, the Public Use Clause might actually broaden rather than limit the eminent domain power implied in the Necessary and Proper Clause of Article I, section 8—when the very purpose of the Fifth Amendment, as with the other provisions of the Bill of Rights, was to clarify limits on the exercise of powers already granted.

Congress gets whatever eminent domain power it has from the Necessary and Proper Clause, *not* the Fifth Amendment. This Court appreciated that fact full well in the case of *Kohl v. United States*, 91 U.S. 367 (1875), which upheld Congress's power to take property within State boundaries for its enumerated ends. *Kohl* involved a taking to establish a post office and other federal offices in Cincinnati. As this Court recognized, Congress could use eminent domain to promote its enumerated postal power "so far as is *necessary* to the enjoyment of the powers conferred upon [Congress] by the Constitution." *Kohl*, 91 U.S. at 372 (emphasis added). Correctly, this Court also recognized that the Fifth Amendment does *not* confer to Congress any power of eminent domain. To the contrary, that Amendment provides only an "implied recognition" of the eminent domain power "beyond what may justly be implied from the express grants" in the Necessary and Proper Clause and Congress's enumerated powers. *Id.* Therefore, as a matter of original meaning and structure, the limitations of the Public Use Clause never ap-

plied unless and until Congress had already determined that eminent domain was publicly "necessary" pursuant to the Necessary and Proper Clause.[3]

The Institute maintains that the term "necessary" requires that a law have a "direct, obvious, and precise connection" to the enumerated end that it is supposed to further. Gary Lawson, *Making a Federal Case out of It*, 2003-04 Cato S. Ct. Rev. 119, 151. To be sure, this Court has construed the term somewhat more loosely—in Marshall's definition, "'needful,' 'requisite,' 'essential,' 'conducive to,'" or "most advantageously effect the object to be accomplished." *M'Culloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 413 (U.S. 1819). But under either reading, the term "necessary" incorporates the requirement that a condemnation be useful.[4]

The Fifth Amendment's Takings Clause was clearly meant as a limitation on the eminent domain power, with two components: The taking had to be for "public use," and "just compensation" was required. If "public use" were synony-

[3] A similar relation applies between the States' sovereign powers and the Fourteenth Amendment. As *Kohl* explained, as a basic principle of international law, States enjoy the power of eminent domain by "political necessity; and [the eminent domain power] is inseparable from sovereignty, unless denied to [a State] by its fundamental law," specifically by its constitution. 91 U.S. at 371-72. The Fourteenth Amendment then imposes a separate public-use limitation on the States as the Fifth Amendment does on Congress.

[4] Gary Lawson and Patricia Granger maintain that the word "proper" also limits Congress's ability to utilize the eminent domain power as a means to enumerated ends; takings for private use, or uncompensated takings for public use, would simply not be "proper" in a government designed to protect unalienable rights. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993); *cf. Printz v. United States*, 521 U.S. 898, 924 (1997). Under this reading, both components of the Fifth Amendment's Takings Clause simply make *explicit* the limitations that were already *implicit* in the Necessary and Proper Clause. The Institute finds much to recommend this view.



mous with "public purpose," the Clause would cease to limit the power already implied in the Necessary and Proper Clause. In other words, the "Public Use" phrase would become, in Chief Justice Marshall's words, "mere surplusage." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (U.S. 1803). It would simply parrot what the Necessary and Proper Clause already says when it authorizes Congress to make all laws "*necessary* and proper for carrying into execution" the federal government's power. U.S. Const. Art. I, § 8, cl. 18 (emphasis added).

### C. The Original Meaning of "Public Use" Confirms that the Public Must Use the Property It Takes.

Moreover, the development of eminent domain law explains why the Public Use Clause requires that the public really "use" the property it takes. In republics dedicated to the social compact, the only way to make a citizen sacrifice his property rights is to guarantee that the sacrifice goes to the "public." The social compact treats citizens as partners. It can require that they yield their possessions for public purposes, but only on the proviso that they yield it to the entire partnership and not to any one partner.

The term "eminent domain" originated in the seventeenth century, with treatise writers who systematized European constitutional and international law. In 1625, Hugo Grotius explained that a monarch may:

> take away from his subjects [property] by the power of eminent domain. In order to do it by the power of eminent domain, first, the public welfare must require it, and, second, compensation must be made to the loser, if possible, from the public funds.

Hugo Grotius, *The Law of War And Peace* Vol. 2, Ch. XIV, § 7 (L. Loomis, trans., Walter J. Black 1949). Similarly, in 1673, Puffendorf wrote that "when urgent necessity of the state demands, any subject's property which the immediate

situation especially requires, can be seized and applied to public purposes." Samuel von Puffendorf, *Second Book on the Duty of Man and Citizen* 136 (Oceana Pub. 1964). In 1758, Emmerich de Vattel described this power as "[t]he right which belongs to the State, or to the sovereign, to make use of all property within the State for the public welfare in time of need." 1 Emmerich de Vattel, *The Law of Nations or The Principles of Natural Law* § 244 (James Brown Scott, ed., Carnegie Institute of Washington, 1916).

Grotius, Puffendorf, and Vattel all illustrate the early view: Eminent domain was an incident of sovereignty; it was associated with the prerogatives of kingship; and it was governed by some standard of necessity, phrased differently by different authors. *See* Sandefur, *supra*, at 571-72. Two points deserve mention. First, all of the treatise writers presupposed that the monarch would keep the property he took. Therefore, none of these writers confronted "public use" issues in considerable depth. Second, the treatise writers' views also explain why, in *Kohl*, this Court agreed that eminent domain was governed in part by a determination of public necessity. Grotius, Puffendorf, and Vattel were restating conclusions both of political theory and of international and constitutional law. The term "necessary" in the Sweeping Clause incorporated the international-law understanding of eminent domain by reference. *See Kohl*, 91 U.S. at 372.

Nevertheless, this sovereign understanding of eminent domain was heavily qualified in England, and then even more so in the United States. English and American authorities balked, as this Court has put it, at leaving "so potent a Hobbesian stick in the Lockean bundle" of property rights. *Palazzolo*, 533 U.S. at 627. Locke approved of eminent domain, but he warned that "[t]he Supreme Power cannot take from any man any part of his property without his own consent." John Locke, *Second Treatise on Government*, §§ 138-39 (Cambridge 1988). In Locke's understanding, and more generally the English understanding, "consent," or approval



by one's elected representative, subtly transferred the power of eminent domain from the monarch or executive to the legislature. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 552, 562-67 (1972). Later, in 1758, Thomas Rutherforth argued that this power:

> is not a right to take the whole or indeed any part of it from them causelessly or arbitrarily. The preservation of each man's property, is one of the ends which he proposed to himself in entering into civil society. But it is absurd to suppose, that he would give up the whole of his property for the sake of preserving it.

2 T. Rutherforth, *Institutes of Natural Law* 48 (1756).

These reservations led William Blackstone to describe the nerve of the public-use limitation and to attack a "purposive" understanding of eminent domain. In his *Commentaries*, Blackstone described private property as "[t]he third absolute right, inherent in every Englishman." 1 William Blackstone, *Commentaries on the Laws of England* 134 (Stanley Katz intro., 1979) (1765). Blackstone's emphasis on individual rights led him to construe the power of eminent domain narrowly:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more

> essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.

1 *id.* at 135.

Within that framework, Blackstone recognized a place for the power of eminent domain—as long as the property went to the state. He acknowledged that "the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce" in a condemnation. *Id.* But the legislature did so "[n]ot by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification." *Id.* When it did so, "*[t]he public is now considered as an individual*, treating with an individual for an exchange." *Id.* (emphasis added).

Blackstone's understanding of eminent domain left no room for the broad reading of "public usefulness," "purpose," or "advantage." He specifically rejected the idea that "the good of the individual ought to yield to that of the community." He specifically rejected the suggestion that any "public tribunal" could be the judge of what was "expedient" enough to strip a man of his property rights. Blackstone rejected these ideas because he conceived of the "public good" in social-compact terms. In these terms, the proper object of government is not to dole out land to whichever developers will contribute the most to the local economy—it is rather "the protection of every individual's private rights."

Similarly, Blackstone paved the way for the narrow reading of "public use." To contribute to the "public good" as conceived of in social-compact terms, the public needed to benefit from eminent domain as partners benefit when their partnership acquires property and uses it on their behalf. That is why Blackstone regarded "the public" during eminent domain "*as an individual*, treating with an individual for an exchange." 1 Blackstone, *supra*, at 135 (emphasis added). The term "public use" reduces to a term of art Blackstone's substantive requirement that the government take and em-



ploy private property in the same manner "as an individual" would.

The first state public use clauses all reflect these background commitments to social-compact theory. Thus, Pennsylvania's first post-Revolution Constitution declared that "government is, or ought to be, instituted for the common benefit, protection, and security of the people." Penn. Const. of 1776, art. V, *reprinted in* 2 Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1541 (1878). As to takings, the constitution proclaimed that "no part of a man's property can be justly taken from him, or applied to *public uses*, without his own consent, or that of his legal representatives." *Id.* art. VIII (emphasis added). Similarly, Virginia's Bill of Rights declared "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people," and specified that "all men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected . . . ." Virginia Bill of Rights of 1776, §§ 3, 6, *reprinted in* 2 Poore, *supra*, at 1908-09. *Accord* Del. Const. of 1792, art. I, § 8, *reprinted in* 1 Poore, *supra*, at 279; N.H. Const. of 1792, Part I, art. 10, *reprinted in* 2 Poore, at 1295.

Some of these provisions also reinforced the narrower understanding by using contrasting terms relating to public use with a broader idea of "public exigencies." For instance, Massachusetts' 1780 Bill of Rights provides that "[w]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, Part I, art. X, *reprinted in* 2 Poore, *supra*, at 958. Similarly, Article 2 of the Northwest Ordinance states that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." *An Ordinance for the Government of*

*the Territory of the United States Northwest of the River Ohio*, Art. 2, 1 Stat. 51, 53 n.a (July 13, 1787, re-enacted Aug. 7, 1789). The Massachusetts Bill of Rights contrasted "public exigencies" with "public uses"; the Northwest Ordinance contrasted the same phrase with "common preservation." Even if "public exigencies" may have impelled the government to condemn, "public uses" or the "common preservation" imposed separate substantive limitations on what governments could do with the properties they took.

The Institute is not aware of any primary source that explains how 1790s-era Americans understood public use limitations better than Supreme Court Justice William Patterson's circuit opinion in the case of *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dallas) 304 (C.C.D. Pa. 1795). To be sure, *Van Horne's Lessee* was decided after the ratification of the Fifth Amendment, it was decided under Pennsylvania law, and the narrow grounds for decision focused not on public use but on just compensation. Even so, Justice Patterson's sweeping opinion comprehensively explained the political theory behind public use constitutional guarantees. Thus, even if *Van Horne's Lessee* post-dates the Fifth Amendment by a few years, it is extremely revealing evidence as to the moral "common knowledge" that American jurists shared during the 1790's.

Patterson interpreted guarantees in Pennsylvania's constitution to lock in a commitment to protecting private property rights. He insisted that "[t]he preservation of property . . . is a primary object of the social compact" because "[n]o man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry." 2 U.S. (2 Dallas) at 310.

For Patterson, social compact theory laid down the principles that both justified and limited the State's power of eminent domain. On one hand, in a government pledged to securing the rights of every citizen, each citizen could in turn be required to sacrifice his property for the good of the



whole. "Every person ought to contribute his proportion for public purposes and public exigencies." *Id.* At the same time, if the government was going to exercise this power, it needed to do so on two conditions—that the owner receive "a recompence in value," and that the taking be "for the good *of the community*." *Id.* (emphasis added).

Patterson then reinforced the same point by explaining that takings guarantees protect owners from government actions "laying a burden upon an individual, which ought to be sustained by the society at large." *Id.* at 310. This Court still echoes Patterson's view, for it still holds that takings guarantees were "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Under either formulation, the implications for public use are quite clear: A "public use" occurs only when the "society at large" or the "public as a whole" acquires the property taken.

Justice Patterson also confirmed that constitutional takings guarantees were designed to limit a wide-ranging power of eminent domain. He recognized the continental or sovereign conception of eminent domain—he dryly called it "the despotic power." 2 U.S. (2 Dall.) at 311. He conceded that this power "of taking private property, when state necessity requires, exists in every government." *Id.* At the same time, in a republic dedicated to the social compact, this power needed to be circumscribed:

> It is . . . difficult to form a case, in which the necessity can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it.

*Id.*

In stark contrast, Chapter 132 of Connecticut's statutory code presumes that city officials may and should redistribute land in whatever way is most advantageous for their cities. Patterson insisted, though, that States' main business is to protect and enlarge the rights of their citizens to own and use their land for their own chosen purposes. "It is infinitely wiser and safer to risk some possible mischiefs," he warned, "than to vest in the legislature so unnecessary, dangerous, and enormous a power." *Van Horne's Lessee*, 2 U.S. (2 Dallas) at 312.

## III. Government Takes Property for a Public Use Only If the Government Retains Ownership or Assigns Ownership to a Regulated Common Carrier.

As a result, during and after the Founding, the term "public use" clearly signaled that the public controlled the property taken in a corporate sense, and it clearly precluded any general idea of "public usefulness," "purpose," or "advantage." To appreciate how to carry the former meaning into effect, this Court should look to the doctrines developed by American courts early in the nineteenth century. With exceptions in a few lines of doctrine, to be discussed in part IV, courts followed a simple three-part categorization: public ownership, public control of a common carrier, and pure private ownership. If a taking fell into one of the first two categories, it qualified as a public use; otherwise, it was for private use and therefore unconstitutional.

### A. The Government Takes Property For a Public Use When It Keeps Ownership of the Property.

Early American courts and commentators uniformly recognized that government takes property for a public use when it retains ownership of the property. In *Wellington, et al., Petitioners*, 16 Pick. 87 (Mass. 1834), for example, Massachusetts Supreme Court Chief Justice Lemuel Shaw upheld



the appropriation by the highway commissioners of land already owned by the public as a military training field. He explained that when the owners of the land granted it to the town of Cambridge in 1769, the town "became owners of the soil with full power, as such owners, to make any use of the property, which owners of land can make." *Id.* at 99. This Court confirmed the same understanding in *Kohl* when it approved of takings "for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, *and for other public uses*" (emphasis added). 91 U.S. at 371.

### B. The Government Takes Property for a Public Use When It Subjects a Private Recipient to Common Carrier Regulation.

Early courts recognized limited circumstances in which governments could take private property and turn it over to private owners—transfers to common carriers with a duty of access to the public. The public's right of access ensures that the public "uses" the property even though a private delegate happens to own the property.

This exception is best explained in *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45 (N.Y. Ch. 1831). In *Beekman*, Chancellor Williams upheld the use of eminent domain for the construction of a private railroad. As a beneficiary of a state taking, and as an entity providing a service normally provided by the government, the railroad owed the public a duty of non-discrimination, and it was subject to utility rate regulation:

> The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may regulate the franchise and limit the amount of the tolls....

*Id.* at 75. Other cases applied this common-carrier public right of access to distinguish between roads taken for public and private uses. *See* John Lewis, *A Treatise on the Law of Eminent Domain* § 158 (1st ed. 1888) (citing cases).

### C. The Government Takes Property for a Private Use When It Transfers Property to a Private Owner Without Common Carrier Duties.

By contrast, when the government redistributed private property from one private owner to another without establishing common carrier duties, it violated public use principles. Justice Chase, in the case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), regarded "a law that takes property from A. and gives it to B" as offensive in principle as an *ex post facto* law or a law altering contracts. *Id.* at 388. This motif quickly became a poster child for the worst sort of constitutional violation. In 1829, Justice Story wrote for this Court:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.

*Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829). Such a law, Story explained, was pernicious for "subverting the great principles of republican liberty, and the social compact." *Id.* at 647.

Thus, long after the ratification of the Public Use Clause, courts routinely rejected—in extremely strong language—the proposition that legislatures could redistribute land between private parties. *See, e.g., Den ex. dem. Robinson v. Barfield*, 6 N.C. 391, 421 (N.C. 1818) ("[N]ecessity can never demand that the lands of A. shall be taken and given to B."); *Arrowsmith v. Burlingim*, 1 F. Cas. 1187, 1189 (C.C.D. Ill.



1848) ("Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation"); *Jordan v. Woodward*, 40 Me. 317, 323 (1855) ("The private property of one citizen cannot be taken and given to another citizen, for private uses."); *Nesbitt v. Trumbo*, 39 Ill. 110, 114 (1866) ("private property cannot be constitutionally condemned and appropriated by the legislature to private uses").

In short, for most of America's history, courts consistently warned that the power to redistribute property from one private party to another "would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state." *Buckingham v. Smith*, 10 Ohio 288, 297 (1840).

### D. Sound Doctrine Keeps Separate the Issues of "Public Use" and "Public Purpose."

These early state precedents are also revealing because courts kept the question whether the government takes for an acceptable public purpose entirely separate from the question whether it takes for a public use. The public-purpose inquiry presented a political question committed entirely to the legislature. Public use, by contrast, presented a pure question of law, without any standards of review or deference. Thus, when New York equity Chancellor Walworth "den[ied] to the legislative power the right thus to take private property for the mere purpose of transferring to another," he admitted "that [the legislature] are the sole judges . . . as to the exercising the right of *eminent domain* for the purposes of making public improvements." *Varick v. Smith*, 5 Paige Ch. Rep. 136, 159-60 (N.Y. Chn. 1835). In his influential *Commentaries*, Chancellor Kent explained that while "it undoubtedly must rest in the wisdom of the legislature to determine when public uses require the assumption of private property," still

"if they should take it for a purpose not of a public nature . . . the law would be unconstitutional and void." 2 James Kent, *Commentaries on American Law* 276 (1st ed. 1827). *See also Tyler v. Beacher*, 44 Vt. 648, 651 (1871); *Loughbridge v. Harris*, 42 Ga. 500, 504-05 (1871); *Harris v. Thompson*, 9 Barb. 350, 362 (N.Y. Supr. Ct. 1850); Lewis, *supra*, § 158.

This distinction makes perfect sense if one recalls that public use ideas developed as a limitation on eminent domain separate from the eminent domain power itself. Legally, courts had few if any standards to second-guess whether a taking would promote sound public policy, but they had a simple and rule-bound test to execute the corporate understanding of "public use." Substantively, since eminent domain was an attribute of state sovereignty, it made sense for courts to leave alone the decision whether eminent domain would promote a public purpose. But the public use question was totally different. *That* was a limitation created to stop American legislatures from assuming the worst tendencies of European despots. European kings might take their subjects' property whenever they happened to think it convenient. But republican representatives needed to be reminded that they could only condemn their constituents' property to pursue projects from which *all* of their constituents would benefit.

As a result, in most lines of precedent over the nineteenth century, state courts thought it was anathema to conflate the questions of public purpose and public use. As a New York judge explained in *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 60 (N.Y. 1837) (opinion of Tracy, Sen.):

> When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property[?]



## IV. The Public Use Clause Does Not Permit Condemnations Simply Because the Government Finds It Useful or Advantageous to Redistribute Private Property.

### A. Why This and Other Courts Mistakenly Conflated "Public Use" with "Public Purpose"

Modern law, however, has mistakenly ignored the requirement that the public actually use, own, or control the property it takes. Instead, the law now comes near to treating the term "public use" as synonymous with "public usefulness," "purpose," or "advantage." This unfortunate shift has doctrinal roots in mill-act cases and other nineteenth-century cases. *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Ore. L. Rev. 203, 204-25 (1978). But the main reason for the shift was theoretical—the rise of Progressive political theory and Legal Realist legal theory at the beginning of the twentieth century. As Progressive historian Charles Merriam explained, by 1924 individual property rights no longer barred the way to statist Progressive government: "The question is now one of expediency rather than of principle." Charles Merriam, *A History of American Political Theories* 322 (1924).

Broad *obiter dicta* in this Court's decision in *Berman v. Parker* brought Merriam's notion of "expediency" into this Court's public use doctrine. 348 U.S. 25 (1954). *Berman* upheld a law that allowed local authorities to condemn "blighted" land. *See id.* at 28-29. In his opinion for the Court, Legal Realist Justice William O. Douglas treated the blight laws as exercises of the police power. Douglas treated the questions of public use and of police power both as questions about "the public interest," which he defined as "essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." *Id.* at 32. Douglas went out of his way to encourage local governments to redistribute property: "The public end may be as well or

better served through an agency of private enterprise than through a department of government." *Id.* at 33-34.

### B. The Plain and Original Meaning of "Public Use" Must Not Be Conflated with the Police Power or with Any Open-Ended Notion of Public Purpose.

While *Berman*'s specific findings about blight are not at issue in this case, the case's broader statements about eminent domain have misguided state and federal courts for more than half a century. This Court's most recent pronouncement on public use, *Hawaii Housing Authority v. Midkiff*, cited *Berman* to say that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. 229, 240 (1984). To uphold the law under challenge, which cited so-called "oligopoly" concerns to redistribute land from owners to their tenants, *Midkiff* drew from *Berman* that governments may redistribute property from one private owner to another whenever "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Id.* at 241. Similarly, in the case below, the Connecticut Supreme Court followed the trend of many state courts and hailed *Berman* as a metaphor for a "broad, purposive view of eminent domain." 843 A.2d at 525.

This "public purpose" view, however, is antithetical to the Constitution. It squashes into one flat and statist utilitarian calculus several constitutional powers that are substantively distinct. To begin with, as Part II explained, *Berman*'s understanding confuses a notion of sovereign advantage with the plain and original meaning of "public use." The Framers were well aware of the broad view of "public purpose." They learned it when they learned about the foundations of eminent domain in the treatises of Grotius, Puffendorf, and Vattel. The Framers would not have instituted public use guarantees if they had not wanted to *limit* that monarchical conception of eminent domain.



Justice Douglas broke with the Framers' understanding, however, for reasons shared by most Progressives and Legal Realists: He assumed that modern democratic majorities would not be as tyrannical as kings—at least, not when they were supervised by expert planners trained by the Progressives and Legal Realists. "[W]hen the legislature has spoken," he insisted, "the public interest is well-nigh conclusive." *Berman*, 348 U.S. at 32. When the legislature's "authorized agencies" implement the legislature's edict, "there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33. But as Justice Patterson warned in *Van Horne's Lessee*, public use guarantees codified a much more pessimistic understanding of democracy and government:

> The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and not further. Not a particle of it should be shaken; not a pebble of it should be removed. . Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent . . . . Where is the security, where is the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?

2 U.S. (2 Dall.) at 311-12.

Justice Douglas then compounded his error in *Berman* by confusing both public purpose and public use with a third, distinct concept—the police power, or the power to "regulate." Here Justice Douglas read a huge anachronism into the Constitution. He assumed that the police power could promote a wide range of "purposes neither abstractly nor historically capable of complete definition." *Berman*, 348 U.S. at 32. Douglas, like other Legal Realists, assumed that legislators could write "regulations" to promote virtually any conception of the public interest that any local combination of voters and experts happened to choose.

This view has no support in the Constitution's original meaning. In the Framers' view, majorities and experts do not create citizens' rights. To the contrary—individuals are entitled to their inalienable rights as soon as they are created, and majorities and experts act tyrannically unless they use their power to secure those inalienable rights. "Regulations" are therefore positive laws that mark off, protect, and encourage people to exercise the substance of their inalienable rights. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 944-60 (1992)).

This natural law understanding of "regulation" deeply penetrates the Constitution's design. In Randy E. Barnett's restatement, whenever the Constitution uses the term "regulate," the term means something close to the definition "to make regular"—or "to recognize, protect, and encourage." *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001); *see also* John Adams Wettergreen, *Capitalism, Socialism, and Constitutionalism*, in To Secure the Blessings of Liberty: First Principles of the Constitution 244, 254-58 (Sarah Baumgartner Thurow ed., 1988); Claeys, *supra*, at 1553-54.

No surprise, then, that Douglas's view of the police power has no support in the plain meaning of the Constitution. As a textual matter, the police power has nothing to do with the Public Use Clause; it is the flip side of the Takings Clause: "Nor shall private property be taken." U.S. Const. amend. V. Like many other Bill of Rights guarantees, the idea of a "taking" quietly excludes police "regulation." For example, the Second Amendment protects the people from "infringements" of the right to bear arms even as it speaks of a "well regulated militia." U.S. Const. amend. II. The contrast makes no sense unless "infringements" tacitly exclude sound "regulations"—laws that codify the natural right to bear arms, encourage its free exercise, and prevent abuses of the right. "Infringements" are positive laws that restrain the



right to bear arms for purposes not related to these specific ends. What is explicit in the Second Amendment is implicit in many other terms of art throughout the Bill of Rights, including "abridging" free speech and having property "taken." U.S. Const. amends. I, V; *see also* Barnett, *supra*, at 141-42; Claeys, *Natural Property Rights*, *supra*, at 1664-65; Hamburger, *supra*, at 948-53.

If one understands the Constitution as the Framers did, Justice Douglas's opinion in *Berman* totally confounded the law of takings. It merges into one inquiry what are really three separate issues: "public purpose," "police regulation," and "public use." First, the question whether a condemnation promotes a public purpose is irrelevant to takings law. This question is relevant to whether the condemnation is necessary under the Necessary and Proper Clause or under a state constitution, but it has no place in Fifth Amendment analysis. *See supra* parts II.B, III.D. Second, the question whether a condemnation is a police regulation is then relevant to whether the condemnation is a taking at all, not whether it is a taking for public use. A law may condemn property on the ground of "regulating" it if, under principles of intermediate scrutiny, the condemnation either directly prevents a real threat to the public or secures affected owners an average reciprocity of advantage. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *see also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 107-45, 195-215 (1985); Claeys, *supra*, at 1570-1604, 1618-26.

Finally, if the condemnation does not pass muster intermediate-scrutiny principles of police "regulation," it restrains property rights more than necessary to regulate and is therefore a taking. The Public Use Clause then controls. Such a condemnation must pass muster, if at all, under the principles about public ownership and common carriers set forth in parts II and III above. Neither the Takings Clause nor the Public Use Clause is an escape hatch to encourage govern-

ments to redistribute their constituents' lands whenever officials happen to find it expedient to do so.

### C. The Original Meaning of the Fifth Amendment Can Resolve the Most Vexing Public Use Cases.

The best way to appreciate these principles in action is to consider how they apply to constitutional challenges to mill acts. Now, not all courts and cases handled the mill acts correctly, as the court below confirmed when it cited *Olmstead v. Camp*, 33 Conn. 532 (1866), for its "deferential approach to legislative declarations of public use." *Kelo*, 843 A.2d at 523. At the same time, these erroneous cases are not as numerous and uniform as is commonly supposed. Many courts did approach these cases correctly, respecting the principled distinctions between public purpose, police regulation, and eminent domain. The better-reasoned mill act cases confirm that many courts appreciated and conscientiously applied the original and narrow meaning of "public use" even to mill dams. They also illustrate how sound doctrine can decide even the hardest public use cases.

First, most cases kept questions about public purpose and sovereignty out of takings analysis. As one court recognized, "the eminent domain of the Sovereign Power, extends to the taking of private property." *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 264 (1828). *See also Harding v. Goodlett*, 3 Yerg. 33, 42 (Tenn. 1832) (citing Vattel).

Second, courts knew how to apply sound public use principles to mill acts that condemned property under the eminent domain power and not the police power. Many courts conscientiously held the condemnations to the literal meaning of "public use." Since mill acts did not keep mills and mill dams in public hands, to survive public use challenge these acts needed to convert the private dams and mills into common carriers. Otherwise, courts declared the condemnations unconstitutional takings for private use. *See, e.g., Blair v. Cuming County*, 111 U.S. 363, 371-73 (1884); *Tyler*, 44 Vt. at 652-56; *Loughbridge*, 42 Ga. at 503-05; *Harding*, 3 Yerg. at 43-44; *Crenshaw*, 27 Va. at 264-65.



Third, however, when legislatures followed a police "regulation" model instead of an eminent domain model, this Court and others knew how to switch from the public use principles explained in parts II and III to the regime of intermediate scrutiny that comes with regulatory takings analysis. The great economic benefits generated by mills did not justify regulation by themselves. Nor could it be said that mill acts controlled any recognizable nuisance or other harm. Riparians did not "injure" anyone merely by refusing to sell out to the owner who wanted to build a dam and mill.

However, mill acts could be written to "regulate" to secure the affected riparians an "average reciprocity of advantage." *Pennsylvania Coal Co.*, 260 U.S. at 415. That is because mill acts resolved an extraordinary problem associated with riparian rights. When it comes to dry land, states may hardly ever use "regulation" to condemn or occupy land without taking it. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Riparian land is different because riparian rights are correlative—less exclusive and more interdependent than the rights associated with dry land. This fact has been appreciated in American law since colonial times. While Blackstone described property as a "sole and despotic dominion," he recognized that "some few things . . . must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had"—specifically including "the elements of light, air, and water." 2 Blackstone, *supra*, at 2, 14.

Because riparian rights remain "in common" in an important sense, they create a need and justification to "regulate" disputes much as equitable principles of partition regulate the break-ups of tenancies in common. Rather than be forced to continue cooperating with each other, the owners of joint property often find it more convenient to cash out their joint interests and partition their co-tenancy into individually-

owned properties. Sound partition laws may "regulate" these cash-outs even though they seem to redistribute private property. To count as regulations, however, such laws need to respect the principles of equity that guide partitions. To secure owners an average reciprocity of advantage—to make sure that joint owners do not suffer a net loss of rights in the transfer from joint to individual property—partitions must pay ousted owners compensation proportional to the rights they lose. *See* Epstein, *supra*, at 170-75.

This Court upheld a New Hampshire mill act on this joint-property partition model in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). The challenged law instructed dam-builders to pay the owners ousted not only damages but also an extra fifty percent of damages. *See id.* at 10-11 & n.1. This Court approved of the act as "regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed." *Id.* at 21. The Court specifically analogized to "equitable compensation" in partition proceedings. *See id.*; *see also Fiske v. Framingham Mfg. Co.*, 29 Mass. (12 Pick.) 68, 70-72 (1832). The act passed muster for two reasons: First, it was fair to presume the owners gained some advantage from exchanging water rights that they could not enjoy exclusively for money that they could enjoy exclusively. Next, and even more important, the law ensured that ousted owners were paid a reasonable approximation of "equitable compensation"—one and a half times the value of their land. (Of course, neither claim could be made about the condemnations at issue here).

### D. *Berman* Should Be Limited to Make Clear That the Public Use Clause Is Not Interchangeable with the Police Power or Any Public Purpose.

Needless to say, *Berman*, *Midkiff*, and similar state cases have caused the law to drift far from the original understanding of the Public Use Clause. The Court should therefore



question the passages in these cases that conflate public use, public purpose, and the police power.

At the same time, the Institute understands that *stare decisis* principles may counsel against repudiating *Berman* and *Midkiff* entirely. But the Court need not overrule *Berman* or *Midkiff* to hold for petitioners. There are at least three ways to limit the extreme aspects of these cases. First, neither case is anywhere as extreme as this case. Neither allows a state to pretend that it is merely "regulating" land when it redistributes land from one private owner to another for mere economic advantage. *Berman* had at least some connection to a ground for exercising the police power, namely controlling local crime and disorder. *See* 346 U.S. at 32. Similarly, *Midkiff* had at least some connection to antitrust problems in local land markets. *See* 467 U.S. at 241-42. Section 8-193 of Connecticut's statutory code, however, highlights a new trend, "municipal development" laws that give local governments free license to redistribute land without statutory guidance. Such laws exceed even the extremely deferential rational basis principles of *Berman* and *Midkiff*.

Second, in other cases that have tested the police power, this Court has asked whether the so-called regulation under challenge enforces limitations that "background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). As *Head* suggested, 113 U.S. at 22-26, there may be background principles for rearranging riparian rights under equitable principles of partition, and perhaps *Berman* and *Midkiff* identify other such principles. No such principles, however, allow dry land to be redistributed to businesses for mere local economic advantage.

Finally, this Court could harmonize its public-use case law with its exactions case law. When a State or municipality tries to evade takings requirements by "exacting" land under the guise of the police power, this Court requires the government to show that there is a factually-demonstrable

need for the exaction and that the exaction is roughly proportional to the need. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). This Court could apply the same intermediate-scrutiny principles when governments try to evade public-use requirements under the guise of the police power. *See* Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003). Most so-called "municipal development" condemnations cannot pass muster under this standard.

## V. The City of New London Unconstitutionally Took Kelo's Private Property for Developers' Private Uses.

The condemnations of Kelo's and the other petitioners' property were therefore unconstitutional. Judged as an exercise of eminent domain, New London's takings violated the original meaning of the Public Use Clause. New London did not keep the condemned lots under public ownership. Nor did the city impose any common carrier duties of access or rate regulation on those developers. New London simply took the property of A and transferred it to B—a classic violation of the Public Use Clause.

Nor can New London cite the police power as a backdoor justification for these private takings. New London's actions go beyond any precedent this Court has cited to justify property redistribution under the police power. Kelo and the other petitioners were not "harming" their neighbors in any meaningful sense of the word. Pure and simple, the city is redistributing the petitioners' lots to developers to generate perceived secondary local economic benefits. Judged under any standard, that transfer is not a police regulation but a taking. Judged as a taking, the transfer is for private use and runs afoul of the original meaning of the Public Use Clause.

## CONCLUSION

The Claremont Institute respectfully requests that the judgment of the Supreme Court of Connecticut be reversed.

Respectfully submitted,

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No. 04-108

IN THE

# Supreme Court of the United States

SUSETTE KELO, *et al.*,

*Petitioners,*

v.

CITY OF NEW LONDON and
NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT**

## BRIEF OF *AMICI CURIAE* CONNECTICUT CONFERENCE OF MUNICIPALITIES AND THE STATE MUNICIPAL LEAGUES OF ALABAMA; ARKANSAS; CALIFORNIA; COLORADO; FLORIDA; GEORGIA; ILLINOIS; INDIANA; IOWA; KANSAS; KENTUCKY; LOUISIANA; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; MISSOURI; NEW HAMPSHIRE; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH CAROLINA; OHIO; OKLAHOMA; PENNSYLVANIA; RHODE ISLAND; SOUTH CAROLINA; SOUTH DAKOTA; TEXAS; WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICI CURIAE

The Connecticut Conference of Municipalities ("CCM") is Connecticut's association of cities and towns.[1] Its 142 member municipalities comprise over 91 percent of the state's population, including the City of New London (the "City" or "New London"). CCM's mission is to meet the evolving needs of local governments. CCM represents municipalities at the Connecticut General Assembly, before state agencies, and in the courts. CCM is governed by a board of directors elected by member municipalities, with due consideration to geographical representation, representation of municipalities of different sizes, and a balance of political parties.

The 31 other state municipal leagues identified in the Appendix also join this brief. The amici state municipal leagues have an intimate knowledge of the shared interests of the cities and towns in their respective states, and thus are able to assist the Court in understanding the significance of this case.

## SUMMARY OF ARGUMENT

For the past half-century, New London and other Connecticut cities have been declining, and efforts to revive them have struggled due in large part to the scarcity of developable urban land. Recognizing this problem, the State of Connecticut empowered its municipalities to use eminent domain to assemble urban lands into unified parcels situated and sized to foster economic growth, based on a legislative finding that the market itself was incapable of doing so. The source of this power is a state statute that was crafted especially to aid economically distressed municipalities like New London, an ageing city with little developable land that has seen

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1. No counsel for a party authored this brief in whole or in part and no person or entity, other than the amici curiae, their members or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents for the filing of amicus briefs with the Clerk of the Court.

its population shrink and its businesses relocate to the suburbs during the past few decades.

New London's experience in this case exemplifies the Connecticut legislature's finding that the assembly of urban lands needed for economic growth "often cannot be accomplished through the ordinary operations of private enterprise." Conn. Gen. Stat. § 8-186. Acting in accordance with Connecticut's statute, the City in 1998 sought to capitalize on the plans of a multinational corporation to build the first major new industrial development in New London in more than a century. Specifically, the City sought to assemble a jigsaw puzzle of 115 properties in a 90-acre, commercial and industrial-zoned area adjacent to the corporate site (the "Fort Trumbull area") in order to attract businesses that would complement the new project and generate sorely needed jobs and property tax revenues for the City. Most of the properties in the Fort Trumbull area were in poor condition, and the lots were far too small individually to accommodate such businesses. Except for petitioners, all the landowners in the area agreed to sell their properties to the City, in accordance with a growth plan that had been aired in duly noticed public hearings and approved by the City's elected officials and state agencies. But the petitioners, who own fifteen unconnected properties that are necessary to develop the Fort Trumbull area, have refused to sell and have thereby prevented the City from completing the land assembly called for by the statutory plan.

The assembly of urban lands for economic growth is a "public use," as it eliminates the accretion of small parcels that has acted to hinder older cities like New London from competing in the market for economic development projects. It advances the same public policies of consolidating lands and correcting market failures that this Court approved in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). As such, it plainly falls within the police powers of the State of Connecticut, which has determined that



its municipalities need the power to assemble lands to create developable urban parcels that the market itself has been unable to supply. Mindful of the states' greater familiarity with local land conditions, this Court has been properly loath to disturb such determinations. To the contrary, it has sensibly applied the Public Use Clause in a way that gives broad leash to experimentation in the laboratories of the states, and it should reaffirm that federalist tradition in this case.

Further, this Court should avoid imposing the unsupported and unworkable restrictions on eminent domain that the petitioners offer as an alternative argument. A "reasonable certainty" test is not appropriate in this case, because ongoing state oversight of the development plan and Connecticut's record of carrying out successful development projects provide sufficient assurances that the planned economic development will be implemented. In addition, the petitioners' proposed test fails to take account of the challenges facing cities seeking to attract developers to urban lands and would stifle economic development in the places that need it most.

## ARGUMENT

### I. The Scarcity of Developable Land Has Stymied the Economic Revival of Connecticut Cities.

The rise and decline of Connecticut cities is a familiar story. Founded by the early colonists on small areas of land, cities like New London grew into booming manufacturing centers and bustling seaports by the middle of the nineteenth century. During the second half of the twentieth century, however, they withered, as people and businesses flocked to the suburbs, leaving behind vacant buildings, poor populations, and crime-ridden streets. This well-worn tale of "old economy" cities has taken an especially cruel twist in Connecticut. For just beyond the borders of these declining cities lie some of the wealthiest suburbs in the nation – towns

with excellent public schools, green space, and developable land that continue to attract new residential and commercial development. In Connecticut a deep gulf spans a short distance between the "haves" and the "have-nots."[2]

Efforts to reverse the past few decades of urban decline have met with mixed success, in part because Connecticut cities suffer from a distinct disadvantage vis-à-vis their wealthier suburban neighbors in the competition to attract economic development: a scarcity of developable land.[3] Designed by the early colonists, Connecticut's cities occupy small land areas that have undergone centuries of development, leaving a collection of small and irregular lots that are ill-suited for corporate campuses, shopping centers, industrial and research parks, convention centers, and other modern development projects. Connecticut's urban redevelopment statute expressly recognizes the checkered pattern left by centuries of urban development; it authorizes redevelopment agencies to condemn not only urban land that is "blighted" but also bordering parcels that, though not blighted, are "essential to complete an adequate unit of development." Conn. Gen. Stat. §§ 8-125, 8-128. In the suburbs, by contrast, lot sizes are larger and undeveloped

2. Paul Zielbauer, "Poverty in a Land of Plenty: Can Hartford Ever Recover?" The New York Times, August 26, 2002 at A1 ("Connecticut . . . has the nation's highest per capita income but also has a split-level economy of affluent suburbs and almost universally floundering cities.").

3. "Bridgeport Economic Prospects Seen Weak," Connecticut Post, April 6, 2003 (main obstacle to development in Bridgeport is lack of "development-ready land") Comprehensive Plan of Development, New Haven, Connecticut, available at *http://www-.cityofnewhaven.com/govt/gov28.htm#Comprehensive%20Plan* ("[T]he lack of available land will impair economic development. . . ."); Plan for Development City of Hartford, Connecticut, Introduction, available at *http://www.hartford.gov/-housing/temp/planofde.pdf* ("[t]here is a shortage of large assemblage of land for commercial and industrial uses.").



land remains available, making it much easier to find parcels suited to modern development projects.[4]

New London has unfortunately played a starring role in the story of urban decline in Connecticut, and exemplifies the land assembly problem that older cities face as they struggle to capture some of the "new economy" growth that has swirled around them. Few Connecticut cities have suffered a more dramatic reversal of fortune than New London. (Mem. Dec. at 86-88.) Incorporated in 1648, New London grew into the second busiest whaling port in the world by the middle of the nineteenth century.[5] By the 1990s, however, New London had a declining population, the worst unemployment in its region, and dismal building vacancy rates, all of which prompted the State to designate it a "distressed municipality." (J.A. at 239.)

As the second smallest (by area) and sixth most densely populated of Connecticut's 169 cities and towns, New London also has precious little developable land with which to revive its economy.[6] The city sits on 5.79 square miles of land that has been divided and subdivided by successive waves of development and currently hosts over 11,900 housing units.[7] New London's land is spread among a patchwork of residential,

4. The suburbs of New Canaan, Avon, and Stonington occupy 22.5, 23.4, and 39.1 square miles, respectively. Each includes 328, 146, and 97 "barren" acres, 7,784, 2,919, and 4,643 agricultural acres, and 4,447, 9,780, and 14,158 forested acres, respectively. By contrast, New London occupies 5.79 square miles and has 11 "barren" acres, 378 agricultural acres, and 426 forested acres. "Table 5.6 – Connecticut Land Use By Town, 1997" available at *http://www.ct.gov/ecd/cwp/view.asp?a=1106&Q=251002&ecdNav=|*.

5. Tom Condon, "My Kind of Town," The Hartford Courant, Northeast, August 2, 1998; Robert Owen Decker, *The Whaling City* 76 (1976).

6. *See* Mem. Dec. at 87 ("New London is a small city with relatively little open land to develop."); J.A. 93; New London's population density is 4,798 persons per square mile. CT Ofc. of Policy & Mgmt., *Municipal Fiscal Indicators*, 2002.

7. J.A. at 91, 313; Gregory N. Stone, *The Day Paper: The Story of One of America's Last Independent Newspapers* 278-92 (2000).

commercial, and industrial uses and generally consists of small lots not suitable for the kind of economic development that has fueled growth in suburban areas. As of 1997, only 11 of its 3,979 acres were undeveloped.[8] In addition, although local property taxes are the principal source of funding for most Connecticut municipalities, 54 percent of New London's land is tax-exempt. (J.A. 91.) Its effective property tax rate is 3.5 times and 2 times as high, respectively, as that of the adjoining towns of Waterford and Groton. The lack of developable land in New London has hindered its efforts to compete with the suburbs for economic development and has stood in the way of its revival.[9]

The 90-acre Fort Trumbull area bears the imprint of centuries of hybrid urban development in a small city. It consists of 115 parcels of varying sizes devoted to residential, commercial and other uses, including a series of small residential parcels. The residential properties owned by the petitioners, for example, range in size from .04 acres to .29 acres, and are sprinkled throughout Parcels 3 and 4A of the "project area."[10] While the petitioners' properties themselves are in "fine condition," many of the adjacent properties are in "poor shape," suffer from "disinvestment and owner neglect," have high vacancy rates, generate "low" tax revenue, and generally "contribut[e] to a sawtooth visual impression in the various

8. "Table 5.6 – CT Land Use By Town, 1997" available at *http://www.ct.gov/ecd/cwp/view.asp?-a=1106&Q=251002&ecdNav=* (showing eleven acres in New London as "barren"); J.A. 196.

9. Condon, *supra* ("Without much land, and with more than half of it off the grand list for one reason or another, [raising property tax revenue to pay for social services] was increasingly difficult."); Stone, *The Day Paper* 375-76 (describing adverse impact to New London of opening of Crystal Mall in neighboring suburb).

10. *See* map in appendix. The lot sizes of some of the petitioners' properties are as follows: Susette Kelo, 8 East Street: .04 acres; Wilhelmina and Charles Dery, 87 Walbach Street: .29 acres; William Von Winkle, 31 Smith Street: .09 acres; James Guretsky, 19 Smith Street: .15 acres. Available at *http://data.vision-appraisal.com/newlondonct.*



blocks." (Mem. Dec. at 87-88; J.A. at 321-23.) Almost the entire Fort Trumbull area, including all of the area containing the petitioners' properties, has for decades been zoned for commercial and light industrial use. (J.A. 113-16, 288-91.)

## II. Connecticut Has Reasonably Determined That Its Cities Need the Power to Assemble Land For Economic Growth.

### A. *Connecticut's Legislature Recognized That the Market Cannot Adequately Supply the Cities' Need for Developable Land.*

The General Assembly's concern for the problem of scarce developable urban land is apparent from the text of Chapter 132, which authorized the City's use of eminent domain in this case. Conn. Gen. Stat. §§ 8-186 – 8-200. The statute opens with legislative findings that the "acquisition and improvement" of land needed for economic development "often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost," and that aiding municipalities to acquire "unified land . . . areas" for economic development is a "public use[] and purpose[] for which public moneys may be expended." *Id.* § 8-186. The trial court found that the term "unified land area" is a "word of art" in the planning field, and means "an assemblage of parcels into one land parcel." (Mem. Dec. at 128-29.) As the trial court concluded, "the legislature envisaged under Chapter 132 that whole discrete areas would be developed. . . ." (*Id.*) The concept of unifying or assembling land appears again in the definition of a "development project," i.e., "a project conducted by a municipality for the *assembly*, improvement and disposition of land or buildings or both to be used primarily for industrial or business purposes. . . ." *Id.* § 8-187(4) (emphasis added).

The legislative history further evinces the General Assembly's concern for the scarcity of land suitable for modern economic development in the State's "old economy" urban areas. *See* Legis. Hist. of P.A. 184, April 19, 1974, Rep. Sullivan ("[T]his . . . will enable the state to help in . . . the older urban areas, where we do have . . . a substantial number of older factory buildings that are just not suited for today's manufacturing methods.") The legislative history of Chapter 130, the forerunner to Chapter 132, is also instructive.[11] As one lawmaker noted, "because of the problems of land acquisition, the present tendency for industrial relocation is to move to suburban areas where large parcels of land can be assembled." Legis. Hist. of P.A. 8, April 18, 1958 at 348 (Sen. Castelano).[12]

Chapter 132 makes clear that the legislature wanted especially to aid "distressed municipalities," a term that applies to New London and many other Connecticut cities.[13] Although the statute applies to all municipalities, it makes special provision for "distressed municipalities," including authorizing more favorable planning and development grants, and permitting loans to businesses in such municipalities. Conn. Gen. Stat. §§ 8-186, 8-190, 8-193(b), 8-195; *see also id.* § 8-195(d)

11. Chapter 132 was adopted in 1967 as a revision to Chapter 130, Connecticut's urban redevelopment statute. *Compare* Conn. Gen. Stat. §§ 8-186 et seq. *with id.* §§ 8-124 et seq.

12. *See also* Peter S. Simmons and Jonathan D. Ford, Dept. of Econ. Dev. Report, Feb. 1, 1992 ("DECD Report"), at IV-1 ("[I]t was deemed necessary and in the public interest [by the legislature] for the State to forge a partnership with municipalities to assemble suitable land resources"; noting that related legislation had failed due in part to "the challenge of land assembly in urban areas").

13. A "distressed municipality" is one that meets sufficient "quantitative physical and economic development distress thresholds" to qualify for funding under the federal Housing and Community Development Act of 1977. Conn. Gen. Stat. § 32-9p(b); *see http://www.ct.gov/ecd /cwp/view/*asp?a=1101&q=249844.)



(state may prioritize funding based on municipalities' relative needs).[14] The Connecticut courts relied on New London's economically distressed status in upholding the statute. (Mem. Dec. at 69 n.10, 71-72); *Kelo v. City of New London*, 843 A.2d 500, 531 (Conn. 2004).

To achieve its goals, the statute authorizes each municipality, "by vote of its legislative body," to designate a "development agency" to exercise the powers granted by the statute, including the power of eminent domain. Conn. Gen. Stat. § 8-188. Before acquiring any property by eminent domain, however, the development agency must (1) prepare a detailed "project plan," including, *inter alia*, land use and zoning descriptions, marketability and land-use studies, a statement of anticipated job growth, and a "plan for relocating project-area occupants;" (2) make various findings, including that "the project will contribute to the economic welfare of the municipality and the state" and that "public action under this chapter is required" to carry out the project; (3) secure approvals of the project plan – following duly noticed public hearings – by the municipal planning commission, the regional planning authority, the municipality's legislative body, and several state agencies; and (4) obtain specific approval by the municipality's legislative body of any proposed condemnations. *Id.* §§ 8-189, 8-191, 8-193; *Kelo*, 843 A.2d at 510 n.8.

### B. *Similarly Situated States Have Likewise Found the Need to Empower their Cities to Assemble Urban Lands for Development.*

States legislatures facing conditions of land use maturity similar to those in Connecticut, and Congress in its role as sovereign of the District of Columbia, have likewise recognized the market's inability to assemble land in urban areas and the

14. *See also* DECD Report at II-4 ("75% of the Program funding was applied to projects located in or near the State's major urban centers.").

corresponding need to empower municipalities to exercise this function.

- Massachusetts allows municipalities to use eminent domain for economic development, based on legislative findings that the "unaided efforts of private enterprise have not provided and cannot provide the necessary industrial sites within the urban environment due to problems encountered in the assembly of suitable building sites" and that cities "are frequently at a competitive disadvantage with suburban areas in the process of assembling and developing industrial land resources." Mass. Gen. Laws ch. 121C, §§ 2, 5(l).

- Under the Maryland Constitution, "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses, *at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide.*" *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975) (emphasis added).

- New York's urban renewal statute recognizes that in some cases "the redevelopment of [blighted] areas cannot be accomplished by private enterprise alone without public ... assistance in the acquisition of land [and ...] the financing of land assembly" and that in such cases "it is in the public interest to employ the power of eminent domain." N.Y. Mun. Law § 970-b (Consol. 2004). New York has adopted a broad definition of "blight" that effectively permits the use of eminent domain for economic development. *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327, 330, 332 (N.Y. 1975) ("areas eligible for ... renewal are not limited to 'slums'"; "economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable



as a public purpose"; factors relevant to "blight" determinations include "irregularity of plots" and "diversity of land ownership making assemblage of property difficult. . . .").

- Georgia has declared eminent domain necessary not only for "blighted areas" but also for "areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land." Ga. Code Ann. § 8-4-2.

- Although not relating primarily to economic development, the District of Columbia blight-clearance statute upheld by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), contained findings that the elimination of "substandard housing" "cannot be attained 'by the ordinary operations of private enterprise alone without public participation' ... and that 'the acquisition and assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan ... is hereby declared to be a public use.'" *Id.* at 29 (quoting 60 Stat. 790, D.C. Code, §§ 5-701 – 5-719 (1951)).

- In 1982, the Pennsylvania Avenue Development Corporation (the "PADC"), an entity Congress created and endowed with eminent domain authority to develop the corridor between the White House and the Capitol, promulgated regulations providing for government intervention to aid private development "through such means as land assemblage. . . ." 86 Stat. 1266 § 2(c), Oct. 27, 1972; 36 C.F.R. § 910.2. The PADC was created not only for blight clearance and historic preservation but also to ensure "suitable development, maintenance, and use" of the area, and it promulgated regulations to provide for "more lively and varied shopping, cultural, entertainment, and residential

opportunities, as well as high quality office uses," and the "[i]ntroduction or expansion of retail uses." 86 Stat. 1266 § 2(c); 36 C.F.R. §§ 910.1, 910.16.

- Congress has authorized public funding for the acquisition of land that is "undeveloped or inappropriately developed from the standpoint of sound community development and growth" – a formulation that encompasses land assembly for economic growth. *See* 42 U.S.C. § 5305(a)(1); *see also* Ohio Const. Art. VIII § 2o (State may issue bonds for "public purpose" of "providing for the . . . productive development and use or reuse of publicly and privately owned lands, including those within urban areas" by using "land acquisition or assembly" to address circumstances that inhibit "economic use or reuse of the property.")

Individual cities have reached similar conclusions about the critical need to assemble lands within their borders.[15]

To be sure, in "newer" municipalities, which occupy large land areas or are less developed, market-driven land assembly may at times be a realistic alternative. Thus, it is not surprising that most instances of "private land assembly" have occurred in newer, less developed cities such as Las Vegas, Nevada, and

15. Plan for Development, City of Hartford, Connecticut, Introduction ("the major thrust of future development in the City of Hartford should be . . . to assemble land for commercial and industrial uses, along with site preparation, to meet the changing land requirements for the type of commerce and industry that produces jobs for residents.") available at *http://www.hartford.gov/-housing/temp/planofde.pdf*; "City of Philadelphia: Neighborhood Transformation Initiative - Land Assembly" (noting that few vacant properties are "large enough to support significant commercial, industrial or residential development" and that the "ability to assemble land for reuse and redevelopment is critical to stabilizing and rebuilding Philadelphia's neighborhoods.") available at *http://www.phila-.gov/nti/landassembly.htm.*



West Palm Beach, Florida, or previously undeveloped areas, as in Columbia, Maryland. (*See* Br. of Am. Cur. Norquist 5-6.) Because of stark differences in land use maturity, these examples of "private" land assembly are of little value in assessing whether a small, 350-year-old, economically distressed city needs the power of eminent domain to assemble urban lands.[16]

The lone example cited by Amicus Norquist that even approaches the land use maturity of Connecticut cities is the case of Providence, Rhode Island, where a developer apparently assembled 21 parcels of land to construct a shopping mall. (*Id.*) But that case involved some features not mentioned in Norquist's brief. First, the project would never have been completed without the donation of seven acres of state land and the state's adoption of legislation granting $136 million in tax relief to the developer.[17] In addition, the process of assembling the land for

16. Las Vegas and West Palm Beach occupy 84 square miles and 55 square miles, respectively, and each was incorporated within the last 110 years. The West Palm Beach case cited by Norquist actually weighs in favor of broad municipal power: The developers who had assembled the land lost it to foreclosure, and any hope of attracting development would have vanished absent the intervention of the city, which purchased the land assemblage with state funds and issued $55 million in bonds for infrastructure improvements. Johanna Marmon, Urban Renewal-West Palm Beach, South Florida CEO, May 2002, available at *http://www.findarticles.com/p/articles/mi_m0OQD-/is_4_5/ai_100500854.* The case of Columbia, Maryland, is at the opposite end of the land-use maturity spectrum from 350-year-old New London: In the 1960s a developer purchased rural parcels that averaged 10 acres each to build a new, "planned" city in a pristine area of Howard County, Maryland. See "Columbia: Its History and Vision," available at *http://www.columbia-md.com/columbiahistory.html.*

17. R.I. Gen. Laws § 42-63.5-2 (2004) (findings regarding Providence Place Project: "(19) a public investment to help defray those extraordinary expenses [to be incurred by the developer] is required in order to induce the substantial private investment and the myriad public benefits described above."); Darrell West and Marion Orr, "Assessing the Providence Place Mall," Brown Policy Reports, June 2000, available at *http://www.insidepolitics.org/policyreports/mallreport.html.*

the project, which the developer called "one of the lengthiest and most expensive . . . in the history of regional malls," took *fifteen years* – hardly a sign that dying cities can wait for "naturally-occurring economic forces" to assemble their land into developable parcels.[18]

In any event, the short answer to the argument that it is not necessary to empower municipalities to assemble land because the market adequately performs this function is that the State of Connecticut has expressly found otherwise with respect to the assembly of land within its borders: "[S]uch acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise." Conn. Gen. Stat. § 8-186; *see Clark v. Nash*, 198 U.S. 361, 369 (1905) ("[W]hat is a public use may . . . depend upon the facts surrounding the subject"; "the people of a State, as also its courts, must . . . be more familiar with such facts . . . than can any one be who is a stranger to the soil of the State.")

## III. The Facts of This Case Vindicate the Connecticut Legislature's Determination that Its Cities Need Eminent Domain to Assemble Land for Economic Development.

In early 1998, Pfizer, Inc., a multinational pharmaceutical company, announced that it planned to build a global research facility on an old industrial site in New London. The announcement was a watershed for New London, where no major new industrial development had occurred for more than a century.[19] In an effort to leverage this rare opportunity, in April 1998 the City, acting pursuant to Chapter 132, authorized the New London Development Corporation (the "NLDC") as

18. Norquist Br. at 7; David Bodamer, "Providence Place: One Year Later," Shopping Centers Today, October 1, 2000, available at http://www.icsc.org/srch/sct/current/sct1000/07a.html.

19. Stone, *The Day Paper* at 425-26.



its statutorily designated development agency to prepare a development plan for the 90-acre Fort Trumbull area adjacent to the Pfizer site.

The Connecticut Supreme Court found that the City acted at all times in accordance with Chapter 132 in preparing and carrying out the Fort Trumbull Municipal Development Plan (the "Plan"), part of which required condemning the petitioners' properties. The Plan was prepared following neighborhood meetings, public hearings, and consideration of six alternative plans. It was then approved by the NLDC, the elected City Council, the regional planning authority, and several state agencies. According to the trial court's factual findings, the three-year process undertaken by the City pursuant to statute was motivated by a desire to benefit the public, rather than any private entity, and the City did not act unreasonably or in bad faith during the process. (Mem Dec. 91-93, 95.)[20]

In January 2000, the City Council approved the development plan and authorized the NLDC to acquire the properties located in the project area, including by use of eminent domain. 843 A.2d at 510; J.A. 26-29. During the ensuing ten months, the NLDC succeeded in acquiring 100 individual parcels in the project area through voluntary, negotiated transfers. As noted, many of these were small, and most were in poor condition. Only the petitioners, who own a total of 15 parcels, have held out and thereby prevented the City from assembling the entire 90-acre area as called for by the statutory Plan. The Connecticut Supreme Court found that all of the petitioners'

20. All seven justices of the Connecticut Supreme Court agreed with these findings, 843 A.2d at 542-43, 573-74, 595, although one would never guess that from reading petitioners' brief. Citing selectively from the record, petitioners assert that "[r]espondents clearly intended to benefit Pfizer," which cannot be squared with the trial court's factual finding that "the court cannot conclude that the primary motivation or effect of this development plan as regards parcel 3 and 4a was to benefit [Pfizer.]" (Pet. Br. at 4-5, 14; Mem. Dec. 91.)

properties were "necessary" for implementation of the Plan, and the petitioners have not challenged that finding in this Court.[21]

In November 2000, after months of unsuccessful negotiations with the petitioners, the NLDC initiated condemnation proceedings to acquire their properties. In December, 2000, the petitioners filed this lawsuit, which has effectively placed the condemnations on hold. Thus, after a planning and approval process of almost three years, the case has embroiled the City in another four years of litigation, and stoked a major political controversy in the City.[22] And yet the City perseveres in its efforts to secure the properties to fulfill the statutory Plan – which in and of itself strongly suggests that the City could not rely on market forces to realize the economic development it seeks to accomplish through the Plan.[23]

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21. The trial court found that the petitioners' properties in parcel 3 were "necessary" for the project, and that "development would be more difficult if these residences were allowed to remain," because the developer required access to Parcel 3 to perform grading called for by the Plan. (Mem. Dec. 122, 125-26.) Although the trial court concluded that it lacked sufficient information to decide whether the properties on Parcel 4A were similarly "necessary," the Connecticut Supreme Court reversed this determination, due to the deference owed to legislative determinations of necessity in the Takings context. 843 A.2d at 548-49. The dissenting justices did not reach the necessity issue, except to agree that legislative determinations of necessity warrant deference, *id.* at 559-60 (Zarella, J., dissenting), a position that reflects this Court's treatment of the "necessity" issue in Takings cases. *See Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923).

22. "Eminent Domain Foes Buy Space on Billboards," The New London Day, June 30, 2001.

23. *See* Thomas W. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 109 (1986) ("The basic model also posits that beyond assuring proper procedures and just compensation, courts need not intervene to limit the exercise of eminent domain, because the higher administrative costs associated with eminent domain render it essentially self-regulating.").



The land use patterns of Connecticut cities and the Fort Trumbull area in particular, the findings of the Connecticut legislature and similarly situated state and federal governments, and the facts of this case all make clear that cities like New London need the power to assemble urban lands in a way that the market cannot. Absent this power, these cities cannot realistically compete with their less developed suburban neighbors for economic development projects, and have little hope of reversing the decline of the past half-century.

## IV. Recognizing Land Assembly For Economic Development As A "Public Use" Accords With This Court's Precedents And Its Federalist Tradition of Deference to State Land Use Determinations.

### A. *Land Assembly for Economic Development Is A Public Use.*

This Court has made clear that the Public Use Clause of the Fifth Amendment sweeps as broadly as the police powers, and that the legislature's determination that a particular application of the eminent domain power is for a "public use" warrants great deference. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."); *Berman*, 348 U.S. at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.") Judicial review under the Public Use Clause is thus limited to determining whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241; *see also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (same).

The pursuit of economic development is within the police powers, as even the petitioners appear to concede.

(Pet. Br. at 11.) Indeed, any argument to the contrary would place a constitutional cloud over several federal statutes.[24] Moreover, economic development is a legitimate end of government even when it operates by favoring one industry or region over another. Thus, in *Fitzgerald v. Racing Ass'n*, 539 U.S. 103 (2003), this Court unanimously rejected an Equal Protection Clause challenge to an Iowa statute imposing a higher tax rate on revenues from racetrack slot machines than on those from riverboat slot machines; applying rational basis scrutiny, the Court upheld the statute on the ground that the legislature may have wanted to further any one of several "rational" objectives, including promoting "economic development of river communities" and "help[ing] the riverboat industry." *Id.* at 109-10; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-86 (1987) (rejecting Takings Clause and Contracts Clause challenges to Pennsylvania statute aimed at minimizing subsidence from coal mining, in part because statute served "important public interests," including "enhance[ing] the value of . . . lands for taxation"); *id.* at 513 ("economic development" was "central purpose[]" of statute (Rehnquist, C.J., dissenting)).

The petitioners are thus left to argue that, although government may pursue the objective of economic development, it may not do so by means of the eminent domain power. This proposition, however, cannot survive *Berman*: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." 348 U.S. at

24. *See, e.g.*, 7 U.S.C. § 940c(b)(2)(B) (authorizing grants "for the purpose of promoting . . . economic development" in rural areas); 42 U.S.C. § 5318 (authorizing "grants to cities and urban counties which are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery."); 42 U.S.C. § 2991b-1(a)(1)(A) (authorizing grants to enable Hawaii to make loans to native Hawaiians "for the purpose of promoting economic development" in Hawaii).



33; *see also Midkiff*, 467 U.S. at 240. It also conflicts with long-standing precedents permitting eminent domain for infrastructure improvements – such as bridges, harbors, and railroads – undertaken for the purpose of promoting economic development.[25]

The petitioners seek an exemption from these well-established principles, arguing that economic development calls for special treatment because "the public benefits occur . . . as a result of third-party activities." (Pet. Br. at 27.) But this does not avail them either, for it is equally well-established that government may pursue its legitimate ends through the agency of private parties. *See Berman*, 348 U.S. at 33-34 ("The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude."); *Nat'l R.R. Passenger Corp.*, 503 U.S. at 422 ("In both Midkiff and Berman, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged."). This principle is not new; *see Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678, 695 (1873) ("Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. . . . Though the *ownership* is private the *use* is public." (emphases added)); and it is not limited to the land

25. *See, e.g.*, *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-30 (1894) (upholding statute authorizing condemnation of land for construction of bridge "to facilitate interstate commerce": "whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain ..., Congress may do this. . . ."); *Converse v. Fort Scott*, 92 U.S. 503, 506 (1876) (state statute authorized condemnation for railroad right-of-way "for the promotion of trade and commerce."); *Marchant v. Baltimore*, 126 A. 884 (Md. 1924) ("The development of the harbor of Baltimore according to a comprehensive plan, by which the commerce of the port will be most advantageously served, and its future growth encouraged, is a project of distinctively public interest and purpose.")

use context, as governments rely increasingly on the private sector to achieve a broad range of traditionally public objectives, such as educating children and punishing the guilty. *See, e.g.*, 20 U.S.C. § 6316(b)(8)(B)(iii) (allowing local school authorities to contract with private companies to operate public schools that fail to meet standards); *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting) ("employees of private prison management firms ... exercise the most palpable form of state police power").[26]

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26. The petitioners contrive to squeeze into three "categories" cases finding public uses where the condemned property was transferred to another private party. But this Court has never suggested that the principle that "[t]he public end may be as well or better served through an agency of private enterprise," *Berman*, 348 U.S. at 33-34, applies only in the three cases posited by petitioners – a telling omission given the number of times it has applied this principle in Takings cases. The source for petitioners' "three categories" is *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court attempted to categorize *Michigan's* case law, expressly grounded its decision on a Michigan constitutional provision, and eschewed any analysis of this Court's decisions. *See Hathcock*, 684 N.W.2d at 770, 785 & n. 81. The categories themselves are artificial and vague – at least when applied to this Court's cases. For example, what exactly is a "fact[] of independent significance"? According to petitioners, this open-ended term means the condemnation is for a "public reason ... independent of the use to which the condemned property will eventually be put." (Pet. Br. at 24.) If so, however, it surely embraces the over-division of land in New London just as much as the over-concentration of land ownership in Hawaii. (*See* Pet. Br. at 25.) And into which of the petitioners' three categories does *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) fall? That case held that mandated data sharing among applicants for pesticide licenses was a "public use," even though the most "direct" beneficiaries were subsequent applicants who could support their applications with data submitted by earlier applicants. *See* 467 U.S. at 1014 ("This Court . . . has rejected the notion that a use is a public use only if the property taken is put to use for the general public.") The petitioners do not say how *Ruckelshaus* – one of this Court's most recent "public use" cases – fits into their conjured framework.



Accordingly, even when broadly defined as the promotion of economic growth through the agency of private parties, the City's objective in this case fits easily within accepted notions of "public use." The "public" character of these condemnations becomes even clearer, however, when the legislative findings and the relevant facts are considered. As shown, older cities like New London face what amounts to a barrier to entry to the market for attracting economic development projects, i.e., a lack of developable parcels resulting from centuries of development and over-division of land. Further, Connecticut and similarly situated states have found that government–driven land assembly is necessary to correct this market imperfection, because the market has proven inadequate to the task of assembling small urban parcels into land units suitable for modern economic development. The plight of New London, the land use situation of the Fort Trumbull area, and the City's land assembly efforts in this case all bear out this finding.

The market-correction rationale for the takings in this case – which is articulated in the statute that authorized the City's actions – is similar to the rationale for the Hawaii statute upheld by this Court in *Midkiff*. The Hawaii legislature had found that excessively concentrated land ownership was skewing the State's residential real estate market and inflating land prices, and adopted legislation providing for the condemnation and subsequent transfer of land to existing lessees. The Court had "no trouble" endorsing Hawaii's purpose of removing "artificial deterrents to the normal functioning of the State's residential land market" and "correcting the land oligopoly problem," because "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Midkiff*, 467 U.S. at 241-42.

Both the Hawaii statute in *Midkiff* and the Connecticut statute at issue here were aimed at correcting market imperfections, and both were necessary because the market had failed to make these corrections itself – a situation in which this

Court has repeatedly upheld government intervention. *See, e.g.*, *Ruckelshaus*, 467 U.S. at 1015 (finding "public use" where federal statute "would eliminate a significant barrier to entry into the pesticide market."); *Fisher v. Berkeley*, 475 U.S. 260, 264 (1986) (upholding municipal rent control ordinance against antitrust challenge: "the function of government may often be to tamper with free markets, correcting their failures. . . ."); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 121 (1978) (rejecting constitutional challenges to Maryland statute that was "designed to correct . . . inequities in the distribution and pricing of gasoline"). While the Hawaii statute sought to correct the over-concentration of land ownership that stemmed from Hawaii's feudal past, the Connecticut statute seeks to correct the over-division of land caused by centuries of development in cities whose borders were fixed during the colonial era. *Compare Hodel v. Irving*, 481 U.S. 704, 712, 718 (1987) (in Takings case, noting that "the extreme fractionation of Indian lands [i.e., the accumulation of many undivided interests in a single parcel] is a serious public problem" and that "encouraging the consolidation of Indian lands is a public purpose of high order.")

### B. *A Broad Definition of "Public Use" Accords with this Court's Federalist Tradition.*

This Court has taken pains to guard "the States' traditional and primary power over land and water use" from the encroachment of federal authority. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *see also ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 502-03 (1988) (noting Congress's efforts to preserve state control over land use in Flood Control Act of 1944 because of "federalism concerns").

Reaffirming this Court's broad, purposive construction of the Public Use Clause would accord due respect to the state and local land use determinations in this case. Those determinations were made by the City's elected officials in



accordance with a statute adopted by the Connecticut legislature; they were upheld by the Connecticut Supreme Court; and they were consistent with the will of Connecticut's citizens, who in a statewide referendum in 1965 expressly rejected a proposed constitutional amendment to restrict the Takings Clause of the state constitution.[27] As this Court held eighty years ago in dismissing another "public use" challenge, "the determination of this question [whether a use is "public or private"] is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705-06 (1923); *see also Clark v. Nash*, 198 U.S. 361 (1905) (same).

A broad construction of the Public Use Clause would also preserve the mosaic of approaches the states have taken toward the use of eminent domain for economic development based on the "diversity" of local conditions confronting them. To take just a few examples, Connecticut, Massachusetts, and New Jersey all permit the use of eminent domain for economic development; states such as Michigan and Colorado do not; in New York, Florida, and Georgia, blight-clearance laws allow takings for economic development via broad definitions of "blight;" but in Illinois, even takings for blight clearance are tightly regulated with restrictive conditions.[28]

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27. Secretary of the State of Connecticut, "Vote on the Proposals of the Constitutional Convention," December 14, 1965, 1966 *Register and Manual* 664-65 (rejecting addition of sentence providing that, "no property shall be taken for public use unless the taking be necessary for such use").

28. *See* Conn. Gen. Stat. § 8-193; Mass. Gen. Laws ch. 121C, § 5(l); N.J. Stat. §§ 40:54D-18-21 (2004) (allowing use of eminent domain by "Tourism Authority" "if it is necessary or useful to . . .

(Cont'd)

Such state-law variations stem from differences in local conditions that the individual states are "exceptionally familiar with." *Clark*, 198 U.S. at 368. They are also products of the state experimentation that this Court has sought to foster. *See Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("We will not cavalierly impede the States' ability to serve as laboratories for testing solutions to novel legal problems." (internal quotation marks and citation omitted)); *see also* Merrill, *supra* note 29, at 115-16 ("De-federalizing public use would allow us to take advantage of the twin virtues of federalism: experimentation and competition among states.")

## V. Petitioners' Proposed Restrictions on the Use of Eminent Domain Are Unsupported, Unnecessary, and Unworkable.

### *A. Neither Precedent nor Logic nor the Facts Call for A "Reasonable Certainty" Requirement.*

The petitioners argue in the alternative that even if economic development is a "public use," this Court should throw up an additional hurdle to block condemnations for economic development unless "the government can show that there is reasonable certainty that the project will proceed and yield the public benefits that are used to justify the condemnation." (Pet. Br. at 36.) The petitioners cite no case law of this or any other federal court that would support this restriction.[29] Nor do

(Cont'd)
economic development"); *County of Wayne v. Hathcock*, 684 N.W.2d at 765; C.R.S. § 31-25-107 (requiring finding that "principal purpose" of urban renewal plan is elimination of "physically blighted or slum areas" where plan seeks to condemn property for transfer to private party); *Yonkers Cmty. Dev. Agency*, 335 N.E.2d at 327; Ga. Code Ann. § 8-4-2; *Panama City Beach Cmty. Redev. Agency v. State*, 831 So.2d 662 (Fla. 2002) (undeveloped land may be considered "blighted," and thus condemned, under Florida redevelopment statute); 65 Ill. Comp. Stat. 5/11-74.4-3(a) (2004).

29. In *Cincinnati v. Vester*, 281 U.S. 439 (1930), the Court did not reach the constitutional issue, holding that a city ordinance that failed to (Cont'd)



they offer any cogent reason for applying such a restriction to this case. They argue that "any public benefit from economic development condemnations flows from the actions of a third party, rather than the condemnor." (Pet. Br. at 32.) But before any private developer could break ground in the Fort Trumbull area, the City had to assemble its collection of small parcels. As shown above, government assembly of land in older urban environments is itself a public good because it eliminates conditions that act as barriers to entry to the market for modern development projects. *See Midkiff*, 467 U.S. at 229; *Hodel*, 481 U.S. at 704. Thus, this is not a case in which the public benefits will be achieved "only through the success of private parties." (Pet. Br. at 14.)

Even if it were such a case, however, it is not clear why that would make the achievement of those benefits any less likely, or, stated differently, why enlisting government entities to do the work would make the public benefits more "certain." Success in generating public benefits is rarely guaranteed for any use of eminent domain – even for a "public use" as traditional as a canal built by the Army Corps of Engineers.[30] Moreover, condemnations for blight clearance cannot be said to "succeed," if the land, once cleared, remains vacant and ultimately attracts dumping, prostitution, or drug dealing. Yet this Court has never suggested that a showing of "reasonable certainty" was require ' for these or any other applications of eminent domain authority that it has upheld. *See Ruckelshaus*,

(Cont'd)
specify the purpose for which the property was to be taken violated an Ohio statute.

30. *See United States v. 2997.06 Acres of Land*, 471 F.2d 320 (5th Cir. 1972) (upholding condemnation for Cross-Florida Barge Canal even after canal construction was stopped by Presidential Order); Craig Pittman, "Digging Ourselves into A Hole," St. Petersburg Times, October 31, 1999 ("Built in the wrong century for the wrong reasons with the wrong numbers to justify it, the Cross Florida Barge Canal will forever stand as one of the biggest blunders in Florida history").

467 U.S. at 1015 n.18 ("The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives."). Indeed, as shown in Respondents' brief, the notion that courts should second-guess whether any condemnation is "reasonably certain" to achieve its purpose would break with this Court's jurisprudence properly confining unelected judges to a deferential review of the "rationality" of economic and social regulation. (Resp. Br. at 38-41, 18-27.)

Moreover, while no one can guarantee the success of the Fort Trumbull project or any other application of eminent domain authority, the State and the City have taken reasonable steps to ensure that the Plan will be carried out. As the Connecticut court found, the requirements of Chapter 132 and related contractual provisions provide "definitive assurances" that the private sector participants will adhere to the Plan. *Kelo*, 843 A.2d at 545. As the City's statutorily designated "development agency," the NLDC remains subject to its control and may not sell or lease any parcels within the project area without the approval of the City Council. Conn. Gen. Stat. § 8-193(a). In addition, every single such sale or lease will have to be approved by the State, which will scrutinize each conveyance and may inspect the premises of the buyer "to determine if [its] business satisfies the land use requirements" of the Plan. (*Id.*; DECD Report at IV-12.) The State will also have to approve construction contracts and business plans before the NLDC may lease any property to the developer.[31] Such oversight stems from the State's control over the funding for this project, "without which nothing goes forward" and which it will condition upon compliance with an "assistance agreement" between itself and the NLDC. (Mem. Dec. at 104; DECD Rep. at IV-10.)

31. Development Agreement Between New London Development Corp. and Corcoran Jennison Co., Inc., October 3, 2001, §§ 2.04, 3.03. This Agreement was admitted at trial for identification purposes. *See* Appendix.



Even after the NLDC has transferred the properties, the developer remains contractually bound to complete the project in accordance with the Plan. In addition, "the terms of the development plan providing parcel-specific land uses, to which private developers participating in the project must adhere, provide significant control over the destiny of the parcels." 843 A.2d at 545 & n.64.

Perhaps because of such ongoing State oversight, Connecticut has compiled a record of successful economic development projects under Chapter 132 and its sister statute, the 1990 Manufacturers Assistance Act, Conn. Gen. Stat. §§ 32-220 *et seq.*, which also authorizes eminent domain for economic development. According to the most recent available data, by 1991, these statutory programs had generated 62 projects, hosting 667 businesses that employed a total of 32,000 persons and, in 1991 alone, yielded over $22 million in municipal tax revenues before consideration of abatements.[32] The following are some noteworthy projects that required the use of eminent domain:

- **West End Municipal Development Project, Bridgeport, CT.** This Chapter 132 plan was adopted in July 1994, and sought to retain businesses in the 124-acre West End project area, which had lost some major employers. The Plan notes that surrounding suburbs were better able "to provide build-to-suit sites" and had "suitable available land."[33] According to Bridgeport officials, the West End project has resulted in seven private investments in new business

32. DECD Report, "Executive Summary." None of these projects has been abandoned, and petitioners are wrong to suggest that the City may abandon the Fort Trumbull MDP after three years if it fails to succeed. (Pet. Br. at 45.) A municipality may not abandon an MDP where, as here, it has received State funding. (Conn. Gen. Stat. § 8-200(b).)

33. West End Industrial Area Dev't Plan, July 1994, Introduction 1, available from City of Bridgeport, CT.

facilities on land acquired by eminent domain and voluntary acquisitions; has created or retained 200 jobs; and has enhanced the assessed taxable property base in the area by more than $10 million.

- **North Colony Street Industrial Park, Meriden, CT**. This Chapter 132 project involved the reclamation of 15.4 acres in an industrial "brownfield" in the City of Meriden. The project resulted in new construction and almost doubled the number of jobs in Meriden at a major employer, TI Automotive. It received the Environmental Protection Agency's 2001 Phoenix award, which recognizes successful transformations of industrial areas into productive new uses.[34]

- **The Lacey Project, Bridgeport, CT**. In 1993, the City of Bridgeport kept the Lacey Manufacturing Company, a medical supply manufacturer, from relocating to the suburbs by using eminent domain to assemble 18 parcels in a three-acre area that surrounded the company's Bridgeport facility. The land assembly enabled the company, which employs over 300 workers, to undertake a growth-driven expansion.[35]

### B. *The Petitioners' Proposal Would Stifle Economic Development in Cities.*

In an urban environment, where attracting modern development projects requires the assembly and re-use of small parcels, a requirement that courts hold up condemnations until "there are contractual obligations ensuring that the intended public benefits actually occur"

34. DECD, "North Colony Street Industrial Park in Meriden Wins National Development Award," News Release, August 7, 2001.

35. "Lacey Manufacturing, Bridgeport Officials Pursue Expansion," Fairfield County Business Journal, October 18, 1993.



could create a "first mover" problem. (See Pet. Br. at 43.) What if each developer to whom the city markets a "project area" consisting of multiple parcels – including, for example, an abandoned brass foundry or an old oil-tank farm – wants some assurance *before it signs a contract* that the adjacent land will be put to compatible uses? Or what if a business considering locating downtown wants to be sure there will be unused space available for the long-term growth potential of its plant? These are not hypothetical dilemmas for Connecticut cities. Given their shortage of developable land, cities cannot provide such assurances regarding neighboring parcels until they have acquired those parcels, if necessary by eminent domain.

Take River Street, an ongoing Chapter 132 project in New Haven, Connecticut, which involves the conversion of 25 acres of junk yards and oil tank farms along the Quinnipiac River to a mix of light industrial, commercial and residential space. Three years ago, the City of New Haven approved the River Street Plan and voted to use eminent domain to acquire the necessary property.[36] To date, the City has acquired five of the eleven parcels comprising the 25-acre area, and is negotiating for the remaining properties; the process has been slowed by environmental issues, a common feature of urban "brownfields" that complicates the transfer of real estate. Until these issues are resolved and the entire area acquired by the City, however, there will be little prospect of converting the 25-acre area to the commercial and residential uses envisioned by the plan. What developer would commit to building luxury housing next to land that was still operating as a junkyard and that the City could not acquire until it could prove that the future use was "reasonably certain"? In short, the petitioners' restrictions would stifle economic development in the places that need it most.

36. "Downtown New Haven in Middle of a Boom," New Haven Register, March 31, 2002.

## CONCLUSION

What makes this case salient is not the parsing of this Court's Public Use doctrine or its application to the facts of this case. As shown, both are straightforward, and both support the decision reached by the Connecticut Supreme Court. Rather, it is the fact that the exercise of eminent domain will result in taking some of the petitioners' homes, even though for just compensation. This is undeniably a genuine cost of realizing the City's goal of improving the economic well-being of its citizens, but it is one that the State of Connecticut authorized and that both the State and the City decided to incur after careful deliberation conducted in an open, democratic process.

This Court should resist the petitioners' invitation to interfere with the State's and the City's policy choices by contorting the Public Use Clause. Rather, to the extent that the courts should step in to help property owners in cases such as this, it should be to ensure that they receive just compensation. *See* Merrill, *supra*, at 108 ("it is less clear that courts are concerned with uncompensated subjective loss"). In other words, if circumstances like those in this case call for judicial innovation, it should be in construing the Just Compensation Clause to take account of the real cost of losing one's home, not in constricting the Public Use Clause to stifle economic growth in the cities.

The Fifth Amendment does not prohibit the State of Connecticut from empowering a distressed municipality to use eminent domain to assemble small urban parcels into a unified package suitable for modern economic development. New London has done no more than exercise this State-conferred power to address its severe needs for economic revival. Accordingly, this Court should affirm the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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## APPENDIX A — LIST OF 31 OTHER STATE MUNICIPAL LEAGUES JOINING CCM BRIEF AS *AMICI CURIAE*

ALABAMA LEAGUE OF MUNICIPALITIES

ARKANSAS MUNICIPAL LEAGUE

LEAGUE OF CALIFORNIA CITIES

COLORADO MUNICIPAL LEAGUE

FLORIDA LEAGUE OF CITIES, INC.

GEORGIA MUNICIPAL ASSOCIATION

ILLINOIS MUNICIPAL LEAGUE

INDIANA ASSOCIATION OF CITIES AND TOWNS

IOWA LEAGUE OF CITIES

LEAGUE OF KANSAS MUNICIPALITIES

KENTUCKY LEAGUE OF CITIES, INC.

LOUISIANA MUNICIPAL ASSOCIATION

MARYLAND MUNICIPAL LEAGUE

MASSACHUSETTS MUNICIPAL ASSOCIATION

MICHIGAN MUNICIPAL LEAGUE

LEAGUE OF MINNESOTA CITIES

MISSOURI MUNICIPAL LEAGUE

NEW HAMPSHIRE LOCAL GOVERNMENT CENTER

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

NEW MEXICO MUNICIPAL LEAGUE

NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS

*Appendix A*

NORTH CAROLINA LEAGUE OF MUNICIPALITIES

OHIO MUNICIPAL LEAGUE

OKLAHOMA MUNICIPAL LEAGUE, INC.

PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES

RHODE ISLAND LEAGUE OF CITIES AND TOWNS

MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

SOUTH DAKOTA MUNICIPAL LEAGUE

TEXAS MUNICIPAL LEAGUE

WEST VIRGINIA MUNICIPAL LEAGUE

LEAGUE OF WISCONSIN MUNCIPALITIES



## APPENDIX B — EXCERPTS FROM 1991 REPORT BY CONNECTICUT DEPARTMENT OF ECONOMIC DEVELOPMENT

## CONNECTICUT INDUSTRIAL PARK PROGRAM 1967 – 1991

A special report on the history and development of Connecticut's Industrial Parks Program since its inception in 1967 with statistical data on employment, dollar investment and community economic development assistance.

Prepared by Peter S. Simmons and Jonathan D. Ford
Community & Business Finance Division

Connecticut Department of Economic Development
865 Brook Street, Rocky Hill, Connecticut 06067

Lowell P. Weicker Jr., Governor
Joseph J. McGee, Commissioner
A. Searle Field, Deputy Commissioner

February 1, 1992

**EXECUTIVE SUMMARY:**

The Industrial Park Program was enacted through legislation in 1967. Since then, the program has gone through numerous modifications, the most significant being in 1990 with the enactment of the Economic Development and Manufacturing Assistance Act. Under this Act, the Industrial Park Program

was consolidated with other economic development programs of the Department of Economic Development and additional flexibility was added in order to address the challenges of the 1990's.

Nevertheless, the primary goal of the program has been and remains the planning and development of properly located real estate to facilitate the private investment and job creation of the state's manufacturers and other economic base industries.

Major highlights of the program are:

There are a total of 62 projects that have been developed; these projects have been located throughout all regions of the state with a greater concentration in urban areas.

These 62 projects involved approximately 4,350 acres of land, resulting in over 3,500 acres of developable lots ready for private investment.

There are 667 businesses located in the park projects, employing over 32,000 persons.

Approximately 19.5 million square feet of building has been developed in the parks; real and personal property taxes received by the host municipality in 1991 were, with only 86% of the projects reporting, in excess of $22 million. This number does not include any property taxes that were abated in that year under municipality or state programs.



At the present time, there are over 2,800 acres that have been sold/leased, and 670 acres that are fully developed and available for sale or lease. In addition, there are about 470 acres currently in planning for which development is anticipated by the end of 1992, and about 600 acres of land for which planning projects will be initiated during this same time frame.

To date, the state has authorized and is spending approximately $ 114,260,560 of bond funds in support of the program. It is projected that an additional $13 million will be requested in 1992 for additional projects.

**Location of Projects**

The accompanying map and table identifies the municipalities of Connecticut with which the Department of Economic Development formerly reviewed a project proposal. As of December 1991, the Department has examined 141 proposals in 77 cities and towns. Of these proposals over 62 projects have been completed or are currently in development: 11 additional projects are in the planning stage.

Figures 4, 5 and 6 present the distribution of project and grant awards by the 9 major geographic/economic regions of the state (a description of these regions can be found in the Exhibits section). Projects have been developed in every region of the state, as shown on figure 5, *Grant Approvals.*

Figure 6, *Grant Apportionment* compares the degree of development activity which has occurred within the regions

on a percentage basis. The regions dominated by the state's largest urban centers (New Haven, Waterbury, Hartford, and Bridgeport) have received the greatest amount of financial assistance for economic development projects. 75% of the Program funding was applied to projects located in or near the State's major urban centers. The least amount of development activity has occurred in the Midstate region, predominately Middlesex County. 5 proposals were reviewed by this Department, however, due to site concerns and a lack of sewer and water utilities preempted further action. One project, the Middlesex Mutual Assurance Company Redevelopment Project, was successfully implemented and completed.

Statewide a total of 169 grants were administered under the Industrial Park Program. This breaks down as 63 Planning, 75 Development, and 31 Special Development grants.

**Grant and Project Award**

Figure 9, *IBD Grant Activity,* presents the Planning and Development Grant awards in 3-year increments from 1967 to 1991 with a $13 to $16 million in funding projected for 1992. The early years of the Program experienced greater activity in Project Planning, while the development phases lagged behind until the 1979 to 1981 period when a significant increase in development activity occurred.

It is noted that many of the early planning grants were awarded for projects which did not proceed into development due primarily to site constraints.



## LEGISLATIVE HISTORY

In 1965 the General Assembly passed Public Act 449 which found and declared that the continued growth of industry, research and business enterprise in the State was essential to maintain Connecticut's competitive position among the states of the nation. The Legislature recognized the increasing difficulty of business and industry to acquire and improve land for their needs in accordance with local, regional and state planning objectives. In order to insure the State's tax base, public services, and manufacturing employment opportunities, it was deemed necessary and in the public interest for the State to forge a partnership with municipalities to assemble suitable land resources and equip them with the necessary utilities, streets, and other public services.

In the 1970's a number of Public Acts extended the scope of the Industrial and Business Development (IBD) Program – water areas; acquisition, improvement and demolition of vacated commercial plants; and the mini-industrial park program were new considerations of the program. The decade's legislation also outlined State grant utilization and municipal financial responsibilities, including increased state participation for distressed municipalities.

Changes in the program made in the 1980's were even more expansive. P.A. 81-98 required a municipality's legislative body to approve a project before the Project Development Plan could be accepted by the Commissioner of Economic Development. A more flexible definition of a vacant commercial plant was defined. The types of non-

occupancy situations for industrial buildings eligible for special planning grants was increased along with the types of industries eligible for Chapter 132 loans in distressed municipalities. P.A. 85-50 authorized distressed municipalities to loan funds to businesses and industries renovating or operating within the industrial park.

The Industrial Park Program provides assistance to construct on-site improvements for a project with limitations on state financial participation in off-site improvements. In 1985 the Infrastructure Development Economic Assistance (IDEA) Program was enacted. This program provided assistance for off-site roadway and infrastructure improvements to serve a specific manufacturing site. I.D.E.A. was expected to speed the overall process by avoiding the delays associated with the Industrial Park Program. In practice however, I.D.E.A. revealed its own problems, largely due to stringent associated terms and the challenge of land assembly in urban areas. Hence, no projects were undertaken under the I.D.E.A. Program.

In the late 1960's and 1970's the Municipal Development Projects program was given life and structure. In the 1980's the program grew and was shaped, primarily to attract and sustain small businesses.

**Development Phase**

As with the Planning Phase, the engineering contract is executed between the agency and the consultant. The plans and specifications for project construction activities are available to all interested construction contractors by the



agency. The construction contract is also executed between the agency and the general contractor. During the construction phase, the development agency has direct control over the construction of the project improvements with full coordination and review by the Department.

**Fiscal Management**

The Assistance Agreement (contract) between the state and the agency details the administrative and financial obligations for the project.

In administering project funds, the agency approves and charges all eligible expenditures from the project account. To meet state reporting requirements, the agency must submit to the Department Quarterly Financial Reports accompanied by a Balance Sheet, Monthly Meeting Minutes of the agency's ruling body, and Monthly Progress Reports. Additionally, biannual audits are conducted on all Planning and Development Grants Accounts and submitted to the Department for review and approval.

Payment from State Grant funds occurs on an allotment basis. The agency typically submits to the Department payment requisition, based on a 6-month cost projection, requesting a drawdown from the state grant. Following the allotment and allocation process, the funds are then placed in the agency's project accounts.

Most Industrial Park Projects, at this time have been

converted to the Tax Exempt Proceeds Funds Accounts.

**Bonds**

Frequently, state and local financing of these projects, are obtained by the sale of long-term bonds. Municipalities have had two types of bonding packages at their disposal to conduct an industrial park project; 1) General Obligation Municipal Bonds, and less frequently, 2) Tax Increment Financing, in which the taxes anticipated from the parcel sales are pledged to reduce bonding costs.

**Role of Other Divisions within DED**

Prior to completion of project construction, private and public sector marketing forces are used to attract industries. The services of private commercial real estate brokers and the municipal development agencies are encouraged to recruit businesses into the project.

The Division of Business and Regional Services in the Department of Economic Development takes a proactive role in marketing the industrial parks. The division maintains the largest computer database of available industrial and commercial properties in the state. This listing is available to the brokers actively working with a client company, and the public, and use by the Department of Economic Development. Regional Field Agents of this division, using this database and other tools available to them, have been instrumental in relocating a significant number of both



in-state and out-of-state companies to many of these parks.

**Role of Other State Agencies**

State Agencies are involved with the development process of the industrial park program from the early planning stages through to the construction of improvements.

As previously outlined under Process and Overview, the Department of Economic Development circulates all project proposals to state agencies through the Office of Policy and Management in a preliminary review. The agencies are encouraged to comment on the proposed development, and provide any history of state agency actions within the project area, and possible impacts and concerns which must be mitigated prior to development. This review establishes the groundwork for coordination of planning and development activities for the duration of the project.

State agency involvement continues with the final review process which includes the circulation and review of the CEPA documentation, if required, and the Project Development Plan. Both of these documents must satisfy each state agency's planning objectives prior to the commitment of state funding.

Industrial Park Projects must comply with applicable local, state, federal permits and regulations. Coordination of

the application process for these various permits is closely monitored by the Department of Economic Development.

**Land Disposition**

The main goal of this Program, is to create and retain quality jobs for the citizens of Connecticut. An equally significant goal of the program is the creation of fully equipped industrial property served with full utility infrastructure. Performance standards are established for the park which encourage architectural quality in the building construction and landscaping to produce an aesthetically pleasing and environmentally sound park – a showcase in industrial development for the tenant companies and the community.

Once the construction activities have begun, the project is then ready for the market. Frequently, marketing can begin prior to construction to meet the schedule of prospective businesses. The Project Budget assists in funding the municipality's marketing and administrative program for the park. Prior to a land sale by the municipality to an industry, an approval of this sale, as required by statute, must be obtained by the Commissioner. This review and approval is to ensure that the use is appropriate for the park, and the sale price is based on the fair market value of the land.

To facilitate approval for land sales, a standard package of material is required to be submitted to the Department for review. This package includes; 1) the land sale contract, 2) the A-2 Class boundary survey of the parcel being sold, 3) the Metes and Bounds Description of the parcel being sold,



and 4) a Departmental parcel/company data form. This material will supply all the information to the Department necessary to approve a typical land sale. Occasionally, a visit by a Department staff member to the proposed occupant is necessary to determine if the business satisfies the land use requirements of the park.

Land sale approvals are typically processed by the Department within 3 to 5 working days.

**Performance Standards**

Performance Standards and permitted land use controls are adopted in the Project Development Plan and filed in the Municipal records as Land Use Covenants. All site plans and building construction must comply with the standards set forth in the covenants. Performance standards adopted for the parks are generally more restrictive then the applicable municipal zoning regulations.

Enforcement of these regulations is the responsibility of the municipal zoning and the local economic development office who accomplish this through normal zoning board and site plan approvals and through regular inspections of the project. The Department staff also conducts spot inspections of projects to monitor the maintenance of the project roadways and ensure that the businesses keep their properties in good repair and neat and orderly condition.

Permitted uses for the projects are designed to attract those industries which are manufacturers or wealth generating businesses. Professional office space uses, retail trades and

other services sector industries that are not considered priority economic base business generally are not permitted in state sponsored projects.

Manufacturing companies are defined as having a Standard Industrial Classification (SIC) Codes assigned by the Federal Labor Department between the 2000 and 3999. Warehouse and distribution operations with an SIC in the range of 5100 are also allowable business activity within an IBD project. Most recently, approved state funded industrial parks limit the number of distributions activities allowed in the project.

Additionally, any business operation which directly supports manufacturing, such as research and development, or is wealth generating, such as a bank, insurance company or lending institution's headquarters or capital processing centers are considered an economic base industry, and is an eligible use for awarded by the State to Valley Cities and Towns amounting to $34,472,698. From this total, 20 projects were completed to provide employment opportunities for this region.

**Urban Projects**

Although not a formal initiative, the needs of the state's



cities has been at the forefront of the Department of Economic Development's strategies to foster the state's economic health. Again, the Industrial Park Program is used to help address these needs.

The Program's first projects were undertaken in the major urban centers of the state. During the first years of the Program, projects were begun in the cities of Hartford; the North Meadows Project and the Colt Park South Planning Project*, Ansonia; Downtown Revitalization Project, Norwich; the Norwich Industrial Park, and the Waterbury Captain Neville Drive Industrial Park. Projects developed under the Industrial Park Program still remain major centers of employment and taxes for the cities.

A total number of 20 IBD Project have been undertaken in the State's 5 major distressed urban areas; Hartford, New Haven, Bridgeport, New Britain, and Waterbury. This represents 34% of the IBD Program Development Projects. Additionally, 75% of the total projects undertaken by this program located within the Economic Development Regions of these Connecticut cities. These industrial projects have created 14,000 jobs and furnished 6.5 million square feet of manufacturing space.

As part of this continuing initiative, planning projects in the Cities of Meriden, New London, New Haven, Bristol, and Danbury have being initiated during the Fiscal Year of 1991-92.

* The Hartford Colt Park South was subsequently developed using the Chapter 130 Urban Renewal Program.

# APPENDIX C — EXCERPTS FROM DEVELOPMENT AGREEMENT BETWEEN NEW LONDON DEVELOPMENT CORPORATION AND CORCORAN JENNSION CO.

## DEVELOPMENT AGREEMENT BETWEEN NEW LONDON DEVELOPMENT CORPORATION AND CORCORAN JENNISON COMPANY, INC. DATED: OCTOBER 3, 2001

### Article II

### INTRODUCTION AND BASIC TERMS

2.01. *Introduction.* This Agreement will govern the relationship of NLDC and the Developer with respect to the development of the Project.

2.02. *Project Area.* The Project Area will consist of approximately 27.5 acres of real property, more particularly shown as constituting three (3) parcels designated as MDP Parcels 1, 2 and 3 on *Exhibit C*, as more fully described on *Exhibit C-1* attached hereto (the "Project Area").

2.03. *NLDC's Obligations.* NLDC hereby agrees to undertake and complete the NLDC work, all as more fully set forth in Articles III and IV and further terms and provisions set forth herein. NLDC further agrees to convey the Project Parcels to the Developer by Ground Lease,





substantially in the form attached hereto as *Schedule A*, and, in the case of the NUWC Property, the Sublease, all as more fully set forth in Article III.

2.04. *Developer's Obligations.* Developer hereby agrees to undertake and complete the Project (excluding the NLDC Work) in accordance with the Plans and Specifications, the terms of the MDP, the EIE, the NUWC-EA, and all Legal Requirements, including any and all environmental land use restrictions required by DEP, at its sole cost and expense (utilizing, to the extent limited by Section 6.01(a), third-party equity and debt financing secured by Developer), as more fully set forth in Article V hereof and in accordance with the further terms and provisions hereof.

2.05. *The Project.* The Project shall consist of construction of Phase A (Hotel, Conference Center and Marina), Phase B (Housing), Phase C (Building 2 Renovation), Phase D (New Commercial #1), and Phase E (New Commercial #2) as shown and described on the Site Plan attached hereto as *Exhibit D* and as described on *Exhibit E*, as the same may be from time to time amended in accordance with the terms of this Agreement. The public rights of way shown on *Exhibit C-3* will be conveyed to and maintained by the City of New London, except as provided in Sections 4.06 (b) and 4.07. The Project shall be named the Fort Trumbull Peninsula Redevelopment Project, or such other name as may be approved by NLDC.

2.06. *Term.* This Agreement shall be effective from and after the date hereof, and shall terminate with respect to each Phase upon the issuance of a Certificate of Completion for

such phase, except with respect to obligations and liabilities which expressly survive the termination hereof as set forth herein, or as otherwise set forth in the Certificate of Completion.

2.07. *Acknowledgement of Role of State.* NLDC and the Developer agree and acknowledge that: (i) the State, acting by and through DECD, has entered into, or will enter into, the various financial assistance agreements, including the Assistance Agreement, which will provide substantial financial assistance for the development of the Thames Peninsula Area and in association with NLDC has assisted with the preparation of the MDP pursuant to Chapters 130, 132 and 5881 of the Connecticut General Statutes, as amended, (ii) without such financial assistance from the State the Project would not be developed and completed as contemplated

(ii) the NLDC Work to be completed prior to commencement of the Phase as described on *Exhibit G* has been completed;

(iii) NLDC has secured such approvals as are its responsibility as set forth on *Exhibit O*, and as may be required to convey the Project Parcel;

(iv) the Developer has satisfied the "Conditions Precedent to Lease", as set forth below in Section 3.03.

The Developer shall have the right to waive conditions 3.02(a) (i) through (iii); NLDC, with the prior written



approval of DECD, shall have the right to waive condition 3.02(a)(iv). Execution of a Ground Lease by the Developer for a Phase shall constitute Developer's agreement that NLDC has satisfied conditions (i), (ii), and (iii) with respect to such Phase, except as otherwise expressly set forth in the Ground Lease or in a separate agreement executed in connection therewith expressly referencing this Section 3.02(a).

(b) A Ground Lease or Sublease, with respect to the NUWC Property (except as set forth in Section 3.05(b) below) shall be entered into with respect to a Project Parcel at the time when all conditions precedent to lease such Project Parcel are satisfied or waived.

3.03. *Conditions Precedent to Lease.* NLDC shall not be obligated to enter into a Ground Lease or Sublease with the Developer unless and until the Developer has delivered to NLDC and DECD for approval evidence, in form and substance reasonably satisfactory to NLDC and DECD, that it is prepared to commence construction of a Phase on the Project Parcel to be conveyed including, without limitation, the following:

(a) Permits and Approvals. All governmental permits and approvals required to construct the Phase have been issued, remain validly outstanding, and have been complied with in all respects;

(b) Design and Construction Contracts. The Developer has entered into such construction contracts, as

shall be necessary to complete construction in compliance with the Plans and Specifications and the terms hereof;

(c) Insurance Requirements. The Developer has obtained the insurance coverage required pursuant to the Ground Lease;

(d) Evidence of Financial Feasibility. Evidence that sufficient funds are available to complete the Phase on the Project Parcel to be conveyed, including, without limitation, loan and equity commitments containing customary and reasonably attainable contingencies and conditions providing sufficient funds to cover the cost of any construction, renovations, architects, engineers and other professional fees, debt service, taxes, insurance, legal fees, loan fees, operating expenses, and all other reasonable needs of the Phase. The evidence shall be consistent with information provided in the Business Plan, as amended, as described in Section 5.03;

(e) Guarantees and Payment and Performance Bonds. Corcoran Jennison Company, Inc. shall have executed the Performance and Completion Guarantee in substantially the form set forth in Schedule D, and Developer shall have delivered the payment and performance bonds as described in Section 5.08; and

(f) Developer shall have complied with the requirements set forth in Section 5.03 below, NLDC and DECD shall have approved the Business Plan for the subject Phase pursuant to Section 5.03 and Developer shall have certified that there has been no material change in the



information included in the Business Plan for the subject Phase since it was approved by NLDC and DECD.

3.04. *Permitted Encumbrances.*

(a) Developer shall take the Leased Premises (as defined in the Ground Lease) subject to the Permitted Encumbrances, as described in Article III, and to such other easements and rights of way as shall have been granted or reserved by NLDC in connection with the Project, subject to the reasonable prior approval of the Developer. Anticipated easements and rights of way are shown on *Exhibit C-3*, *provided, however*, the parties recognize and agree that other easements and/or rights of way may be necessary or desirable for the Project. Such Encumbrances shall include public access easements to the Riverwalk and the so-called "Green".

(b) The parties acknowledge and agree that subject to compliance with the standard requirements of the City of New London, the City shall, upon completion, accept the public streets constructed and to be constructed within the Project. The parties agree that Project Parcels may be conveyed subject to easements for completion of said streets and that upon completion of the streets, the parties shall cooperate in offering the streets to the City to be held and maintained as public streets.

3.05. *Acquisition Closing Schedules.*

(a) Time shall be of the essence with respect to Developer's obligation to enter into the Ground Lease for a

Phase (or a Sublease for Phases A, B, C and/or E) on or before the Default Milestone specified for a given Phase.

(b) In the event that fee title to the NUWC Property has not been transferred to NLDC and, as a result, the Developer is unable to satisfy the requirements of Section 3.03 (d) with respect to Phases A, B, C and/or E by the Default Milestone for execution of a Ground Lease, and provided the Developer has exercised reasonable efforts to secure such financing on reasonable commercial terms, then (i) the Developer shall not be required to enter into the Sublease, and (ii) the Default Milestones for Phases A, B, C and E, as applicable, shall be extended by a period equal to the time between the Default Milestone and the date on which fee title to the NUWC Property is conveyed to NLDC.

## Article V

## THE PROJECT DEVELOPMENT DEVELOPER'S OBLIGATIONS

5.01. *Developer Obligations.*

(a) With the exception of the NLDC Work, the Developer shall, at its sole cost and expense (utilizing third-party debt and equity financing secured by the Developer), subject to the terms of this Agreement, complete construction of all Phases of the Project in accordance with the Plans and Specifications and the Default Milestones. In particular, the Developer further agrees to undertake and perform, for each Phase, the activity listed in the "event" column of *Exhibit F* on or before each applicable Default Milestone. The Developer



recognizes and agrees that the NLDC Work shall be limited to the work authorized and approved by DECD pursuant to the terms of this Agreement and the Assistance Agreement. The Developer shall design each Phase, obtain the necessary permits and approvals and construct, or cause to be constructed, each Phase.

(b) Each Phase shall comply with all Legal Requirements (including specifically, but without limitation, all Environmental Laws, the MDP, the EIE, the NUWC-EA, and the terms of this Agreement, the Sublease, and the Ground Lease).

5.02. *Design Review.*

(a) The Developer shall submit for the review and approval of NLDC and DECD all design and engineering work for each Phase, including specifically, the Site Plan and the Plans and Specifications. Such Plans and Specifications shall be submitted and reviewed in accordance with the procedures detailed on *Exhibit L.*

(b) The Developer and NLDC shall meet as outlined on *Exhibit L* during the design planning of each Project, from concept to final design. No site plan or design-related approval or other approval by a local, State or federal agency shall be sought by the Developer without prior written notice to NLDC and DECD.

*Appendix C*

5.03. *Due Diligence Review.*

(a) With respect to each Phase, NLDC and DECD shall undertake a due diligence review and approval process. Not later than ninety (90) days after approval of design development for each Phase pursuant to *Exhibit L*, Developer will submit a business plan for the subject Phase for NLDC and DECD review (herein, the "Business Plan"). NLDC and DECD shall respond within 30 days of submission of a complete Business Plan by the Developer. If the Business Plan does not include sufficient information for NLDC and DECD to provide approval, DECD and/or NLDC may request additional information. Any material change in the Business Plan occurring prior to the execution of the Ground Lease for the subject Phase shall be submitted for review and considered for approval in the same manner as the original Business Plan.



**APPENDIX D — MAP**

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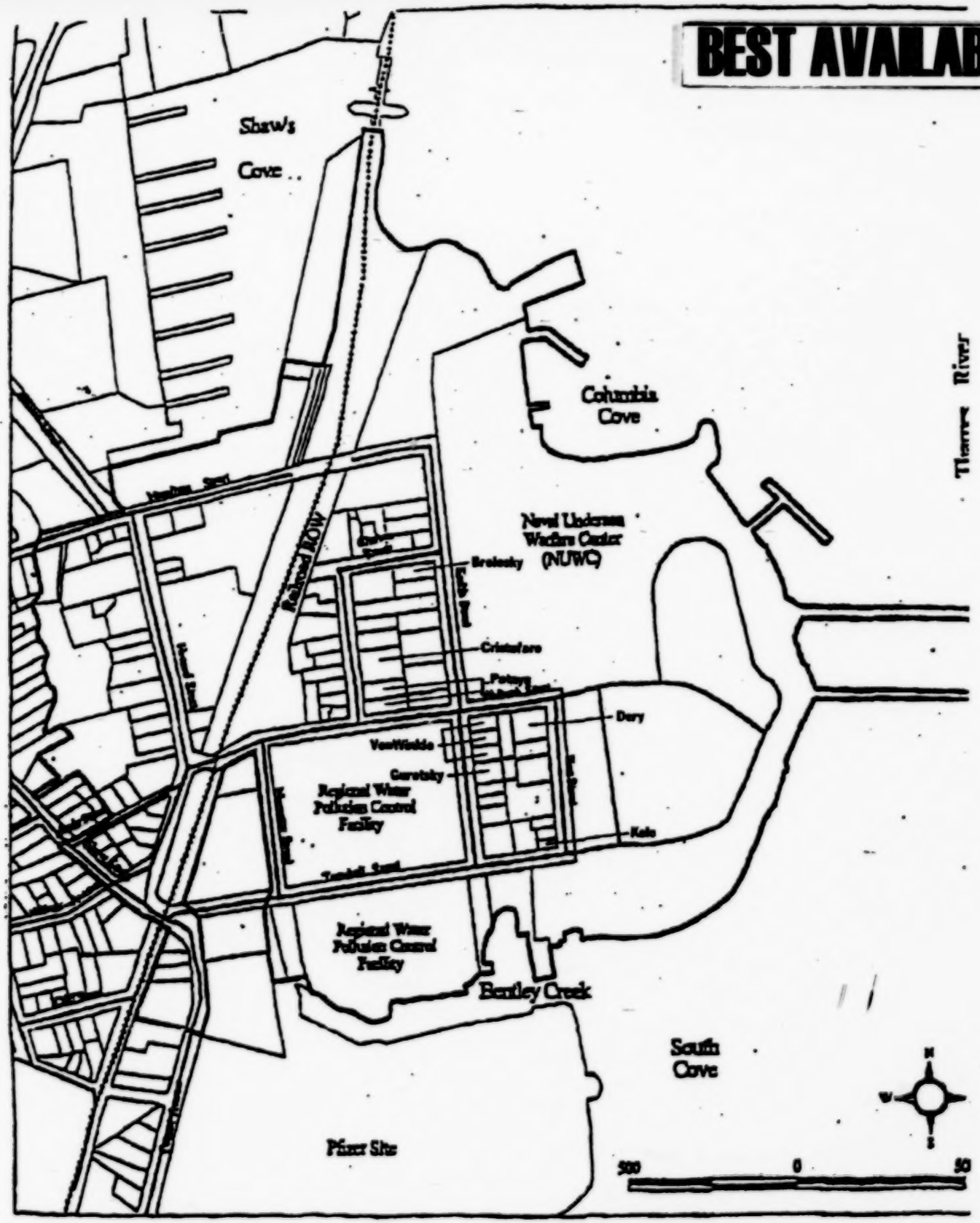


Fort Trumbull MDP Area - New London, Connecticut

Figure 2

Note: GIS coverages developed by Milone & MacBroom, Inc. and HMA, Inc. Sources include Connecticut DEP, City of New London, FEMA, and US Navy. Intended for planning

PLAINTIFF'S EXHIBIT
TT
Full
MDP Project

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

No. 04-108

# In The Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

v.

CITY OF NEW LONDON, et al.,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF THE STATE OF CONNECTICUT, THROUGH ITS ATTORNEY GENERAL RICHARD BLUMENTHAL, AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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## QUESTION PRESENTED

Does the Fifth Amendment prohibit a state legislature from allowing municipal authorities to condemn private residences in a distressed municipality for the purpose of furthering a community economic development plan that is projected to create jobs, increase tax revenues and revitalize downtown and waterfront areas?

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## INTEREST OF *AMICUS CURIAE*

The State of Connecticut, through its Attorney General, Richard Blumenthal, respectfully submits this brief as *amicus curiae* in support of the City of New London and the other respondents.

The State of Connecticut has a unique and significant interest in this case because the power of eminent domain that the petitioners are challenging is set forth in a Connecticut statute – Conn. Gen. Stat. § 8-186. Although this litigation involves a particular development project in New London, Connecticut, the constitutionality of the condemnation authority embodied in § 8-186 is of vital concern to the State as a whole because it is a key element of the State's effort to promote economic revitalization statewide.

Specifically, Conn. Gen. Stat. § 8-186 states that "[i]t is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state." It further states that "assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants" is a valid "public use" as a "matter of legislative determination." *Id*. Reflected in this statutory language is the State of Connecticut's interest in myriad projects and challenges faced by the State and the 169 municipalities within the State, including the City of New London. If the Court were to adopt the petitioners' position, the State of Connecticut and the municipalities to which the State has delegated its eminent domain power would find their hands tied by litigation, or the threat of litigation, that would seriously hamper their efforts to promote economic development and prosperity within the State.

Accordingly, the State of Connecticut, as *amicus curiae*, respectfully urges this Court to uphold the constitutionality of the condemnation authority set forth in Conn. Gen. Stat. § 8-186 by affirming the decision of the Connecticut Supreme Court.

## SUMMARY OF ARGUMENT

In challenging the City of New London's condemnation of their property, the petitioners are challenging far more than a single decision of one municipality. In effect, they are challenging Connecticut's statutory scheme for addressing the deep-seated economic problems of distressed municipalities across the State and, in particular, the General Assembly's determination that "assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants" is a valid "public use" as a "matter of legislative determination." Conn. Gen. Stat. § 8-186. Because such determinations are properly the province of the legislature, not the judiciary, the petitioners' challenge is fundamentally unfounded.

Furthermore, the means employed by New London to carry out its state-sanctioned economic development plan are not novel. On the contrary, the common law of eminent domain has long recognized that private actors may be used to accomplish public goals. Thus, the petitioners' claim that the condemnation at issue in this case represents a new and troubling expansion of the law should be squarely rejected.



## ARGUMENT

### I. THE CONDEMNATION AT ISSUE IN THIS CASE IS A VITAL COMPONENT OF A BROADER EFFORT BY THE STATE TO PROMOTE ECONOMIC REVITALIZATION OF DISTRESSED COMMUNITIES.

The petitioners portray the condemnation at issue in this case as the cavalier act of a rogue municipality. Nothing could be further from the truth. As the history of this case demonstrates, the subject condemnation is one component of the City of New London's carefully conceived economic development plan, which in turn is the product of a broad effort by the State to promote the revitalization of communities that have been devastated by economic downturns.

Often, as in the present case, local economic downturns are the result of national and international forces far beyond the control of local governments. For example, the federal government's decision in 1996 to close the United States Naval Undersea Warfare Center in New London resulted in the loss to the City of over 1000 jobs. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). To address such problems, the State is working with municipalities such as New London to develop plans to promote revitalization of the local economy. Given the reality that dependence on local taxation and state revenues often cannot solve the problem, economic development plans that incorporate both public and private entities offer a promising option that, in some cases, may be the only viable solution to chronic economic decline.

This is precisely the situation in New London. New London is a city that, like many cities in the State and

across the country, has suffered significant economic reverses, in large part due to forces beyond its control. (Pet. App. 196, 272-73, 327).[1] Much of its business and industry has declined over the last several decades and its tax base has appreciably eroded. The local situation has deteriorated to the point that the State has reviewed the situation and the Connecticut Office of Policy and Management ("OPM") has repeatedly designated the city a "distressed municipality." *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). This designation allows the city to address its problems pursuant to the provisions of Connecticut General Statutes §§ 8-186, *et seq*.

The General Assembly adopted Conn. Gen. Stat. §§ 8-186, *et seq*. more than thirty years ago to address the crippling economic conditions of distressed municipalities. In pertinent part, this statutory scheme authorizes the establishment of economic development agencies or development commissions specifically to develop comprehensive economic development plans, particularly for distressed municipalities such as New London. (Pet. App. 272-73).

Once a development agency or commission has been given instructions to proceed by the municipal authorities, it must initiate a project plan that, by law, must include a clear legal description of the land within the designated development area, plans for relocating affected residents, financing plans, etc. Conn. Gen. Stat. § 8-189. After relevant state agencies have determined that the proposed plan does not vary from state planning

[1] References to the Appendix to the Petition for a Writ of Certiorari are noted as "Pet. App."



program objectives, the development agency must then present the plan to the municipal authorities, and provide appropriate notice for a mandatory public hearing, before these authorities vote to approve or disapprove the plan. Conn. Gen. Stat. §§ 8-189, 191.

In February, 1998, Pfizer, Inc. publicly announced its plans to develop a major research facility on the New London Mills site adjacent to the Fort Trumbull area of New London, Connecticut. (Pet. App. 4). In April, 1998, the New London City Council ("City") authorized a development plan for the Fort Trumbull area pursuant to its authority under Conn. Gen. Stat. § 8-186, *et seq*. (*Id.*)

Soon after receiving the initial go-ahead from the City under Conn. Gen. Stat. § 8-186, the New London Development Corporation ("NLDC"), a private, nonprofit economic development corporation formed by the City in 1978 to assist in economic planning, began holding informal neighborhood meetings regarding the development plan. (Pet. App. 3). In May, 1998, the City authorized the NLDC to proceed.

In July, 1998, the NLDC began to prepare an environmental impact statement, required under the Connecticut Environmental Policy Act, Conn. Gen. Stat. § 22a-1, *et seq*. The NLDC considered six alternative plans for the project area as part of the required environmental impact evaluation. (Pet. App. 7).

The NLDC's development plan area is approximately ninety acres in size and is located on the Thames River in New London, adjacent to the proposed Fort Trumbull State Park, and the Pfizer global research facility, which opened in June, 2001. It includes residential and commercial areas, and is comprised of approximately 115 land

parcels. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004).

The project's goals are to create a development that would complement the Pfizer facility and create jobs, increase tax and other revenues, encourage public access to and use of the City's waterfront, and eventually "build momentum" for the revitalization of the rest of the City, including its downtown area. *Kelo*, 843 A.2d at 509.

The development plan itself is divided into seven parcels of land. Parcel 1 will include a waterfront hotel and conference center, along with marinas for both transient tourist boaters, and commercial fishing vessels. Parcel 1 also will include a public walkway along the waterfront. Parcel 2 will provide for approximately eighty new residences, organized into an urban neighborhood and linked by a public walkway to the remainder of the development plan, including the Fort Trumbull State Park. Space will be reserved at the southern end of parcel 2 for the United States Coast Guard Museum, which will be moved to the development plan area from the nearby United States Coast Guard Academy. Parcel 3 would have 90,000 square feet of high technology research space adjacent to the Pfizer facility, but would also retain the existing Italian Dramatic Club, a private social club. Parcel 3 includes private residences currently owned by three of the plaintiffs. Finally, parcel 4A, which includes homes owned by four plaintiffs, would be designated for "park support" services and parking for the nearby state park. *Kelo*, 843 A.2d at 509.

When it approved the development plan in January, 2000, the City Council also authorized the NLDC to acquire properties within the development area. Thereafter, in



October, 2000, the NLDC voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell them. All acquisitions were initiated pursuant to Conn. Gen. Stat. § 8-186.

Once acquired, the project area will be owned by the NLDC, which will then lease the land for $1 a year to Corcoran Jennison, a private, for-profit development company. Corcoran Jennison would then undertake the economic development of the area as described above.

The development plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the City, in which 54% of the land area is exempt from property taxes. These gains would occur in a city that, with the exception of the new Pfizer facility adjacent to the development plan area that now employs approximately 2000 people, recently has experienced serious employment declines, particularly with the loss of approximately 1900 government sector positions and, as noted above, the closure of the United States Naval Undersea Warfare Center in 1996, which transferred more than 1000 positions to Newport, Rhode Island. *Kelo*, 843 A.2d at 509.

In short, the condemnation at issue in this case is not a lone decision by one municipality, but rather the product of careful legislative decisionmaking by the State legislature and the City of New London. It reflects a concerted effort by State and local government officials to address problems that are, in large part, caused by forces beyond

the City's control and require comprehensive solutions. Because "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation," *Berman v. Parker*, 348 U.S. 26, 36 (1954), there is no basis for upsetting the legislative determinations at issue in this case. As this Court has emphasized, "[t]his principle admits of no exception merely because the power of eminent domain is involved," *id.*, and no exception is warranted here.

## II. THE USE OF PRIVATE ACTORS TO ACCOMPLISH PUBLIC GOALS IS WELL ESTABLISHED IN THE LAW OF EMINENT DOMAIN.

In seeking to condemn private property to accomplish public goals, the City is not doing anything new. Contrary to the petitioners' claims, the use of private actors to accomplish public goals is well established in the law of eminent domain.

In its modern form, the doctrine of eminent domain dates from the mid-seventeenth century. According to most commentators:

> The phrase 'eminent domain' appears to have originated with [Hugo] Grotius who carefully described its nature (Lewis on Eminent Domain, Section 3; Mills on Eminent Domain, Section 5; 1 Thayer, Cases on Constitutional Law, 945), and the power is universal and as old as political society.

*Welch v. Tennessee Valley Authority*, 108 F.2d 95 (6th Cir. 1939).

The doctrine has long been part of common law jurisprudence. For example, Blackstone clearly recognized



the existence of the power of eminent domain in his Commentaries on the Laws of England, where he stated:

> In [certain] cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification. . . . All that the legislature does is oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Commentaries on the Laws of England, Vol. 1, p. 135 (1765).

Blackstone's description of eminent domain authority as exercised in England is helpful because, for all relevant purposes, it describes the law as it was understood in the colonies where condemnation was used by colonial legislatures for a wide variety of public projects. Specifically, "[e]minent domain was employed quite extensively in colonial and early America for purposes including but not limited to mills, private roads, and the drainage of private lands. There was little disagreement that these uses were public and that eminent domain could be used in their assistance." Nichols on Eminent Domain, § 7.01[3] (3rd ed. 2004). However, this same treatise continues, "As demands for government support of commerce increased, so did controversy surrounding what constituted a valid public use justification for the employment of eminent domain." *Id.*

The reason for this controversy lay in the recognition that, while the power of condemnation was widely accepted

as a necessary incident of government, it was also recognized as being a direct potential threat to property rights. This tension, between the need for government to have the power of eminent domain and the need to protect the property rights of individuals, was reflected in the debates surrounding the Bill of Rights, specifically in the Federalist Papers, *e.g.*, The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868), and formed the backdrop for the eventual adoption of the Fifth Amendment.

Ultimately, the Framers drafted the Fifth Amendment with language that evinces a clear effort to provide government the power that it needed while protecting the property rights of citizens. The amendment expressly permits governmental condemnation of private property, as long as it is for a "public use," but explicitly requires "just compensation."

The term "public use," however, is not defined in the Fifth Amendment and a review of the caselaw suggests that, during the early stages of the Republic, the power of eminent domain was confined to certain traditional areas, such as taking land for governmental buildings, military installations, and roads. This use of the power of condemnation did not engender much controversy.

As one example, transportation projects have long been recognized as the type of activity which benefits from governmental exercise of the power of eminent domain. *Rindge Co. v. County of Los Angeles*. 262 U.S. 700, 706 (1923); *see also, Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir. 1969). In *Rindge*, for example, the landowners objected to the taking of their property for two proposed highways that were to be built entirely on their private property. This Court upheld the condemnation as being for



a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706.

As times changed and technology advanced, new forms of transportation appeared, such as the railroad. Railroads offered new efficiencies in national transportation, but required vast amounts of capital and technical experience, both of which were difficult for government to obtain. Congress, and the state legislatures responded, first, by expressly recognizing the public need for railroads and second, by granting ***private*** companies the power of condemnation to build them. The courts uniformly upheld these developments in the law of eminent domain. *See, e.g., Hairston v. Danville & Western Railway*, 208 U.S. 598, 600-01 (1908).

Finally, in the last sixty years, this Court has upheld the acquisition of private land for new forms of otherwise typical government activities. The leading case in this regard is *Berman v. Parker*, 348 U.S. 26 (1954), in which this Court held that alleviation of severe urban blight could be a public use. The case involved a severely depressed slum where more than 50% of the dwellings were beyond repair and the public benefit from addressing persistent crime, disease and poverty were self-evident. Significantly, this Court upheld the constitutionality of the development act at issue, notwithstanding the fact that it permitted the transfer of acquired property to redevelopment companies or individuals to carry out the plan and, in fact, preferred the use of private enterprise over public agencies for execution of the plan.

Another significant case is *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231 (1984). In *Midkiff*, authorities

in Hawaii acquired private land, not to address blight, but to break up an oligarchic land ownership system that resulted in an economic stranglehold on property. *Midkiff* is also very important for its conclusion that, for all practical purposes, the power of eminent domain is "co-terminous" with the state's police powers.

Finally, *Midkiff* and *Berman* are also relevant because they describe the standard of review used by the federal courts. Exercise of eminent domain is uniformly considered a legislative function and, therefore, courts have been very hesitant to interfere. As noted above, this Court has concluded that:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-high conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

*Berman v. Parker*, 348 U.S. 26, 32 (1954). Consequently, courts defer to such legislative determinations and generally adopt a very circumscribed scope of review.[2]

[2] This is not to say that a legislative determination of public use cannot be challenged. As the Connecticut Supreme Court noted in this case, while "great weight" is accorded to a statute authorizing a taking, "the courts are empowered to resolve disputes when such determinations are challenged."



A review of the decisional law, therefore, demonstrates that government can employ condemnation to take private property, and even turn that property over to private hands, if required, in order to achieve a valid public use. Further, the legislature is the custodian of that power and the primary arbiter of what constitutes the public need. The logic is inescapable; if the end result is to address a public need lawfully identified by the legislature, then the fact that private versus public means are used to achieve that goal is constitutionally irrelevant. No state or federal constitutional provision has ever limited Congress or the legislative bodies of the several states to accomplishing necessary public projects solely through public instrumentalities. Furthermore, while the vast majority of cases involve noncontroversial cases where the public use is not questioned, such as roads, post offices, bridges, etc., this Court has upheld taking private land for more indirect governmental purposes such as removing slums or ending an oligarchic landholding system. In this regard, there does not appear, in any of these cases, any express language, or any logical reason, to limit the definition of public use to cases of blight as opposed to cases involving a distressed municipality. More importantly, the critical underlying fact is that it is the legislature, not any private party, that has, after due deliberation, defined the public need and has approved the means selected to attain it.

Consequently, what is before the Court in this case is nothing new. It is not a heretofore unrecognized expansion of the law of eminent domain because the use of private

actors to accomplish public goals is hardly novel but well established in the law of eminent domain.[3]

Furthermore, the decision whether the use of private actors to carry out development plans is a public use is a *legislative* determination. In the present case, the legislature has spoken, and very clearly. As discussed above, the General Assembly, in enacting Conn. Gen. Stat. § 8-186, clearly identified an unambiguous public need to address the crippling economic conditions of distressed municipalities.

In addition to the explicit definition of public use contained in the statute, the issue was again addressed when the City of New London sought to act under the powers granted it by § 8-186. Specifically, as noted above, in order to ensure fairness, full disclosure, and the protection of affected parties, the State legislature insisted that: 1) municipal authorities grant permission for the development agency to begin; 2) the agency present a publicly available plan which identified areas for potential acquisition; 3)

[3] The dissent in the Connecticut Supreme Court, as have courts in other jurisdictions, demonstrated clear unease with the use of governmental condemnation power for the benefit of a private company, but could not conclude that the legislature does not have the authority to enact such a law. As a consequence, the dissent below advanced an approach that would require clear and convincing evidence that a project would address a definable public need when land was being condemned for a private entity. While potentially useful as a judicial check on the misuse of the power of condemnation in particular cases, there remains the concern that using a higher level of scrutiny on certain cases contravenes a long tradition of deference to state and federal legislative bodies in matters involving determinations of public need. In this regard, there are, of course, valid reasons for deferring to the legislative process in these cases. Unquestionably, state legislatures, and not the courts, are best equipped to identify what is a legitimate public need and the means to address it.



public hearings be held; and 4) the municipal legislative bodies vote on the plan. Thus, not only has the State legislature acted to identify the public need in question, but the local authorities have agreed that there is a valid need, have developed a publicly available plan to correct it, and have voted on it. Finally, not only have the municipal authorities reviewed and approved the plan, but the Connecticut Department of Environmental Protection, the Connecticut Department of Economic and Community Development, the Office of Policy and Management, and the Southeastern Connecticut Council of Governments have conducted their own independent reviews.

The problems of persistently distressed municipalities are, clearly, a proper subject for legislative consideration and action. The Connecticut General Assembly, consistent with its obligations, examined the problem and responded with a carefully crafted statutory scheme to empower cities and towns to address a real and recognized need. The City of New London did not shirk its duty but, after providing full notice and an opportunity to be heard, designated an area for economic development, arranged for a plan to be drafted, and ultimately voted to act on that plan. This is what government does and, under the constitution, what government is given the power to do. After the government has done this, it would be anomalous, at best, for a court to step in and second-guess what state and local officials have determined is a pressing public need.

## CONCLUSION

Eight centuries of common law have defined and established the limits of the power of government to take

property for the benefit of the public. It is beyond dispute that, without the power of eminent domain, government cannot act to accomplish the public good. The primary check on misuse of this power is, and has been, the legislative process. In this case, not one, but two, legislative processes are at work. The Connecticut General Assembly lawfully enacted a statute to permit municipalities to act to correct adverse economic conditions. The municipality, in turn, lawfully proceeded to create a development plan that comports with the statutes and the most restrictive notions of due process. There is nothing untoward, of itself, in permitting government to employ private parties as means to accomplish a desired end. Further, there is nothing constitutionally suspect in government seeking to improve economic conditions for distressed municipalities. Consequently, both the statute itself and the application of it in this case meet the terms of the Constitution and the Connecticut Supreme Court's decision should be affirmed.

Respectfully submitted,

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No. 04-108

# In the Supreme Court of the United States

Susette Kelo, et al.,

Petitioners,

*v.*

City of New London, Connecticut, et al.,

Respondents.

**On Writ of Certiorari to the Supreme Court of Connecticut**

## BRIEF *AMICI CURIAE* OF DEVELOP DON'T DESTROY (BROOKLYN), INC. AND THE WEST HARLEM BUSINESS GROUP IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?



## INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of two New York City organizations of interested parties who find themselves in a circumstance similar to the circumstances of Petitioners in the above-entitled proceedings.

The first, Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), is a not-for-profit corporation formed on behalf of interested parties in Brooklyn, New York, fighting, inter alia, to protect the property rights of individuals and businesses in a thriving mixed-use community that is being earmarked for demolition in order to accommodate the plans of a private developer. The developer, Forest City Ratner Companies ("FCRC"), has created a project for Prospect Heights, Brooklyn, which envisions a footprint of 24 acres–1.3 times that of the World Trade Center site–and includes a 19,000-seat arena, 17 tower buildings ranging from 210 to 610 feet, 2.1 million square feet of office space (equal to that in the Empire State Building), and 4.5 million square feet of (mostly rental) housing. A key component of this project is the use, or threat of use, of eminent domain to acquire 13 acres of the site, whereby private property will be condemned, seized and transferred by the government to FCRC. Many property owners and long-term business owners have felt compelled to negotiate with FCRC in a disadvantageous environment created by an effective media

campaign that portrays the use of eminent domain as legally inevitable.

The West Harlem Business Group (the "Group") is an unincorporated association of property owners in a 17-acre district of West Harlem in New York City (42 % of which is already owned by Columbia University ("Columbia")) who have been threatened by Columbia with condemnation proceedings if they do not agree to Columbia's price for the acquisition of their land. Columbia has met with governmental officials, but no Memorandum of Understanding has been negotiated between Columbia and any agency having statutory authority to condemn property. Many of the businesses that are members of the Group have a long-term local customer base, so that relocation would cause enormous economic hardships for such businesses far beyond the fair value of the real estate that they could recoup in a condemnation proceeding. Further, there are a few remaining commercial-zoned areas in Manhattan where a commercially competitive replacement property can be occupied.

The situation of the Petitioners in the instant case is similar to those of the property owners in both Prospect Heights and West Harlem. In each case, a question of fundamental constitutional importance is raised: Does the Fifth Amendment limit the power of government to take



property from one private entity and effectively transfer it to another private entity for the stated purpose of stimulating economic development or other perceived more attractive private use that may be veiled under the camouflage netting of "public" purpose? We respectfully submit that the Fifth Amendment proscribes such abuse of the power of eminent domain.

A decision favorable to Petitioners in the case under review would bring greater certainty as to the rights of property owners in similar circumstances. Accordingly, we respectfully urge this Court to reverse the erosion of the rights of property owners and formulate a sufficiently narrow definition of "public use" such that it excludes a purported "economic benefit" theory where the primary economic beneficiaries of a government taking are private parties.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37(3)(a); the requisite consent letters have been filed with the Clerk.[1]

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[1] Pursuant to this Court's Rule 37(6), we note that no part of this brief was authored by counsel for any party, and no person or entity other than DDDB, the Group, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

## SUMMARY OF ARGUMENT

The Connecticut Supreme Court in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), erroneously disregarded the individual civil right that is coterminous with the right to enjoy one's property when they ruled in favor of Respondents. The lower court's decision marks a further erosion of the "public use" limitation on the condemnation of private property. While this Court's ruling in *Hawaii Hous. Auth v. Midkiff*, 467 U.S. 229 (1984) grants a state or local authority broad powers in condemning land, a taking for the benefit of a private entity, whether profit or not-for-profit, under an "economic development" argument is prohibited by the Fifth Amendment to the United States Constitution.

Accordingly, this Court should correct the Connecticut court's mistaken definition of "public use" and adopt the reasoning of other state supreme courts, which in recent rulings have struck down takings for purely private use.



## ARGUMENT

### I. The Right to Enjoy One's Property is Tantamount to a Fundamental Civil Right and is Protected by the Fifth Amendment.

The sanctity of an individual's right to acquire and enjoy rights to property is well-established in United States jurisprudence, and, indeed, this Court has defined a right to property as essentially an individual civil right.

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations omitted.] Congress recognized these rights in 1871 when it enacted the predecessor of [42 U.S.C. § 1983]."

*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). In fact, long before the 1871 Act, it was recognized in 1795 that people have "a sense of property" and that private ownership is an "inalienable" human right.

> "[I]t is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labour and industry. The preservation of property, then, is a primary object of the social compact."

Patterson, J. in *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795).

The Fifth Amendment to the United States Constitution states in part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. The Due Process clause of the Fourteenth Amendment states that no "state [shall] deprive any person



of life, liberty or property without due process of law." U.S. Const. amend. XIV § 1. The Due Process clause is interpreted as imposing the same limitation upon the states regarding eminent domain as is found in the case of the federal government. Accordingly, the meaning of "public use" found in the Fifth Amendment also applies to state uses of eminent domain. *See Richardson v. City & County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (holding that when the power to condemn has been delegated by the state to a municipality, then the applicable parts of the Fifth and Fourteenth Amendments apply). Whatever may be the precise meaning of "due process of law," there can be no question that it does not include the taking of one person's property and giving it to another, either directly or indirectly, solely for his/her private benefit and use, regardless of the perceived "economic benefit" to a political entity or the perceived notion that the proposed use is preferable to the current use. It follows that a taking of property for private use cannot be authorized by Congress without violating the Due Process Clause of the Fifth Amendment to the United States Constitution. Such a taking when authorized by a state is in violation of the Fourteenth Amendment. *See O'Neill v. Leamer*, 239 U.S. 244 (1915). Thus, federal questions are implicated in every eminent domain case arising under the laws of the state in which it is contended that the taking is not for a public use.

## II. The Weakened Standard of "Public Use:" *MIDKIFF* and its Progeny.

States and local authorities over the years have failed to take into account the civil rights associated with owning and using one's property and increasingly eroded the term "public use" such that it has come to include a "public benefit" in terms of higher tax revenues and job creation. Most disturbingly, such takings have been effected at the behest of private corporations and developers, who select the property to be taken and derive the principle benefits from the taken land. *See, e.g., Southwestern Illinois Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1, 4 (Ill. 2002) (hereinafter *SWIDA*).

State supreme courts have upheld the constitutional sufficiency of using eminent domain for economic development based on this Court's ruling in *Midkiff*. *See, e.g., Kelo*, 843 A.2d 500; *Gen. Bldg. Contractors, LLC v. Bd. of Shawnee County Comm'rs of Shawnee County*, 66 P.3d 873 (Kan. 2003); *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003); *Vitucci v. New York City Sch. Constr. Auth.*, 735 N.Y.S.2d 560 (2d Dep't 2001) leave to appeal denied by 775 N.E.2d 1288 (N.Y. 2002); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996). In *Midkiff*, this Court held that the "public use" requirement of the Fifth Amendment is "coterminous



with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. The Court further explained that a reviewing court must defer to a governmental exercise of eminent domain authority, so long as the government's "purpose is legitimate and its means are not irrational." *Id.* at 242-43.

As a result of state courts' reliance on *Midkiff* as permitting the use of eminent domain to secure an economic benefit, "public use" has lost its original, true meaning–"use by the public." Traditionally, this meant that to make a use public, the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property taken. *See West River Bridge Co. v. Dix*, 47 U.S. 507 (1848); *Shasta Power Co. v. Walker*, 149 F. 568 (C.C. N.D. Cal. 1906). "Public use" has instead evolved such that it has been broadly defined to mean something akin to "public advantage." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23 (1992).

## III. Reining in "Economic Development" as "Public Use."

Nevertheless, legal practitioners have sought to reinvigorate the public use limitation and directly criticized *Midkiff* and its progeny. Ellen Frankel Paul and Richard Epstein both wrote books opposing the direction suggested

by *Midkiff*.[2] Paul has rightly described the ruling in Midkiff as a "constitutional impropriety" regarding eminent domain procedure, effectively neutralizing the public use limitation on government takings.[3] Their solution to limiting *Midkiff* includes a return to substantive due process, a reinvigoration of property rights and judicial protection for the same, and a limiting of public use to the most narrow definition of public use possible.

Other writers have also offered attempts at reinvigorating the "public use" limitation on eminent domain.[4] For example, Martin J. King sees several notable public use decisions as the demise of the public use requirement.[5] King concludes that the law of eminent domain involves two conflicting propositions: "the desire of the consensus to have its demands met versus the rights of the

[2] Ellen Frankel Paul, Property Rights and Eminent Domain (Social and Moral Thought series) (Transaction Books 1988); Richard Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard University Press 1985).

[3] Paul, *supra* note 2, at 99, 102.

[4] *See* Russell A. Brine, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1986); Thomas J. Coyne, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 Notre Dame L. Rev. 388 (1985); Mark C. Landry, *The Public Use Requirement in Eminent Domain–A Requiem*, 60 Tul. L. Rev. 419 (1985).

[5] Martin J. King, *Rex Non Potest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 Dick. L. Rev. 266 (1972).



individual."[6] The demise of the public use limitation means that these two propositions or goals can no longer be balanced. King proposes to redefine public use. He argues that "use" implies a "user" and that public use implies a public user and therefore the only public user there is, is the government. King's "objective" test for eminent domain requires that the condemned property be taken by the government for functions over which the government will have control and operation.

Thus, there is a sentiment that "public use" should no longer be considered "public benefit" and that it is essential that the entire community should directly participate in any improvement in order that it constitute a public use.

This line of thinking has been followed by the Illinois Supreme Court in *SWIDA*, 768 N.E.2d at 10-11, which held that the taking of property by a governmental authority to be used as a parking lot at a privately-owned automobile racetrack did not constitute a taking for a valid public use and was therefore unconstitutional. The court rejected the argument that the taking would foster economic development, observing that the racetrack could have built a parking garage at higher cost without the taken property. The court found that the condemnation was

[6] *Id.* at 280.

intended to result in the racetrack's private profits and that the "public purpose" concept does not amount to an unfettered ability to exercise the takings for a purely private use.

Ironically, the *Kelo* court, in *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1187-88 (Conn. 2002), held that a redevelopment agency acted unreasonably when it attempted to take as part of a redevelopment project property that was not substandard or essential to the project. The court found that if an owner's property can be integrated into a redevelopment area, the taking of the property is not essential. The court found against the redevelopment agency where the agency failed to consider or discuss the integration of a yacht club's property into the overall development plan.

Hence, there is a growing consensus that eminent domain may not be used to assist private individuals to carry on their business to a better private advantage. This is consistent with the traditional notion of eminent domain which prohibited its use if the sole or primary object was to secure the private interests of some party, even if the community benefits as a result. *New York Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936). For example, in *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856-57 (S.C. 2003), the court applied a restrictive view of "public use" and held that although the projected economic benefit to a county from a proposed marine terminal was attractive, it



was not a public use that could justify the power of eminent domain. The court noted that the terminal would be financed, managed and operated by a private firm with no general right of public access.

Significantly, in July 2004, the Michigan Supreme Court emphatically overturned *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, the court held that the public would be the primary beneficiary of the City of Detroit's use of eminent domain to accommodate General Motor Corporation's plan to build a new assembly plant: "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and ... the law does not so much regard the means as the need." *Poletown*, 304 N.W.2d at 459 (citation omitted). Over twenty years later, the Michigan Supreme Court now has acknowledged that this type of eminent domain simply secured the private advantage of General Motors Corporation. *Hathcock*, 684 N.W.2d at 786-87. The Michigan court's decision marks an important step in the efforts to provide a narrow definition of "public use" and contain the potentially broad application that could threaten property rights, but the three-pronged test suggested by that court still provides potential for abuse by creative public agencies and entities.

## IV. Takings Destroy the Fabric of Communities.

A ruling in favor of the Respondents in the instant case would be unwise because it would allow for the use of eminent domain to assist private industry and supplant the market. Such a decision would give a private transferee unjust enrichment at the expense of the condemnee, and it would infringe the rights of the latter. As DDDB and the Group are focused on the effects eminent domain has on a community, we also bring to the Court's attention the numerous deleterious consequences the tactics of Respondents would have on communities like Prospect Heights and West Harlem. Social historians have documented how eminent domain has destroyed the entire social fabric of a community.[7]

In a staggering report on the uses and threats of eminent domain for private parties from 1998 to 2002, the Institute for Justice has documented the destruction or removal of: (1) 127 homes in Hurst, Texas for a shopping mall, (2) 150 families in Wyandotte County, Kansas for a racetrack, and (3) 83 homes in Toledo, Ohio for a car manufacturing facility, for example.[8] The author notes that

[7] *See, e.g.*, Armond Cohen, Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization (Lincoln Institute of Land Policy 1972); Herbert J. Gans, The Urban Villagers: Group and Class in the Life of Italian-Americans (Free Press of Glencoe 1962).

[8] Dana Berliner, Public Power, Private Gain 58 (Institute for Justice 2003).



all too often, "City officials are more than willing to sacrifice their own citizens, particularly those of moderate income, for the promise of richer residents and larger retail."[9]

Alarmed by the unchecked destruction of communities, DDDB and the Group strongly urge this Court to rule in favor of Petitioners and formulate a narrow definition of "public use" to the exclusion of "economic benefit." Such a ruling would reinvigorate the Fifth Amendment as a protection against a plutocratic government, something Justice Harlan was acutely aware of: "[A] government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) (paraphrasing Justice Miller in *Loan Ass'n v. Topeka*, 87 U.S. 655, 662 (1874)). A ruling against Respondents would send a clear message that the civil rights of property owners may not be compromised by an entirely speculative economic benefit.

[9] *Id.*

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and hold that the Fifth Amendment limits the power of a state or local authority to condemn property for the benefit of a private entity where the ostensible purpose is for "economic development."

Respectfully submitted,

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No. 04-108

In the

# Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

v.

CITY OF NEW LONDON, CONNECTICUT, et al.,

*Respondents.*

**On Writ of Certiorari to**
**The Supreme Court of the State of Connecticut**

## BRIEF AMICI CURIAE OF MARY BUGRYN DUDKO, FRANK BUGRYN, JR., MICHAEL J. DUDKO, HARRY PAPPAS, CURTIS BLANC, PACIFIC LEGAL FOUNDATION, AND CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

The Fifth Amendment, as incorporated to the states, limits the power of eminent domain to "public use[s]." The State of Connecticut condemned private property to transfer to private developers who use it for their own profit. Do the economic results of this transfer constitute a "public use"?

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are two public interest legal foundations, as well as a group of individual citizens who have had their property taken via eminent domain, or have been threatened by condemnation, to benefit private parties. Mary Bugryn Dudko, Frank Bugryn, Jr., and Michael Dudko are members of the Bugryn family, whose homestead was taken by the City of Bristol, Connecticut, to benefit a steel company. Harry Pappas is the son of John and Carol Pappas, whose land was condemned by Las Vegas, Nevada, to build a parking lot for a casino consortium. Curtis Blanc owns a warehouse in Liberty, Missouri, which he leases to a group of charitable organizations, and which is being threatened with condemnation to build an industrial park.

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and has represented the views of thousands of supporters nationwide who believe in limited government and private property rights, in such cases as *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF also participated as amicus in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), urging the Michigan Supreme Court to overrule the notorious eminent domain case

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). PLF participated as amicus in support of the petition for certiorari in this case.

The Center for Individual Freedom (CFIF) is a nonprofit, nonpartisan foundation dedicated to defending the individual rights protected by the United States Constitution, including the right to own property. Since its founding in 1998, CFIF has appeared before this Court as amicus curiae in several cases involving the Fifth Amendment's protections of life, liberty, and property.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Good fences make good neighbors, and one of the strongest legal "fences" in the Constitution is the public use clause. It prohibits citizens from using the power of eminent domain to take their neighbors' land for their own private benefit.

Yet this Court's decisions have come to equate "public use" with "any benefit to the public." *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. at 241. Since *anything* the legislature decides to do can be plausibly described as a benefit to the public, the consequence has been an epidemic of private condemnations, with states and local governments routinely taking property for redistribution to private interests, particularly businesses which use the property for their own profit.

Economists call this phenomenon "rent seeking": private parties try to gain control of the eminent domain power and use it for their own advantage. Rent-seeking behavior is economically wasteful, damages the rule of law, and seriously undermines private property rights. Between 1998 to 2003 alone, there were approximately 10,000 reported cases of condemnation or threatened condemnation for the benefit of



private parties. *See generally* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Those who suffer the most from such rent-seeking are the parties who have the least political influence, which usually means racial minorities and the poor. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998).

Amici will illustrate the rent-seeking phenomenon, and the deleterious social effects resulting from the broad interpretation of "public use," by reference to specific examples. As this brief demonstrates, condemnation is an extreme example of government coercion. Its effects on property owners are severe, not only in the form of economic deprivation, but in emotional, psychological, and social terms as well. Condemnations that take the land of innocent citizens, and transfer it to private developers for their own profit, are fundamentally unfair. They threaten not only the legal standards established by the Constitution, but also the more abstract social values of citizenship and domestic tranquility.

Only this Court can restore the Public Use Clause as an effective constitutional limit on the abuse of government power. The Court has repeatedly declared that such private takings are unconstitutional. *See, e.g., Midkiff*, 467 U.S. at 240. This Court should restore the Constitution's protections for private property not only to ensure that the law is followed as written, but also to ensure that citizens can trust in the security of their property, and in fair and equal treatment by the governments under which they live.

## ARGUMENT

## I

## THE EVISCERATION OF THE "PUBLIC USE" CLAUSE HAS CAUSED A PROLIFERATION OF RENT-SEEKING CONDEMNATIONS

### A. Eminent Domain Abuse Is a Threat to the Homes and Businesses of All Americans

The practical effect of the erosion of the "Public Use" Clause has been a rash of condemnations benefitting private parties. One recent study found over 10,000 instances of government using or threatening to use eminent domain to benefit private parties, just in the past five years. *See* Berliner, *supra*. Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998, and over 6,000 have been threatened with condemnation. *Id.* at 2. In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners, who lack the resources to oppose a condemnation.

Most eminent domain abuse occurs at the local level. For example, the City of Merriam, Kansas, condemned a Toyota dealership in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4 (1999 WL 2402262). The City of Bremerton, Washington, condemned 22 homes, including the home of an elderly widow named Lovie Nichols, in part to resell the land to private developers. Mrs. Nichols challenged the condemnation, but the court upheld the taking. *City of Bremerton v. Estate of Anderson*, 1999 WL 1116811 (Wash. App. Div. 2 Dec. 3, 1999), *rev. denied*, 10 P.3d 407 (Wash. 2000). The City of Corte Madera, California, condemned a private owner's land to give to a developer to build a grocery store. This, too, was permitted. *Town of Corte Madera v. Yasin*, No. A092777, 2002 WL



1723997 (Cal. App. 1st Dist. July 25, 2002). In one especially notorious case, billionaire Donald Trump nearly convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot. *See Casino Reinvestment Redevelopment Auth. v. Banin*, 727 A.2d 102 (N.J. 1998); Stephen J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 288 (2000).

The primary victims of such condemnations are poor minorities, and the primary beneficiaries are wealthy, politically powerful groups, who are more able to persuade authorities to condemn property for their benefit. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Kochan, *supra*, at 56.

### B. Rent Seeking Is the Inevitable Consequence of the Erosion of the Public Use Requirement

Whenever government has power to redistribute benefits and burdens between constituents, those interest groups will compete for control of that power, to secure benefits for themselves or to impose burdens on their competitors. Modern scholars refer to this as the problem of "rent seeking." *See generally* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 287 (Ann Arbor Paperbacks, 1965) (1962) ("[T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the 'generality' of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . . ."). Rent seeking leads to at least four major social problems.

First, it is unjust for citizens to have their property taken from them and given to others based not on merit or on any other valid public reason, but simply because they are less

successful at political activism. As Professor Sunstein has put it, the Constitution's authors believed it was unjust for "government power [to] be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Instead, they believed that "government action [should] result[ ] from a legitimate effort to promote the public good rather than from a factional takeover." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690-91 (1984).

Second, rent seeking is economically inefficient, because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying rather than into wealth-creating activity or innovation. *See* Buchanan & Tullock, *supra*, at 111 ("bargaining opportunities afforded in the political process *cause the individual to invest more resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly"). This harms the public because it distracts producers from meeting consumer needs.

Third, rent seeking has a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth distribution. *See id.* at 287-88 (noting "spiral effect" of ever-greater lobbying efforts). Suppose government takes $1 from each of 100 people, and gives it all to person X. It is in X's interest to spend $99 to convince the government to do this again; but it is only in the interest of each other person to spend $1 to convince it not to. Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); *see also* Kochan, *supra*, at 81 ("It is not cost-efficient . . . for a taxpayer to fight a particular piece of special-interest legislation.").



The fourth problem is that rent-seeking behavior rewards those who are already most wealthy and powerful. A group's wealth can greatly affect its ability to influence legislation. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115-16 (2003). Small grassroots organizations, or individuals, are less able to rally support behind a cause. And in the eminent domain context, winners are so enriched that they are increasingly likely to win the next time around. This problem is acute in eminent domain abuse.

> Even though a particular condemnation may concentrate the cost of the taking on the affected landowner . . . that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process . . . . Additionally, the interest group is unlikely to seek rents through condemnation and transfer if it does not believe that it has a reasonable likelihood of success.

Kochan, *supra*, at 82. Experience bears out these predictions. Wealthy neighborhoods are rarely condemned for "economic development." Instead, poor or middle class neighborhoods are condemned to make way for those in higher income brackets. For example, in one recent case, the City of Canton, Mississippi, tried to condemn 23 acres of minority-owned land to give to the Nissan Corporation to build an auto plant. Sandefur, *supra*, at 598. Although authorities dropped their case before the State Supreme Court ruled, the case is typical of economic development condemnations: landowners who are less

politically adept are at the mercy of those who exercise raw political power.

## II

## EMINENT DOMAIN ABUSE WREAKS HAVOC ON FAMILY AND SOCIETY

### A. Unchecked Use of Eminent Domain Damages Civility

Robert Frost famously said that "good fences make good neighbors." Robert Frost, *Mending Wall* (1949), *reprinted in Robert Frost: Collected Poems, Prose, and Plays* 39 (R. Poirier & M. Richardson eds. 1995). The phrase means that respect for each other's privacy and individuality reinforces the sense of goodwill that makes for a healthy community. As Nobel laureate Friedrich Hayek put it,

> The understanding that "good fences make good neighbours," that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property . . . is the only solution men have yet discovered to the problem of reconciling individual freedom with an absence of conflict . . . . There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.

1 F.A. Hayek, *Law, Legislation, and Liberty: Rules and Order* 107 (1973). *See also* Richard Pipes, *Property and Freedom* 119 (1999) ("It is the sense of economic independence and that of personal worth which it generates that give rise to the idea of freedom."). Indeed, societies that lack strong, enforceable property rights tend to suffer from profound social ills, including



economic stagnation, and worse. *See id.* at 224 ("The curtailment to the point of abolition of personal rights and freedoms in totalitarian states thus went hand in hand with the curtailment, to the point of abolition, of private property.").

American culture has long cherished the spirit of neighborliness and mutual respect that reach their highest expression on election day. Then, citizens with the most profound political differences settle their disputes peacefully, by ballot, and return safely to their homes, unafraid of reprisals, if their favored candidate should lose. The next day, these citizens, who shortly before were chanting opposing slogans and even making "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), can come together again as peaceful fellow citizens. This sense of domestic tranquility depends entirely on "good fences": that is, on mutual respect for property rights and, thereby, the individual liberties of one's fellow citizens. Thomas Jefferson noted that in America,

> [e]very one, by his property, or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome controul over their public affairs, and a degree of freedom, which in the hands of the [mob-rule] of the cities of Europe, would be instantly perverted to the demolition and destruction of everything public and private.

Letter to John Adams (Oct. 28, 1813), *in The Adams-Jefferson Letters* 391 (L. Cappon ed. 1959).

Eminent domain abuse threatens this sense of domestic tranquility by putting the private property rights of some citizens at the mercy of others. Unlike simple political differences on policy outcomes or particular candidates, eminent domain proceedings result in depriving the losing person and his family

of their homes or businesses, destroying the social bonds that make for healthy neighborhoods. A stark example of this arose in 1981, when Detroit condemned the Poletown neighborhood for the benefit of the General Motors Corporation, promising that a new auto factory would create jobs and alleviate a crushing economic recession. *See generally* Jeanie Wylie, *Poletown: Community Betrayed* (1989). The public debate over the project turned what had been a peaceful, integrated community, into a heated clash between neighbors and officials. As Wylie describes,

> people whose lives were composed of their union loyalty, their tenure in the auto plants, their patriotism, and their willingness to fight in U.S. wars were rejected, ignored, and robbed by the very institutions through which they claimed their identities . . . . [T]hese same people broke free of the illusion of civility that these institutions carry as trappings . . . . [H]istorically law-abiding Poletown residents felt free to cry out and to disrupt [a General Motors stockholders] meeting. In exactly the same spirit, Poletown resisters learned to interrupt reporters' interviews, to raise placards at the mayors' inaugural dinner, and, ultimately to go to jail when the city's police force moved on the [town's] church.

*Id.* at 219-20. After heated protests and a hurried decision by the State Supreme Court, the condemnation proceeded, and the Poletown neighborhood was razed to make way for an auto plant that never created the 6,000 jobs that were promised. *Id.* at 230. The residents of Poletown came to see democracy not as a system of mutual respect and participation toward a common good, but as a machine, destroying their homes, their family heritage, and their community.



Alexis de Tocqueville argued that American democracy rested on democratic *mores*, and in particular on the spirit of restraint by which "no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant." Alexis de Tocqueville, *Democracy in America* 292 (G. Lawrence trans., J. P. Mayer ed. 1969). Tocqueville believed that this spirit of restraint—that is, of mutual respect for each other's rights—was responsible for the fact that "while the law allows the American people to do everything," there are things which their *mores* "forbid[ ] them to dare." *Id.* But eminent domain abuse upends these *mores*, and puts the livelihood and the safety of a citizen's home at the mercy of the political process. Indeed, the eradication of the "public use" clause has established the principle that "everything is allowed in the interests of society," and turned the ballot box into a weapon. As a result, citizens learn to disrupt public proceedings, interrupt interviews, and otherwise break with the principles of civility on which good citizenship rests. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("fundamental values of 'habits and manners of civility' [are] essential to a democratic society").

This harms not only the relationship of citizens to their government, but of citizens to each other, as well. In his dissent in the *Poletown* case, Justice Ryan noted that it was "easy to underestimate the overwhelming psychological pressure which was brought to bear upon [the] property owners" who challenged the condemnation of their homes, "especially the generally elderly, mostly retired and largely Polish-American residents." 304 N.W.2d at 470 (Ryan, J., dissenting). The plans for the Poletown project were met with "a crescendo of supportive applause" from "[l]abor leaders, bankers, and businessmen . . . [and] radio, television, newspaper and political opinion-makers," who sought "new tax revenues, retention of a mighty GM manufacturing facility . . . new opportunities for

satellite businesses, retention of 6,000 or more jobs, and concomitant reduction of unemployment." *Id.* at 470-71. These landowners were forced to stand up for their property in the face of crushing political pressure, something which landowners are often unable or unwilling to do. "In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

### B. Eminent Domain Abuse Sets Neighbor Against Neighbor and Disrupts Family Life

Eminent domain cases frequently leave property owners as solitary defenders of their property, with little moral or financial support from the community.

> [T]he dispossessed are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout . . . . [T]heir political power relative to the groups favoring government projects . . . may determine whether landowners will block the project.

Daniel Farber, *Public Choice and Just Compensation*, 9 Const. Commentary 279, 290 (1992). Thus property owners who do not want to sell their land generally experience a sense of isolation, which is aggravated in private takings cases by the business community's enthusiasm for the condemnation.

The Bugryn family—four siblings in their 70s and 80s—owned two homes and a Christmas tree farm in Bristol, Connecticut, totaling 32 acres. This land had been in the family



for more than 60 years when, in the mid-1990s, city officials decided to increase tax revenue and employment by putting their land to more industrial use. At first, the city government sought to condemn the land to transfer it to the nearby Yarde Metals Corporation, which wanted the state highway frontage area where the two Bugryn homes were located, so that it could showcase the business with a large sign and entrance way. *See* Don Stacom, *Bulldozers Level Family's Homes, Crews Clear Way for Business Park*, Hartford Courant, Oct. 29, 2004, at B3 (2004 WL 97569879). The city repeatedly asked the Bugryns to sell their land, but the family declined the offers, which were less than half the real value of the land. In May, 1998, homeowner Frank Bugryn, filed for an injunction in state court to bar the condemnation. *Bugryn v. City of Bristol*, 774 A.2d 1042, 1045 (Conn. 2001), *cert. denied*, 534 U.S. 1019 (2001). "I don't want to go anywhere," he told the court. "My parents built the family house in 1939, and I built my own house on the property 42 years ago. I'm almost 78. Where am I going to go now?" MaryEllen Fillo, *Bugryns Take Case to Court, Fight City's Plan to Seize Property*, Hartford Courant, Oct. 7, 1999, at B1 (1999 WL 19959746). Mayor Frank N. Nicastro, however, told the court that the industrial park was "in the best interest of the future growth of the city," because it would "build up the tax base." *Id.*

The trial court denied the injunction, holding that the condemnation of the Bugryns' homes "[did] not . . . constitute serious or material injuries," *Bugryn v. City of Bristol*, 2000 WL 192887, at *3 (Conn. Super. Jan. 31, 2000), and that "the disruption to the homeowners that the taking of their property would cause them [does not] evince[ ] an irreparable injury." *Id.* at *8. The Bugryns appealed, in the face of constant pressure from the city government and community leaders; indeed, the *Hartford Courant* repeatedly editorialized against them. *See, e.g., Time to Make the Land Deal*, Hartford Courant, Feb. 8, 2000, at A8 (2000 WL 4226790); *Keep Plant*

*In the Area*, Hartford Courant, Sept. 14, 2000, at A12 (2000 WL 23020391); *Another Loss for the Bugryns*, Hartford Courant, Aug. 5, 2003, at A10 (2003 WL 59295286). The Connecticut Court of Appeals, however, affirmed the denial of the injunction. *Bugryn*, 774 A.2d at 1050 ("neither this court nor the trial court can second-guess the decision of the agency or the municipality that adopted the plan"). When the litigation delayed the city's plans, Yarde Metals left the area. Nevertheless, the city proceeded, deciding instead to take the Bugryns' land for the Southeast Bristol Business Park.

Shortly after he lost his legal challenge, Frank Bugryn was offered $110,000 for his home, too little to find a comparable home to move into. Jackie Majerus, *Housing Market Pricy for Bugryns*, Bristol Press, Oct. 5, 2002.[2] As an elderly man, Bugryn needed a home with few stairs, and hoped to avoid moving into an apartment. "I'd rather have a ranch like I have," he told a reporter. "That's why I built my own, to live here until I die. But it didn't work out that way." *Id.* In 2002, the family finally agreed to a compensation amount in mediation, on the condition that the elderly generation live out their lives at their homes. But the city rejected this in a closed session. While the city initiated eviction proceedings, 76 year old Michael Dudko, husband of one of the Bugryn sisters, had relapse of cancer. The city, however, proceeded with eviction threats. Mr. Dudko died in September, 2003.

Unable to find a suitable new home, the Bugryns delayed until May, 2004, when the City ordered them to vacate the property immediately. In November, 2003, a new mayor had been elected on a platform promising not to take the Bugryns' property, but in the spring, the mayor changed his mind, and threatened to use marshals to evict the Bugryns. Once again, the newspaper editorialized against them, referring to their legal

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[2] http://www.zwire.com/site/news.cfm?newsid=5605624&BRD=1643&PAG=461&dept_id=10486&rfi=6 (visited Nov. 8, 2004).



challenge to the condemnation as a "public farce," and a "melodrama," and denouncing the family for "stall[ing] and draw[ing] upon the public's sympathy." *It's Time Bugryns Moved Out*, Hartford Courant, Apr. 9, 2004, at A10 (2004 WL 76026254). Meanwhile, after a nearby radio station ran a story about the Bugryns' plight, an anonymous, irate telephone call to city hall forced the police to post a guard in the mayor's office. Ken Byron, *Mayor's Office Under Guard After Irate Telephone Call*, Hartford Courant, Apr. 2, 2004, at B3 (2004 WL 72901667). Relations between the Bugryn family itself became strained; when one sister failed to leave the house in time, her nephew took the city's side, telling reporters "[p]eople are pointing the finger at the mayor and the council and city officials, but all they're really doing in taking the property is using an eminent domain system that was given to them by the legislature." Ken Byron, *Bugryn Deadline Is Tonight: City Lawyer Says Two Women in Home Have Taken No Action Toward Moving*, Hartford Courant, Apr. 1, 2004, at B6 (2004 WL 72901474).

As the Bugryns' story so sadly illustrates, eminent domain abuse is terribly disruptive to the bonds of family and community, and breeds a sense of disillusionment toward democratic institutions best expressed by Frank Bugryn himself, who told a reporter "I'm a veteran of WWII, I fought for our freedom, democracy. But it seems 60 years later it doesn't work." WFSB Bristol, *Bristol Seeks to Evict People for Industrial Park*.[3] His brother in law, Michael Dudko, was born in Poland and was taken by the Nazis from his home when he was 15 years old, and was forced into farm labor during World War II. Here in his new country, as a naturalized U.S. citizen, Dudko watched the government throw him out of his home as

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[3] http://www.wfsb.com/Global/story.asp?S=954365 (visited Nov. 8, 2004).

he was dying. Dudko's son, Michael, an amicus in this case, expresses the shock of condemnations:

> It has become an act of stealing—citizens private property rights are totally disregarded. You're cheated on the value of what they take. There is dishonesty on the part of elected officials of why they are doing what they are doing. Those freedoms we all talk about on the Fourth of July don't mean much if our government can make a buck off its citizens by nullifying their validity . . . . Any moral values are totally ignored in the government pursuit to get what only a few decision makers want to happen. Power does corrupt.

The disillusionment caused by this sort of treatment is deeply harmful to a democratic society. As legal scholar Eric Claeys writes, the American founders saw property not only as a vital protection for individual liberty, and an essential part of a healthy economy, but also as a necessary foundation of healthy social participation. *See* Eric Claeys, *Property, Morality and Society in Founding Era Legal Treatises*, Paper presented to American Political Science Association annual meeting, Aug. 30, 2002.[4]

> [T]he Founders appreciated that self-government, the moral virtues, and social happiness cannot flourish unless . . . [t]he law and political opinion . . . teach and habituate citizens to see their fellow citizens not as rivals but as neighbors and potential friends. That spirit of concord and friendship cannot flourish without security and trust. Security and trust, however, cannot flourish unless people first feel secure that they can take care of their most basic

[4] http://apsaproceedings.cup.org/Site/papers/068/068008Claeys Eric.pdf (visited Nov. 8, 2004).



> needs of survival and, more generally, that none of their would-be friends will interfere with their own . . . . As [James] Wilson emphasizes, without the establishment of private property, "the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each." Trite as it may sound, good fences make good neighbors.

*Id.* at 32 (quoting James Wilson, *On Property, in* 2 *Works of James Wilson* 719 (R. McCloskey ed. 1967)).

Eminent domain abuse puts the private property of citizens at the mercy of each other's whim, thus perpetually disturbing the tranquility of society. Thomas Hobbes warned that in the state of nature, "there [can] be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it." Thomas Hobbes, *Leviathan* 101 (M. Oakeshott ed., 1962) (1651). But the framers of the Constitution specifically rejected the Hobbesian vision. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (explicitly rejecting Hobbesian view of property rights). They established a regime where property could be taken only for *public* use, but *not* in cases where the people might abuse that power to, in James Madison's words, "despoil . . . the minority of individuals." Letter to James Monroe (Oct 5, 1786), *in The Complete Madison* 45 (Saul Padover ed., 1953). Employing eminent domain to transfer property to successful political interest groups "is only reestablishing under another name and a more specious form, force as the measure of right." *Id.* The social consequence is to set neighbor against neighbor, and family member against family member, and wreak havoc on the social *mores* that underlie a healthy democratic society.

## C. Redevelopment Condemnations Leave Homeowners with Little Voice in Safeguarding Their Communities

John and Carol Pappas were Greek immigrants who, in 1940, purchased 7,000 square feet of land in Las Vegas, Nevada, which contained a small retail center. They leased the property to several small retail shops. John often told his wife, "When I die, you'll have this property to support you . . . . This is going to be your retirement." Michael Squires, *Few Gains Seen from Land Fight*, Las Vegas Review-Journal, Aug. 15, 2004, at 1B (2004 WL 61428384). But in the ensuing years, the use of eminent domain for economic redevelopment became increasingly common. Hand in hand with the proliferation of such private condemnations was the abuse of the procedures by which such takings are performed.

In 1985, the city council created a redevelopment agency to redesign downtown Las Vegas. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 17-18 (2003), *cert. denied*, 124 S. Ct. 1603 (2004). The city adopted a redevelopment plan despite the fact that there was "no indication that the property was blighted in any way." *Id.* at 17-18 (Leavitt, J., dissenting).

The following year, the city held a public hearing to address landowners' concerns that the plan might include eminent domain. The appellate court later described this hearing as highly misleading to members of the community. "City officials," the court noted, "repeatedly assured the citizenry that eminent domain would rarely be used." *City of Las Vegas Downtown Redevelopment Agency v. Carol Pappas et al.*, No. A327519 (Nev. DCA 1996), at 49a.[5] The mayor, for example,

[5] Pursuant to Rule 32(3), a request to lodge this unreported decision has been sent to the Clerk of the Court and, if granted, Amici will immediately lodge the decision.



told the audience, "It's not like we are going to wipe out all of Downtown Las Vegas including your area into a big empty lot and then start building." *Id.* at 51a. The city attorney said, "I think people may be getting upset about something that really is never going to happen," and a city councilman said, "I'd just like to make one comment about eminent domain. This Board has always had the power of eminent—and you've seen how we use it in the past. Never . . . since I've been on this Board." *Id.* at 53a.

This hearing was not a serious attempt to inform or protect property owners, but was instead a formalistic show, where citizens were shushed or simply ignored:

> [I]n the exchange between Mayor Briare and a Mrs. Clark . . . Mrs. Clark seeks to learn if any of the comments at the hearing will change anything in the text [of the redevelopment plan]. Briare informs her that the board will decide the question. Mrs. Clark persists and asks what sections in the Plan protect an individual citizen. Briare tells her that the protection is this public hearing. He cuts her off without answering her question by stating that there is "nothing in here that is designed to hurt them."

*Id.* at 54a.

Although Nevada law entitles property owners to legally challenge a redevelopment plan, the city "never informed [the Pappases or other area landowners] of the right to legally challenge the Plan." In fact, the city officials' constant and repeated assurances that the city would not use eminent domain led the citizens not to challenge the plan at all. *Id.* at 54a.

In 1993, a group of casinos decided to construct the Fremont Street Experience, an open-air pedestrian mall including casinos, retail outlets, and topless bars. The casinos created a corporation to handle construction. Seeking land for

a parking garage, the corporation executed an agreement with the Redevelopment Agency whereby the agency would condemn the Pappas family's land, and transfer it to the corporation.

The city's record of procedural abuse, begun at the public hearing, continued in court as well. The agency filed its condemnation action on November 19, 1993, along with a motion asking the court to allow the city to immediately occupy the land pending the entry of judgment. The city did not serve the Pappases until three weeks later. The agency also sought an order shortening time, but did not serve the Pappases. The appellate court explained:

> What the Pappas Family had owned for nearly fifty years was stripped from them in less than 50 seconds in a summary proceeding . . . at which they were not even present. During that hearing, the Agency represented to the Judge that there was no opposition to the motion for immediate occupancy despite their knowledge that Pappas . . . opposed efforts to take the property from her. The Agency failed to inform the Court of its having conducted the environmental study the previous day even though that was their stated purpose for the immediate occupancy . . . . [T]he attorney for Pappas . . . on January 4, 1994, received notice of the entry of judgment . . . [and] filed a Motion for Reconsideration . . . to no avail. On February 16, 1994, the Court denied the Motion for Reconsideration. The Pappas property was now in the hands of the agency.

*Id.* at 60a. The Pappases challenged the taking in litigation that lasted several years, but they were unsuccessful. *Pappas*, 76 P.3d at 12. Today, the Pappas family's land is a private parking garage for the Fremont Street Experience.

This case is all too typical. Redevelopment condemnations have led city officials to regard themselves as sculptors of



neighborhoods, whose raw materials are the homes and businesses of citizens. These officials, focusing on the promises of development, pay little regard to property rights. As the Nevada Court of Appeal put it, the redevelopment agency

> set itself up as an entity answerable only unto itself. The Agency truly believes that compliance with the statutes is a matter of lip service and not of customer service. The Agency has convinced itself that it can operate in its own world making deals without answering to the courts, the legislature, or the public.

*City of Las Vegas Redevelopment Agency*, *supra*, at 107a.

"This Court has emphasized the importance in a democratic society of preserving local control of local matters." *City of Rome v. United States*, 446 U.S. 156, 202 (1980). But condemnations that are driven by powerful private developers leave the people of a community with little chance to influence the direction of their communities. They simply cannot compete with powerful business interests working in concert with government to deprive them of their property.

Victims of condemnation thus feel like outsiders, "without a voice in decisions which may profoundly affect [them] and [their] famil[ies]." *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973) (Powell, Douglas, Brennan, Marshall, JJ., dissenting). And the results are often perverse. In fact, the *Pappas* case is a prime example of what happens when courts are overly deferential to legislative determinations of "public use." In many communities, bighted neighborhoods are often characterized by an excess of "adult" entertainment establishments. Here, ordinary business establishments on land owned by the Pappas family was condemned to make way for a parking lot owned by a consortium of casinos which includes such attractions as the Topless Girls of Glitter Gulch, *see* Richard Abowitz, *Gulch Doesn't Glitter and It's Not Gold*, Las

Vegas Weekly,[6] and which advertises itself euphemistically as the place "where grown ups come to play."[7] Meanwhile, despite the massive expenditures of the Fremont Street Experience, business in the area has continued to fall. In 2002, they fell 8%. Rod Smith, *Aging Properties, California Challenge Hurt Off-Strip Gaming Node*, Las Vegas Review-Journal, Dec. 15, 2002 (2002 WL 6884281). In 2003, they fell another 6%. Steven Mihailovich, *Decision Maker: Joseph Schillaci, New Chief Hopes to Light up Downtown Attraction*, Las Vegas Business Press, Dec. 15, 2003 (2003 WL 11197028).

### D. Eminent Domain Abuse Lures Public Officials from Their Duty To Protect the Public Interest

"[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). Unfortunately, the power of condemnation for the benefit of private interest groups—justified by reference to attenuated public benefits like job creation—weakens that faith severely. Public officials using eminent domain for redevelopment too often become tools of private interests, and even those who act in good faith have little guidance from this Court as to what constitutes a public or a private use.

Flush with the financial prospects of redevelopment through condemnation, officials in cities throughout the nation no longer see their role as protectors of their community.

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[6] http://www.lasvegasweekly.com/2002/05_16/nightlife_skin.html (last visited Nov. 8, 2004).

[7] Fremont Street Experience, *Downtown Las Vegas Visitor Profile Accentuates Adult Environment*, (http://www.a2zlasvegas.com/fse/fse06.html) (last visited Nov. 8, 2004).



Instead, they have come to see themselves as *sculptors* of the community. In Boynton Beach, Florida, city officials considering whether to condemn some neighborhoods for the benefit of private developers took time to hold a hearing entitled "Why We Are Doing This," to address citizens' questions about the taking of their homes and businesses. The Director of the city's redevelopment agency explained:

> Boynton Beach has a population of 62,847 compared to 61,627 in Delray Beach. These two cities are almost identical in population. However, when comparing median household incomes, Boynton Beach ranks lower at $39,845 than Delray at $43,371. Boynton Beach ranks higher in median household income than West Palm Beach at $36,774 . . . . The purpose of this redevelopment, is to compensate for the loss of one of the City's major taxpayers. Our property tax values are meager compared to other cities and this redevelopment is our attempt to enhance property values within this City. Our choices are to expand our tax base, raise property taxes or reduce services to our citizens . . . . In Boynton Beach, there is a significant amount of property that pays little or no taxes. Given that reality, we must do other things to compensate for that loss of tax dollars.[8]

To put it in simpler language, if the city condemns the property of poor people, and gives that property to richer people, the result will be an increase in the city's median income.

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[8] Minutes of Boynton Beach City Council Meeting, Apr. 29, 2003 at 1-2. (http://weblink.ci.boynton-beach.fl.us/Index.asp?DocumentID=19751&FolderID=14493&SearchHandle=12868&DocViewType=ShowImage&LeftPaneType=Hidden&dbid=0&page=1) (last visited Nov. 9, 2004).

In case after case, the use of eminent domain to serve private interests has turned public officials into mere instruments of private business interests, diverting their attention from the public's interest in secure property rights. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), the City of Lancaster, California, condemned a 99 Cents Store to transfer the property to a nearby Costco. As the District Court found,

> Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the *only* reason it enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco . . . . [B]y Lancaster's own admissions, it is was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco . . . . Yet, Lancaster nevertheless insists that the need to keep Costco satisfied is, by itself, sufficient for purposes of the Public Use Clause.

*Id.* at 1129.

Similarly, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the court found that city officials had essentially become agents of private developers: the city's "planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user." *Id.* at 1230. There, the city sought to take land belonging to a church to transfer to a Costco store.



The court concluded that officials had made their condemnation decisions "in order to 'appease Costco.'" *Id.*

Yet, under the influence of their power to redistribute land, city officials are increasingly incapable of distinguishing between their public duties on one hand, and serving powerful private interest groups which seek to use government's coercive powers for their own private gain, on the other. Since this Court has often reiterated the rule that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void," *Midkiff*, 467 U.S. at 245, lower courts would normally "look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext." *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d at 1229. Unfortunately, the rational basis test used to judge condemnations makes this inquiry nearly impossible, and thus provides little guidance for city officials. Simply put, *Berman* and *Midkiff* held that "public use" and "public benefit" are synonymous—and yet "public benefit" is a notoriously unclear concept, particularly when it is assessed under the rational basis test. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (legislative declaration that a project is a public benefit is "well-nigh conclusive"). Practically any private development can be plausibly described as a benefit to the public, however. Public officials therefore have no way of judging whether "keep[ing] Costco satisfied is, by itself, sufficient for purposes of the Public Use Clause." *99 Cents*, 237 F. Supp. 2d at 1129.

In *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the court noted that public officials must not "us[e] the cloak of their official positions to effect their private ends" through eminent domain, but that applying "the usual extreme deference that courts owe to legislative determinations of public use," it could not prevent such private takings:

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use', and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings.

*Id.* But that is precisely what has happened in the public use context. Only this Court can prevent the continued private harms and decline of public institutions which result from equating "public use" with "any public benefit."

### E. Private Takings Undermine the Conditions of Healthy Citizenship

Curtis Blanc, through his company, Mid-America Car, Inc., owns a well-maintained brick office warehouse purchased from The American Red Cross, known as the Spirit of Liberty building in Liberty, Missouri. Mr. Blanc leases this warehouse for $1 per year to two ministries, In As Much Ministries, and Love, Inc., which use the property to help the local poor. In fact, In As Much Ministries feeds more than 400 families per month. The property has never been declared blighted. Indeed, one city council member was said to have stated during a council meeting that "there are no poor people in Liberty," a statement which the Executive Director of In As Much Ministries disputed with documentation at the next city council meeting.

Then the city decided to build a business district on "Liberty Triangle," which consists of 88 acres of land, including Mr. Blanc's office warehouse. In December, 2002, the city established a tax increment financing (TIF) district in the Triangle to promote business development. The first phase of the Triangle project has already begun, and a 160,000



square-foot Lowe's Home Improvement Store has just recently opened. Steve Hansen, the city's public works director, recently told businesses that those which generate high sales tax income for the city will be allowed to remain in the area, but that "[m]ost of the businesses that are there now are not high sales producers" and will be condemned. Summer Harlow, *Officials in Liberty Banking on Triangle, Development Seen As Boon to the City*, Kansas City Star, June 6, 2004, at 2 (2004 WL 82045125). The city's primary purpose in the condemnation of Liberty Triangle is to raise tax revenue to the city. Jack "Miles" Ventimiglia, *An Eminent Domain Primer: State Law Favors Government, Not Public*, Liberty Sun-News, Aug. 19, 2004.[9]

Mr. Blanc has received a final notice from the city requiring him to sell his property, or face condemnation. Although he has not yet decided whether to challenge the taking of his property, he faces serious obstacles should he do so. As one attorney recently noted, condemnations are rarely challenged in Missouri because "the legislature has invested the 'local legislatures' with virtually absolute discretion." *Id.* Indeed, eminent domain presents a classic David-and-Goliath situation. *See* Jones, *supra*, at 297; *Basin Elec. Power Co-op. v. Lang*, 304 N.W.2d 715, 718 (S.D. 1981) (Henderson, J., dissenting). A condemnee finds himself confronted by the full legal power of the state, asserting a practically boundless authority to take the person's property against his will. He is exposed to extreme psychological and political pressure, both from the authorities and from neighbors who might benefit from the taking. Because a condemnee rarely can afford good legal representation, he will generally acquiesce in the condemnation without bringing a serious challenge to the law. The state, on

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[9] http://www.zwire.com/site/news.cfm?newsid=12714176&BRD=1452&PAG=461&dept_id=155083&rfi=8 (visited Nov. 16, 2004).

the other hand, has seemingly limitless resources, both economic and legal, with which to pursue a condemnation.[10]

The condemnation of charity property is nothing new. In fact, in 1996, when Atlanta, Georgia, sought to "clean up the city" to make way for the Olympic Games, it condemned the properties of some 10,000 people, including three homeless shelters. Sandefur, *supra*, at 670 n.563. Since nonprofit organizations have little money to spend on legal defense, it is impossible to say how many are unable to challenge the taking of their property. In fact, in Mr. Blanc's case the city's real estate agent has suggested that, because Mr. Blanc charitably leases the property for $1 per year, the amount he can expect to receive as "just compensation" could be lower than businesses that lease their property for the full land value.

## CONCLUSION

The "public use" clause sets up a legal "fence," which makes good neighbors by ensuring that their relationships are based on mutual respect for each other's property rights. Property rights are essential to domestic tranquility, not only because they ensure personal liberty and a strong economy, but because they protect personal happiness and the public *mores* of democratic society. Equating public use with public benefit has torn down that fence, and subjected people's homes, businesses, and land to a process in which they have very little voice compared to the influence of powerful interest groups. Democratic participation becomes, not a rite of citizenship for which people volunteer, but a struggle for the very survival of their homes, their businesses, and their families. The "public choice effect" is responsible for this, and only by restoring the

[10] Indeed, until Mrs. Pappas began her legal challenge, discussed in part IIC, *supra*, Las Vegas had used eminent domain for redevelopment 143 times without a lawsuit. Squires, *supra*.



public use clause as a meaningful limit on the power of eminent domain, can these effects be averted.

The judgment of the Connecticut Supreme Court should be *reversed*.

DATED: December, 2004.

Respectfully submitted,

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Supreme Court, U.S.
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No. 04-108

In The
# Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## BRIEF OF LAW PROFESSORS ROBERT H. FREILICH, RICHARD BRIFFAULT, JULIE CHESLIK, JANICE C. GRIFFITH, TIM IGLESIAS, JULIAN CONRAD JUERGENSMAYER, ANITA MILLER, THOMAS E. ROBERTS, PATRICIA E. SALKIN, EDWARD J. SULLIVAN, ROBERT R. M. VERCHICK, JUDITH WELCH WEGNER, AND ALAN WEINSTEIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF AMICI[1]

A group of land use and property professors submitted a Brief Amicus Curiae in support of Petitioners. A separate group of land use and property professors are filing this counter brief to express their belief that the position of the prior brief, to wit, that in judicial review of public use under the Fifth Amendment the reviewing court must use intermediate scrutiny in lieu of rational basis, is erroneous, and that rational basis remains the appropriate level of scrutiny for determinations of public use in economic redevelopment matters.

The professors filing this brief in support of Respondents comprise the following:

Robert H. Freilich, Professor of Law, University of Missouri-Kansas City School of Law, national editor of THE URBAN LAWYER, the national quarterly journal on state and local government law of the American Bar Association;[2] Richard Briffault, Vice-Dean and Joseph P. Chamberlain Professor of Legislation, Columbia Law School; Julie Cheslik, Associate Professor of Law, University of Missouri at Kansas City; Janice C. Griffiths, Professor of Law, Georgia State University College of Law; Tim Iglesias, Associate Professor, University of San Francisco School of Law; Julian Conrad Juergensmayer,

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to the brief's preparation or submission.

[2] Professor Freilich and Professor Thomas E. Roberts, who joins this brief, are co-authors, with Professor David Callies, who authored the Law Professors' Amicus Brief in support of Petitioners, of Callies, Freilich & Roberts, Cases and Materials on Land Use. (4th Ed. West 2004).

Professor of Law, Georgia State University, and Professor of Law Emeritus, University of Florida; Anita Miller, Adjunct Professor, Department of Community and Regional Planning, and School of Law, University of New Mexico; Thomas E. Roberts, Professor of Law, Wake Forest School of Law; Patricia E. Salkin, Associate Dean and Professor of Law, and Director, Government Law Center for Albany Law School; Edward J. Sullivan, Adjunct Professor, Department of Urban Studies and Planning, Portland State University, and Adjunct Professor of Law, Lewis and Clark College; Robert R. M. Verchick, Gauthier-St. Martin Chair in Environmental Law, Loyola University, New Orleans; Judith Welch Wegner, Professor of Law, University of North Carolina at Chapel Hill; and Alan Weinstein, Professor of Law, Cleveland-Marshall College of Law and Maxine Goodman Levin College of Urban Affairs.

## STATEMENT OF THE CASE

In an effort to reverse a devastating decline in population, abandonment, and a deteriorating economy due in major part to the region's shifting of resources to suburban sprawl, the City of New London, a "distressed municipality" of the State of Connecticut (the "City"), developed a comprehensive plan and implementation program to reverse the situation. In accordance with Chapter 132 of Connecticut statutes, the City commenced a municipal redevelopment project and granted initial approval to the preparation of a redevelopment plan. The New London Development Corporation (the "NLDC") prepared a multi-faceted plan, covering approximately 90 acres, which included commercial, retail, residential, tourist and recreational facilities. Fulfillment of this plan required the



acquisition of land by the NLDC. When certain property owners refused to sell their land, the NLDC utilized eminent domain to acquire hold-out properties in order to complete the project. Seven property owners in the development plan area ("Petitioners") challenged the City's actions, asserting that economic redevelopment and revitalization of the city was not a public use necessary to support condemnation under the Fifth Amendment, unless there was a finding of blight in the planned area subject to the condemnation. The Connecticut Supreme Court (the "Connecticut Court") determined that economic development was a "valid public use for the exercise of the eminent domain power" where the City's population and economy were severely distressed and major intervention by state and local government was required. *Kelo v. City of New London,* 843 A.2d 500, 528 (2004).

This Court granted certiorari. The Court has before it the issue of whether the Fifth Amendment "public use clause" per se prevents a city from acquiring private land through eminent domain in order to achieve the economic development and revitalization of a distressed community unless there is a concomitant finding of blight in the affected area.

## SUMMARY OF THE ARGUMENT

This Court for over 100 years has reviewed cases under the Fifth Amendment public use takings clause[3] using the rational basis test, and this test remains, in our view, the appropriate test, especially for state and local

[3] " . . . nor shall private property be taken for public use without just compensation." U.S. CONST. Amend. V.

government legislative determinations to use condemnation to achieve the social and economic redevelopment and revitalization of a city. This Court has never used higher scrutiny for eminent domain or takings except in a limited range of cases involving unconstitutional conditions attached to development approval, and there is no reason to apply it to direct condemnation under the Fifth Amendment. In determining whether property may be acquired by condemnation for social and economic redevelopment and revitalization, the requisites of our Constitution are fully satisfied if a court evaluates whether the legislative determination supporting the condemnation is rational, and the legislative decision must be upheld unless it is patently arbitrary or lacks valid statutory authority. Intermediate scrutiny is highly inappropriate in our federalist form of government. This Amicus Brief urges this Court to reiterate its prior holdings, establishing that so long as:

(1) there is state statutory or home rule authority establishing the goals and means of achieving social and economic redevelopment and revitalization;

(2) the state or local government has utilized a comprehensive planning process and analysis assessing the goals and means; and

(3) the state or local government retains regulatory or contractual or ownership control over the project and a private redeveloper,

there is valid public use and purpose to meet the Fifth Amendment's rational basis review.



## ARGUMENT

### A. THE RATIONAL BASIS TEST IS THE APPROPRIATE STANDARD FOR JUDICIAL REVIEW OF CONDEMNATIONS FOR ECONOMIC REDEVELOPMENT AND REVITALIZATION.

For more than seventy-five years, this Court has used a broad reading of the Fifth Amendment public use clause. "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience . . . " *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923). In determining whether a public use exists, this Court has held that it should "regard with great respect the judgments of state courts upon what should be deemed public uses in any state." *Id.* at 706. In its decisions in 1954, *Berman v. Parker,* 348 U.S. 26, 32 (1954) and in 1984, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984), applying the rational basis test to economic redevelopment, this Court cited with approval prior case holdings that rational basis deference to a legislature's "public use" determination is required until it is shown to involve an impossibility, *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), that "any departure" from such deference "has proved impracticable in other fields," *Ex rel. TVA v. Welch*, 327 U.S. 546, 552, and that such deference will not be removed unless "the use be palpably without reasonable foundation." *United States v. Gettysburg Electric R.R. Co.,* 160 U.S. 668, 680 (1896).

A court's review is limited to a determination of whether there is a rational basis for the condemnation: "as long as the condemning authorities were rational in their positions that some public purpose was served," condemnation would be upheld. *Nat'l R.R. Passenger Corp. v.*

*Boston and Maine Corp.*, 503 U.S. 407, 422 (1992), citing *Midkiff*, 467 U.S. at 242-43 and *Berman*, 348 U.S. at 32-34. Particularly in fields of social and economic legislation, which underlie all efforts at economic redevelopment and revitalization, this Court, per Thomas, J., has recently reiterated and made clear that a challenger not only "has the burden to negative every conceivable basis" that might support legislative action but also that "a legislative choice is not subject to courtroom facts findings and may be based on *rational* speculation unsupported by evidence or empirical data." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added).

Arguments raised by Petitioners and some of the amici briefs supporting Petitioners, see, *e.g.* Briefs Amicus Curiae of Professors David L. Callies, et al.; The National Association of Home Builders and the National Association of Realtors; New London Landmarks, Inc. et al.; Cascade Policy Institute; New London R.R. Co., Inc.; and Robert Nigel Richards, et al., assert that a categorical *per se* rule should be established holding that the rational basis test is not appropriate when a court is reviewing the sufficiency of public use in an eminent domain case, and that an ill-defined intermediate scrutiny test should be used by this Court. The use of a higher level of review in eminent domain cases is not supported by any decision of this Court or by the overwhelming majority of state courts.[4]

[4] For a comprehensive review of all state decisions in this area up to and including the *Kelo* decision in the Connecticut Supreme Court, see, Robert H. Freilich and Robin A. Kramer, CONDEMNATION FOR ECONOMIC DEVELOPMENT VIOLATES PUBLIC USE CLAUSE: THE MICHIGAN SUPREME COURT OVERTURNS HISTORIC *POLETOWN* DECISION, 27 Zoning and Planning L. Rep. 1, No. 10, November 2004 (Thomson-West).



Instead, the trend has been to allow a narrow scope of judicial review of legislative decisions on eminent domain. See *Matter of Condemnation by Minneapolis Community Development Agency of Certain Lands in City of Minneapolis Situated in Development Dist. No. 57, South Nicollet Mall*, 582 N.W. 2d 596, 599 (Minn. Ct. App. 1998), *rev. denied*, finding that "the application of a higher level of scrutiny to review condemnation proceedings is out of touch with the national trend," citing 2A NICHOLS ON EMINENT DOMAIN, § 7.06 [24][c] at p. 7-242 (Matthew Bender rev. 3d ed. 1998) (citing cases). Thus, the recent decision by the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), which found that a condemnation was not for a public use and overturned *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455 (Mich. 1981), rejected *Poletown's* heightened scrutiny test. See, also, *City of Las Vegas v. Pappas*, 76 P.3d 1, 11 (Nev. 2003) ("so long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain."); *General Bldg. Contractors, L.L.C. Bd. of County Comm'rs of Shawnee County*, 66 P.3d 873 (Kan. 2003) (upholding county's ability to condemn property for industrial and economic development); *Town of Beloit v. County of Rock*, 657 N.W. 2d 344, 353 (Wis. 2003) ("it is a well-settled rule that the legislative body determines what constitutes a public purpose, and that courts will not interfere unless at first blush the act appears so obviously designed in all its principal parts to benefit private persons . . . ").

The "national trend" acknowledging that economic development is a valid public purpose and that judicial review of such purpose is "extremely narrow," *Berman* 348

U.S. at 32, began over 100 years ago. In *Chicago, Burlington & Quincy R.R. Co. v. Illinois,* 200 U.S. 561 (1906), this Court held that "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity," *Id.* at 592. In *United States v. Gettysburg Electric R.R. Co.,* 160 U.S. 668, 680 (1896), this Court stated "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." In *Rindge Co.*, this Court stated that a state's determination of a public use should be approached "with great respect." 262 U.S. at 707.

The current scope of the public use clause and this Court's deference to the legislative purposes in its review of such cases was set forth in *Berman* and *Midkiff*. In *Berman,* this Court considered whether private property could be taken as part of an urban development project even though the specific property taken was not blighted. This Court held that the definition of the police power "is essentially the product of legislative determination addressed to the purposes of government . . . " and

> the legislature, not the judiciary, is the main guardian of the public needs to be served . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

348 U.S. at 32 (internal citations omitted).

Petitioners and their amici seriously misunderstand the holding in *Berman*. While the *Berman* court held that redressing area-wide blight in a redevelopment plan



satisfies the public use test, *Berman* did not hold that a finding of blight was required to utilize condemnation for redevelopment. This principle was firmly established in *Midkiff*, where this Court reiterated in affirming *Berman* that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241 (citations omitted). "The constitutional requirement is satisfied if the state legislature rationally could have believed the Act would promote its objective." *Id.* at 242 (citation omitted).

Any application of heightened scrutiny would be a serious departure from the Court's well-established principle limiting higher scrutiny to a narrow range of cases. "Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (applying rational basis even to exclusion of a facility for mentally retarded persons). A higher level of scrutiny, either strict or intermediate, is only applied in an extraordinarily narrow range of cases, encompassing innate personal characteristics, including race, alienage, national origin, gender, legitimacy of birth, *Id.* at 440-441; and First Amendment issues relating to freedom of speech, see, *e.g. United States v. O'Brien,* 391 U.S. 367, 377 (1968), *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 703-04 (1986). Heightened, or higher level, scrutiny has not been applied to mental retardation, *Cleburne Living Center*, 473 U.S. at 442-443; poverty, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); or age, *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). The use of heightened scrutiny would mean that the courts were

making "substantive judgments about legislative decisions," *City of Cleburne,* 473 U.S. at 443, or effectively turn the courts into super-legislatures, to decide whether a use really benefited the public, or whether the particular project was the best way to achieve economic development, or even whether economic development is appropriate in the situation. See Phillip A. Talmadge, THE MYTH OF PROPERTY ABSOLUTISM AND MODERN GOVERNMENT: THE INTERACTION OF POLICE POWER AND PROPERTY RIGHTS, 275 Wash. L. Rev. 857 (2000). But this Court has held that it "do[es] not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting Inc. v. State of Mo.,* 342 U.S. 421, 423 (1952). See, also, *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978) (this Court does not "sit as a 'superlegislature to weigh the wisdom of legislation.'") (citations omitted). Separation of powers and federalism preclude the federal courts from such interference in what are clearly state legislative decisions. As long as the courts exercise judicial review over irrational legislative decisions, no higher scrutiny is needed.

Moreover, judicial restraint by this Court has worked well. State courts acting under their own state constitutions as well as the Fifth Amendment have utilized rational basis to overturn a number of state and local government condemnations in recent years. See Freilich and Kramer, at pps. 3-5, listing 20 cases since 1978, most of them since 2000 (17 cases), overturning condemnations on rational basis consideration. Why should this Court overturn a system of review that is working well? This Court has stated that state courts are at liberty to be more expansive in interpreting their own state constitutional



provisions. *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980). Going back to the period from *Berman v. Parker* (1954) until *Midkiff* (1984), one commentator found that an astonishingly high 15% of state cases reviewing public purpose under rational basis have rejected plans for lack of public use. Thomas Merrill, THE ECONOMICS OF PUBLIC USE, 72 Cornell L. Rev. 61 (1986).

In *Cleburne Living Center,* this Court discussed that higher scrutiny was appropriate where the classification is based on some characteristic which can not be related to the achievement of a legitimate state interest. Higher scrutiny is not appropriate where continued legislative response on a subject evidences state concern and review of a subject, and "belies" the "need for more intensive oversight by the judiciary." 473 U.S. at 443. "Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Lawrence v. Texas,* 539 U.S. 558, 579 (2003) (citations omitted) (O'Connor, J. concurring).

Although some commentators have asserted the need for heightened scrutiny in eminent domain cases when evaluating a public use, see, *e.g.* Pritchett, THE PUBLIC MENACE OF BLIGHT: URBAN RENEWAL AND THE PRIVATE USES OF EMINENT DOMAIN, 21 Yale J of L & Pol. Rev. 2 (2003), the majority of state courts have not adopted this procedure, continuing to use the broad purposive review of *Berman* and *Midkiff*. Contrary to several of the cases cited in the amici briefs, presumably as support for the use of heightened scrutiny, many of the state court decisions overturning a condemnation were not decided on higher scrutiny but either on rational basis or statutory grounds.

See, *e.g., City of Little Rock v. Raines*, 411 S.W. 2d 486, 493-94 (Ark. 1967) (finding that condemnation for creation of an industrial park was not authorized by state statute); *Daniels v. Area Plan Commission of Allen County,* 306 F.3d 445, 460 (4th Cir. 2002) (applying rational basis test but finding that state legislature had not made economic redevelopment a basis for eminent domain); *99 Cents Only Store v. Lancaster Redev. Agency,* 237 F. Supp.2d 1123 (C.D. Cal. 2001) (following *Midkiff*, but finding proposed condemnation was clearly egregious).

State and federal courts have proved extremely adept at preventing takings which were palpably without a rational basis. See, *e.g., 99 Cents Only Store; Aaron v. Target Corp.*, 269 F. Supp.2d 1162 (E.D. Mo. 2003) (finding that a temporary restraining order was appropriate because of bad faith acts by city and store) (overruled on *Younger* abstention grounds, 357 F.3d 768 (2004); *Casino Redev. Auth. v. Banin,* 727 A.2d 102, 111 (N.J. Super. Law Div. 1998) (finding that sole purpose of condemnation was to benefit Donald Trump: "any potential public benefit is overwhelmed by the private benefit received by Trump in the form of assemblage and future control over development and use of parcels of prime real estate in Atlantic City").

Many of the amici briefs supporting Petitioners, including the Professors' amicus brief, erroneously distinguish the Michigan Supreme Court's recent decision in *County of Wayne v. Hathcock,* 684 N.W.2d 765 (2004) from the Connecticut Supreme Court decision below, asserting that the "heightened scrutiny" test adopted by the Michigan courts in *Poletown Neighborhood Council* is the correct test. In fact, the Michigan Supreme Court in *Hathcock*, which overruled *Poletown Neighborhood Council*, did not



use the "heightened scrutiny" test in its analysis of public use. 684 N.W. 2d at 778. The "heightened scrutiny" tests applied by the various briefs and commentators, *i.e.* whether the public or private benefit is primary, whether there were alternatives, and whether there is clear and convincing evidence of public benefit, were not at issue in nor considered by the court in *Hathcock,* which decided the case entirely on state constitutional grounds.

This Court's decisions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) do not change the limited and deferential level of review to be applied in eminent domain cases where just compensation is afforded as a remedy. *Nollan* and *Dolan* involved uncompensated unconstitutional conditions attached to development approvals pursuant to regulatory exactions, not title to land through condemnation. Under such circumstances this Court held that higher scrutiny would be appropriate to establish that the required dedication was "roughly proportional" to the demands of the proposed use. *Dolan,* 512 U.S. at 391. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999), this Court made absolutely clear that the *Nollan/Dolan* test is limited to these special title exactions land use cases and does not apply to economic takings in which compensation is a remedy. 526 U.S. at 702. See *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997) ("[W]e believe that *Nollan-Lucas-Dolan* trio does not signal a change from this longstanding rule of deference because we see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.")

Adoption of heightened scrutiny in the instant case and in the review of questions under the "public use" clause would put a peculiar dichotomy in this Court's constitutional analyses under the Fifth Amendment. Since the early years of the last century, cases evaluating regulatory takings under the Fifth and Fourteenth Amendments have used the rational basis test to assess whether the regulation went "too far."

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

*Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), *citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Inverse condemnation cases and direct eminent domain cases are *in pari materia*: they involve "a cause of action against a government . . . to recover the value of property which has been taken in fact by the government . . . " *United States v. Clarke*, 445 U.S. 253, 257 (1980), citing D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971). Thus, in eminent domain cases in which a state requires the property owner to be the plaintiff, rather than defendant, the federal courts will look to the true identity of the parties and allow the plaintiffs to remove to federal courts: "[t]he intent of the [condemnor] to get the land is the mainspring of the proceedings from beginning to end," *Mason City & Fort Dodge R.R. Co. v. Boynton*, 204 U.S. 570, 580 (1907); in



regulatory takings cases, the regulation is the "mainspring of the proceedings." Condemnation cases are simply the "reverse" of a regulatory/inverse condemnation case. *Clarke*, 445 U.S. at 257. The scrutiny by this Court is identical – rational basis.

For this Court to adopt heightened scrutiny in the case of physical takings under the Fifth Amendment, where compensation is paid to the landowner, but not in the case of regulatory takings, where no compensation is paid, would indeed be paradoxical. See *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 854 (9th Cir. 2004): "The Supreme Court reviews the challenged actions in [*Midkiff* and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)] more deferentially because they involve physical takings."

The rational basis test remains the appropriate judicial standard for a determination of whether condemnation is for a public use. See dissent of Justice Rehnquist in *Keystone Bituminous Coal Ass'n*, 480 U.S. at 511, n. 3:

> When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.

(citing *Midkiff*; emphasis in original); *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422-23 (1992) (applying the *Midkiff/Berman* test to a public use analysis).

## B. TO THE EXTENT THE FIFTH AMENDMENT REQUIRES ANY STANDARD FOR PUBLIC USE IN THE CASE OF ECONOMIC DEVELOPMENT, REDEVELOPMENT OR REVITALIZATION, SUCH STANDARD IS ADEQUATELY MET BY ENSURING THAT THE GOVERNMENT CONDEMNOR RETAIN SOME LEVEL OF REGULATORY, CONTRACTUAL OR OWNERSHIP CONTROL OVER THE USE.

If this Court determines that it is necessary to clarify a standard on the scope of condemnation for economic development, redevelopment and/or revitalization purposes, such standard can be adequately accomplished by requiring that state and local governments retain public ownership or regulatory or contractual oversight or control over the future uses of the property. Under such a standard, state and local governments would retain broad discretion to provide for economic development while ensuring that the fundamental public nature of the benefit from the condemnation is maintained. Such a test would be consistent with state Supreme Court and lower federal court cases, and would ensure that there was no abject surrender to private use. This Court has long held that protection of economic prosperity is a valid goal of the police power. See *Chicago, Burlington v. Quincy R.R. Co.*, 200 U.S. at 592. Economic development and redevelopment are essential tools to ensure the viability and health of cities. A recent study of the impact of local government subsidiaries to industrial plants to locate within their jurisdictions demonstrates a net social and economic benefit for the local government. Greenstone & Moretti, BIDDING FOR INDUSTRIAL PLANTS: DOES WINNING A MILLION DOLLAR PLANT INCREASE WELFARE? National Bureau of



Economic Research, Nov. 2004. www.econ.ucla.edu/moretti/milliondollarplant.pdf.

The vast majority of state legislatures have determined that economic development is an important public purpose, which findings have been affirmed by the courts. As of 1996, "courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development assistance." *Macready v. City of Winston-Salem,* 467 S.E. 2d 615, 626 (N.C. 1996). Many states have recognized that economic development is a public use for which purpose a government's powers of eminent domain may be exercised. See, *e.g., Kaufmann's Carousel, Inc. v. City of Syracuse Indust. Development Agency,* 301 A.D. 2d 292 (N.Y. App. Div. 2002) (upholding condemnation of leasehold interests for shopping center expansion project that would promote job opportunities, general prosperity and the public welfare); *General Bldg. Contractors, L.L.C.* (authorizing condemnation for economic and industrial development purposes as a public use); *Prince George's County v. Collington Crossroads,* 339 A.2d 278, 289 (Md. 1975) (projects designed to "benefit the general public by significantly enhancing the economic growth of the State or its subdivisions" are a public use for which eminent domain can be used).

In *Hathcock*, the Michigan court held that such a condemnation of property is a public use *when the private entity remains accountable to the public in the use of that property* (emphasis added). 684 N.W. 2d at 781. Under this standard, the court reviews an asserted public use under rational deference to the legislative determination pursuant to the *Berman/Midkiff* analysis. Where the property is re-transferred to a private entity after condemnation, the

government is required to maintain some contractual, regulatory, or ownership control or oversight to ensure accountability of the continued public use, and, thus, pass public use constitutional muster. In the instant case, the Connecticut Court found that the City retained accountability and oversight because of the "contractual constraints in place to assure that private sector participants will adhere to the provisions of the development plan," which was to be in effect for thirty years. 842 A.2d at 545. Implementation and consistency with a comprehensive development plan has recently been determined to be a valid and important exercise of the police powers by this Court. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

**1. Regulatory Control.**

The continued government control and accountability in *Kelo* is starkly different from the lack of government oversight in *Southwestern Illinois Development Authority v. Nat'l City Environmental L.L.C.*, 768 N.E.2d 1 (Ill. 2002). SWIDA had condemned private property in order to convey it to the owner of a racetrack to permit such owner to expand the racetrack's private parking facilities. The condemnation was not undertaken as part of a redevelopment plan, and SWIDA had no authorized land use control; instead, once the property was condemned it was simply conveyed to the racetrack owner. There was no public oversight or control and the exercise of eminent domain did not result from SWIDA's "economic and planning process." *Id.* at 10. Thus, it was held to be a taking solely for a private purpose.



Many courts have already incorporated this regulatory control test in their analyses of public use claims. See *Condemnation of 110 Washington Street,* 767 A.2d 1154 (Pa. Commw. Ct. 2001) (where condemnor is stripped of all power of regulatory approval, even the power to determine whether and when the condemnation occurs, the condemnation is invalid); *Blanchard v. Dept. of Transportation*, 798 A.2d 1119 (Me. 2002) (condemnation for parking lot was a public use where town has retained regulatory control over the private operator and has right to assert control at any time); *Manufactured Housing Communities of Washington v. State of Washington,* 13 P.3d 183 (Wash. 2000) (statute which gave mobile home park tenants right of first refusal, and took away such right from owner, was a taking even though it would benefit members of the public, because it would vest private property rights in individual mobile park home owners, to the exclusion of all others where there was no regulatory governmental control); *Casino Redev. Authority,* 727 A.2d at 110-11 (there is no public use if the "when, how, and if the property is developed in the future will be outside the control of [the government] . . . ").

**2. Ownership Control.**

Secondly, many governments today enter into a myriad of projects with joint ownership of transit stations, master planned communities, and other transportation corridor centers to promote economic development with walkable neighborhood mixed residential and non-residential uses which promote reduction in air quality degradation due to fewer and shorter trips and corresponding health benefits. See Michael S. Bernick and Amy E. Freilich, TRANSIT VILLAGES AND TRANSIT BOARD DEVELOPMENT: THE RULES

ARE BECOMING MORE FLEXIBLE – HOW GOVERNMENT CAN WORK WITH THE PRIVATE SECTOR TO MAKE IT HAPPEN. 30 Urb. Law. 1 (1990). Similarly, government can preserve public use by requiring that affected landowners be authorized to participate in the project provided they comply with the adopted plan. *Huntington Park Redevelopment Agency v. Duncan*, 190 Cal. Rptr. 744 (Cal. App. 1983), *cert. denied*, 464 U.S. 895 (1983). See also *Township of West Orange v. 769 Associates, L.L.C.*, 800 A.2d 86 (N.J. 2002) (condemnation of property was for a public use where municipality retains ownership and the road remains open to the public).

### 3. Contractual Control.

Thirdly, contractual control over the project to ensure compliance with stated plan goals and objectives will insure public use. Such a principle is evident in the case of land use development agreements, entered into between a local government and a developer in connection with the proposed development of property. Development agreements, authorized by state law to protect the developer against subsequent changes in the law and to provide the city or county with assurance of compliance with plan goals and objectives, do not contract away a government's police power as long as the development agreement preserves the local government's ability to control the issuance of permits and to regulate land use, i.e., as long as the government does not surrender or abnegate a governmental function. *Santa Margarita Area Residents Together v. San Luis Obispo County*, 84 Cal. App. 4th 221, 232 (2002): *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 734 (1978).



## CONCLUSION

Amici request this Court to retain the rational basis test for judicial review of public use for condemnations for economic development, redevelopment and revitalization of cities. Should the Court deem it necessary to provide a standard or guidance for such review, then the provision of regulatory, ownership or contractual control by the state or local governmental authority should suffice to meet Fifth Amendment public use requirements.

Respectfully submitted,

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In The
# Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

v.

CITY OF NEW LONDON, CONNECTICUT, et al.,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF THE GOLDWATER INSTITUTE, BLUEGRASS INSTITUTE FOR PUBLIC POLICY SOLUTIONS, CENTER OF THE AMERICAN EXPERIMENT, COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES, ETHAN ALLEN INSTITUTE, EVERGREEN FREEDOM FOUNDATION, GEORGIA PUBLIC POLICY FOUNDATION, MACKINAC CENTER FOR PUBLIC POLICY, AND NATIONAL TAXPAYERS UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTERESTS OF THE *AMICI CURIAE*[1]

The **Goldwater Institute**, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and promoting the protection of private property rights.

The **Bluegrass Institute for Public Policy Solutions** is an independent, nonpartisan association of writers, speakers and thinkers who analyze state and local public policy in Kentucky, and suggest alternatives more in concert with the founding ideas of individual liberty, economic freedom, personal responsibility and a respect for others. Our mission is to change the way Kentuckians think about government. Enshrined in the Kentucky Bill of Rights and at the core of our mission is: *The right of acquiring and protecting property.*

The **Center of the American Experiment** is a nonpartisan, tax-exempt, public policy and educational institution, which brings conservative and free-market ideas to bear on the most difficult issues facing Minnesota and the nation.

The **Commonwealth Foundation for Public Policy Alternatives** is a nonprofit, nonpartisan, research

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[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

and educational institute based in Harrisburg, Pennsylvania. Dedicated to advancing the Founding principles of limited constitutional government, economic and political freedom, and personal responsibility for one's actions, the Commonwealth Foundation conducts policy analysis and research to improve the lives of all Pennsylvanians.

The **Ethan Allen Institute**, founded in 1993, is Vermont's independent, nonpartisan free market public policy organization. Its mission is to educate Vermonters in the fundamentals of a free society. The Institute believes that the human right of private property ownership is a key ingredient of a free society. The Institute concedes that governments may take private property for public use with the payment of just compensation, but it believes strongly that the power of government cannot lawfully be used to dispossess private property owners where the government's objective is not public use, but merely the government's desire to enlarge the tax base in support of government spending.

The **Evergreen Freedom Foundation** (EFF), founded in 1991, is a nonpartisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. EFF's mission is to advance individual liberty, free enterprise, and responsible government. Among its core functions, EFF advocates for limited government and market solutions to reduce governmental regulatory functions.

The **Georgia Public Policy Foundation**, formed in the fall of 1991, is the only private, nonpartisan research and education organization in Georgia that focuses on state policy issues. Its members are a diverse group of Georgians that share a common belief that the solutions to



most problems lie in a strong private sector, not in a big government bureaucracy. In 2003, the Foundation testified before Georgia's state senators regarding eminent domain policy and practices in the state. The Foundation's commitment to limited government includes ensuring that government's constitutional ability to take private property for public use is never abused.

The **Mackinac Center for Public Policy** is a Michigan-based, nonprofit, nonpartisan research and educational institute dedicated to advancing policies that foster free markets, limited government, personal responsibility, and respect for property rights. The Mackinac Center is a 501(c)(3) organization founded in 1988.

The 350,000-member **National Taxpayers Union** is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountable elected officials at all levels. NTU favors preserving the personal and property safeguards included in the United States Constitution and espouses the principle that private property rights are the foundation upon which a free society is built. The use of government power to seize private property through eminent domain, unless it is absolutely necessary for the public good, is, to NTU's membership, simply another form of taxation.

## SUMMARY OF THE ARGUMENT

A 2004 Goldwater Institute Study provides compelling evidence that condemning private property for economic development is unnecessary and reasonable alternatives for redevelopment exist. Although there are legitimate reasons for invoking eminent domain, such as building

roads, bridges and military installations, the current practice of condemning private property in the name of redevelopment is rarely about blight removal or building public infrastructure and regularly about turning areas that produce little tax revenue into high revenue generators. This abuse of eminent domain power by local governments is not only unnecessary, but creates uncertainty about property rights and violates fundamental constitutional principles. Also, it is often counter-productive to the goals of economic development and revitalization.

The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." Such language was designed to limit government authority and reinforce common law protections of private property. First, the "due process" clause provides protection of private property by ensuring that government will not abuse its police powers. Second, the "takings" clause ensures that any government taking of private property must be for a "public use" and requires fair compensation to the owner.

Allowing the condemnation of private property for alleged public benefits such as increased tax revenue and economic development violates the U.S. Constitution by distorting what constitutes a public use. Such a result is contrary to the plain language of the Constitution and undermines an important protection for private property owners.



## ARGUMENT

### CONDEMNATION OF PRIVATE PROPERTY FOR THE BENEFIT OF ANOTHER PRIVATE PARTY IS UNNECESSARY FOR ECONOMIC DEVELOPMENT AND REASONABLE ALTERNATIVES EXIST

A 2004 Goldwater Institute policy study illustrates that condemning private property for economic development is unnecessary and reasonable alternatives to governmental resort to eminent domain exist.[2] The study examines several redevelopment projects including the revitalization of downtown Seattle, Washington. The study presents examples of economic redevelopment occurring without resort to eminent domain as well as explaining the problems associated with labeling an area as "slum or blighted" in an attempt to condemn private property for redevelopment purposes.

An example of redevelopment and revitalization occurring without resort to eminent domain involves downtown Seattle, Washington. In 1992, the historic Frederick & Nelson department store was abandoned. The former I. Magnin building stood vacant across the street by the end of 1994. Crime was on the rise and the sidewalks emptied at dusk. Homeless people slept in deserted storefronts.[3]

However, developers formed Pine Street Associates and implemented a private redevelopment plan. A group of

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[2] Mark Brnovich, *Condemning Condemnation: Alternatives to Eminent Domain*, Goldwater Institute Policy Report No. 195 (June 14, 2004).

[3] Todd Bishop and Christine Frey, *Resurgent Downtown Still Faces Challenges*, Seattle Post-Intelligencer, Monday, February 10, 2003.

private investors bought the former Frederick & Nelson building and traded it to Nordstrom Inc., the national retailer based in Seattle. In addition to a publicly financed parking garage,[4] the developer's plan called for Pine Street Associates to refurbish the old Nordstrom store and fill it with retail and office tenants. As Washington state courts narrowly construe municipal exercises of eminent domain, *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash.2d 679, 694 n.8, 743 P.2d 793 (1987), redevelopment had to take place without condemnation of any private property. One of the private developers acknowledged that acquiring the property for the three-block redevelopment effort was difficult without being able to call on the power of eminent domain.[5] However, developers instead used techniques such as land swaps, individual and corporate investments, and commitments from current property owners to make the economic redevelopment occur.[6]

Today the intersection of Sixth Avenue and Pine Street is at the heart of a resurgent downtown Seattle. The sidewalks fill with pedestrians during peak shopping hours. Around downtown, shops and restaurants stay open into the night. Property crime is down. The population is climbing, and people can be seen walking the streets long after dark.[7]

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[4] This brief does not address the wisdom or necessity of whether government should be making such expenditures with taxpayer funds. Seattle, however, did not acquire the property through condemnation.

[5] Dave Copeland, *Seattle Can Identify With Pittsburgh's Plan C*, Pittsburgh Tribune-Review, Thursday, April 4, 2002.

[6] Brnovich at *supra* note 2.

[7] *Supra* note 3.



Downtown Seattle is a redevelopment project that city planners and private developers often cite. From 1996-1998, the project redeveloped three blocks, creating more than 1 million square feet of new retail space. Just months after the debut of Pacific Place and the new Nordstrom, retailers with stores downtown experienced a 15.8 percent increase in taxable sales, twice the average growth rate.[8] The number of downtown retail jobs grew an estimated 4.4 percent from 1995 to 2000.[9]

The redevelopment project in Seattle demonstrates that economic development can occur without resort to eminent domain. In the 1980's, Huntington Beach, California also undertook a downtown redevelopment project. The city initially relied upon mass condemnations and lavish public subsidies. As City officials tried to lure big developers to replace beach bungalows and surf shops with sterile high-rises made of stucco, condemnations shut down the local businesses that once gave the city its unique character. Moreover, many of these redevelopments failed. With persistent vacancies in downtown shops, mounting debt, and projects stalled for years, public money mostly bailed out developers without boosting the city's image. Other cities such as Newport Beach that did not establish redevelopment zones grew economically at rates that far outpaced Huntington Beach.[10]

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[8] Data from the City of Seattle's finance department.

[9] Puget Sound Regional Council analysis of state Employment Security Department data.

[10] Jim Hinch, *In Surf City, Rebuilding Strategy Has Fans, Critics*, The Orange County Register, November 24, 2001.

When the City proposed an idea in the late 1990s to condemn the Huntington Beach Mall and turn it over to private developers, discount retailers Montgomery Ward and Burlington Coat Factory, which owned stores at the mall, promised to fight any attempt to take their property and hand it over to someone else. Ultimately, the Huntington Beach City Council voted against using eminent domain to force the retailers out of the mall.[11] So the City decided to approach redevelopment by including the discount retailers rather than replacing them. It did not take long for a developer to produce a winning proposal to reinvigorate the mall into a Mediterranean-themed shopping center, without using eminent domain. The result was a development plan that was consistent with Huntington Beach's flavor.[12] Construction on Bella Terra, the long-awaited complex, began in summer 2002, and includes Burlington Coat Factory (Montgomery Ward has since gone bankrupt), as well as a large movie theater, restaurants and stores. This was all accomplished without taking a single property through eminent domain.[13] Instead, land assembly techniques including partnerships, joint ventures and cooperation with current property owners resulted in vibrant economic development project.

Another example of economic development occurring without resort to municipal condemnation involves Gilbert,

[11] *Property Rights Victories*, The Orange County Register, November 26, 2000.

[12] Jim Hinch, *Mall Project Seen as a Winner; Development – Huntington Hopes to Reverse a History of Plans Falling Through*, The Orange County Register, March 8, 2002.

[13] Curt Seeden, *The Huntington Beach Mall Is Officially on its Way to Becoming Bella Terra, the Long-Awaited Mediterranean-Themed Shopping Center*, The Orange County Register, July 18, 2002.



Arizona. The city has implemented a policy of purchasing small parcels from voluntary sellers, avoiding the use of eminent domain.[14] For instance, the city is spending $1.4 million to purchase and demolish a downtown apartment complex. Putting aside the issue of whether local governments should be making such investments, the city is not condemning the property, but purchasing it from a voluntary seller.[15] Recently, Gilbert officials accepted an offer from Oregano's Pizza Bistro to purchase another parcel owned by the city. The city purchased the land from private property owners and did not use eminent domain to acquire the property.[16] The experience in Gilbert demonstrates that the voluntary purchase of real property is another mechanism available to local governments to foster economic development.

At the same time, by threatening condemnation or including property within a "redevelopment" area, local governments may discourage economic development. For example, the redevelopment designation of an area of downtown Scottsdale, Arizona made it difficult for property owners to improve or sell their property.[17] Property owners and tenants in the redevelopment area were reluctant to make major improvements or investments

[14] Brian Powell, *Remarks Rile Gilbert Officials*, East Valley Tribune, September 26, 2003, p. A3.

[15] Brian Powell, *Gilbert Eyes Area for Redevelopment*, East Valley Tribune, March 15, 2003, p. 3.

[16] Brian Powell, *Gilbert accepts Oregano's Proposal*, East Valley Tribune, April 7, 2004.

[17] Laurie Roberts, *City lifts Noose but Keeps Gallows Intact*, The Arizona Republic, NE Community Section, June 13, 2001.

because their property could be condemned at any time.[18] Additionally, sales tax receipts in areas of the downtown Scottsdale redevelopment zone plummeted by as much as 42%.[19]

After the Scottsdale City Council repealed the redevelopment designation and the threat of condemnation in downtown Scottsdale, economic development increased. Property owners are expanding their businesses, adding floors and planning additions.[20] Construction has also begun on lofts, condominiums, shops and underground parking for a "Main Street Plaza" in downtown Scottsdale.[21] Ironically, economic development greatly accelerated once the threat of condemnation didn't hang over property owners located within the redevelopment zone.

Other property owners have experienced even greater frustration with their local government. In an attempt to stimulate economic development, Mesa, Arizona condemned 30 acres of land. After clearing 63 homes at a cost of $6 million to taxpayers, the land sits vacant because the private developer who was going to build on the site could not obtain financing.[22] Phoenix, Arizona residents experienced similar frustration when the city condemned a

[18] Mike Fimea, *Redevelopment Sites: Stay or Go?*, Arizona Business Gazette, August 29, 2002.

[19] Peter Corbett, *Scottsdale to Revisit Fate of Properties Near Canal*, The Arizona Republic, September 13, 2002.

[20] Elizabeth Bullington, *Condemnation Cloud Lifts, so Downtown Redevelops*, Scottsdale Republic, August 20, 2004.

[21] Peter Corbett, *Work Starts on Downtown's Main Street Plaza Project*, Scottsdale Republic, November 3, 2004.

[22] Robert Robb, *Count on City-Driven Projects to Fail*, The Arizona Republic, September 21, 2001.



grocery store and other small businesses to clean up a blighted area. After condemning various properties, no viable proposal for development was acceptable and the area sat vacant, continuing to harbor criminal activity.[23] One homeowner and her 87-year-old mother were forced from their home by Phoenix officials so a developer could build offices. The residents were forced to relocate themselves when the city couldn't find a suitable property that they could afford. Four years after condemning their property for economic redevelopment, the location of their former house still sat as a vacant lot.[24]

Property owners and taxpayers in San Jose, California were negatively impacted by the threat of condemnation as well. The redevelopment designation in San Jose resulted in the Santa Clara County Association of Realtors warning that homes located within a new "Strong Neighborhoods Initiative" boundary would be difficult to sell and may lose their value as a result.[25] The San Jose Redevelopment Authority also earned a reputation as a take-first, ask-questions-later-agency as a result of its exercise of eminent domain. Ultimately, the downtown development plan flamed out and taxpayers were left with

[23] Gr[illegible]ela Sevilla and Jesus Lopez, Jr., *Crime Magnet is Razed Rainbow Market comes Down in Bid to Rebuild Area*, The Arizona Republic, August 12, 1999; *See also*, David Cieslak, *Victims' Family Vows to Take Back the Area; Violence Plagues 'Rock Block' Neighborhood*, The Arizona Republic, January 13, 2004.

[24] Howard Fischer, *They Came, They Saw, They Evicted; Are You in the Path of Urban Renewal? That Could be Too Bad*, Phoenix New Times, October 4, 1989.

[25] Sharon Simonson, *Realtors Fear Effect of City Plan*, Silicon Valley Business Journal, September 20, 2002.

an estimated $1.5 billion in debt. All the while, property values continue to fall.[26]

Although condemnation of private property through eminent domain can be legitimate in some instances, such as building public roads or parks, the process of condemning property has rarely been about blight removal and mainly about turning areas that produce little tax revenue, such as, churches, old neighborhoods and small businesses, into sales-tax smorgasbords, such as, strip malls, Targets, Wal-Marts, and Costcos.[27] Many of these current development projects would fail to meet the standard set forth by the U.S. Supreme Court in *Kohl v. U.S.*, 91 U.S. 367 (1875). The Court took a narrow view of what constitutes a public use and wrote that the government could exercise eminent domain when it was, "important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, – as must sometimes be necessary in the case of forts, lighthouses, and military posts or roads...." The Court explained that eminent domain was a right belonging to a sovereignty to take private property for its own uses, and not for those of another. *Id.* at 373-374.

However, the Court's ruling in the 1954 case *Berman v. Parker,* 348 U.S. 26 (1954), opened the door for condemning private property to remove slums and urban blight. Local governments have taken this crack and burst open the door. But the situation in *Berman* is different

[26] Editorial, *Redeveloping Redevelopment*, Silicon Valley/San Jose Business Journal, October 31, 2003.

[27] Steven Greenhut, *The Blight of Eminent Domain, Ideas On Liberty*, Foundation for Economic Education's Monthly Magazine, September, 2002, p. 10.



from many of the situations faced by local governments today. In *Berman*, the court was confronted with a unique situation where most of the dwellings in question were beyond repair, had outside toilets, and had no wash facilities. *Id.* at 30. Today, as is in the case in Connecticut, the proposed use of eminent domain is designed to maximize economic development and local government tax revenues. This is commonly referred to as the "fiscalization" of land use.[28]

Fortunately, state courts across the nation are becoming more wary of government's abuse of power. Proponents of private property rights have achieved significant victories in Michigan, Illinois, Massachusetts and Pennsylvania.[29] Judges are recognizing that eminent domain abuse not only violates the public trust but also a long-held principle of American law that proscribes favors and

[28] Brnovich at *supra* note 2.

[29] In *Wayne v. Hathcock*, 471 Mich. 445 (2004), the Michigan Supreme Court made an independent determination of what constitutes a public use and overturned its earlier decision in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), thus providing less discretion to local governments to use condemnation for economic development purposes. In *Southwestern Illinois Development Authority v. National City Environmental*, 199 Ill. 2d 225, 768 N.E.2d 1 (2002), the Illinois Supreme Court refused to accept the redevelopment authority's argument that the use of eminent domain to increase economic growth was a public use. In *City of Springfield v. Dreison Investments*, 11 Mass. L. Rep. 379, 2000 Mass. Super. LEXIS 131 (2000), the Massachusetts Superior Court found that the "all-consuming" goal of attracting a baseball team was primarily for private interests and disallowed a taking of private property to build a private baseball stadium. The Pennsylvania Commonwealth Court reached a similar result in *Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), *review denied*, 2001 Pa. LEXIS 1544 (July 19, 2001). The court held that it was an unconstitutional delegation of authority to provide condemnation power to a private developer.

preferences accorded by government to individuals or identifiable groups.[30] Justice Samuel Chase articulated the principle in *Calder v. Bull*, 3 U.S. 386 (1798): "[I]t is against all reason and justice for a people to entrust [government] with the power to . . . [take] property from A and give it to B."

If provided with unfettered discretion, local governments can come up with a rationale that the public will benefit in some way from the taking of private property for economic development purposes. Such discretion is contrary to the plain language of the Fifth Amendment that takings of private property should only be for a public use. To allow local governments to expand this definition to an economic benefit jeopardizes important long standing Constitutional protections.

Ultimately, experiences in places such as Seattle, Huntington Beach, Gilbert and Scottsdale are demonstrating that eminent domain does not need to be a primary tool for urban development. Local governments can learn from these and other exampies and create land assembly techniques that do not require the use of eminent domain. Such techniques include, but are not limited to: negotiated purchase, private investment, escalating leases, limited partnerships, joint ventures, and land swaps. By using methods that do not rely on condemnation of property, governments not only respect the rights of property owners but ensure stability within the market.

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[30] Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation*, (New Brunswick & London: Transaction Publishers, 1997) p. 229.



This is important because the government's role in maintaining a successful economy should be to protect private property owners and investors, not to confiscate and reallocate at will. Often, resort to the despotic power of condemnation causes more problems than it solves. Most important, the use of condemnation for economic development infringes on an important constitutional protection.

## CONCLUSION

Allowing local governments to condemn private property for economic development purposes is unnecessary and minimizes important Constitutional protections. Accordingly, the decision of the Connecticut Supreme Court should be overturned.

Respectfully submitted,

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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF OF JANE JACOBS AS *AMICA CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnation of private property for transfer to other private parties solely for the purpose of promoting "economic development"?

2. Does the Public Use Clause allow condemnation of private property for transfer to other private parties for the purpose of promoting economic development without any consideration whatsoever of the economic and social costs imposed by the expropriation of homes, charitable institutions, and businesses?

3. Does the Public Use Clause allow condemnation of private property for transfer to other private parties for the purpose of promoting economic development without any binding assurance that such development will actually take place?

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## INTEREST OF THE *AMICA CURIAE*

Jane Jacobs submits this brief as *amica curiae* pursuant to Rule 37.3 of the Rules of the Supreme Court.[1]

The *amica* is a world-renowned scholar in the field of urban policy and economic development. Her 1961 book, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, revolutionized the field of urban studies and showed how the indiscriminate use of coercive large-scale planning and "renewal" programs often harms the very communities that it is ostensibly intended to help. She has written numerous other works on urban policy and economic planning including THE ECONOMY OF CITIES (1969), CITIES AND THE WEALTH OF NATIONS (1984), SYSTEMS OF SURVIVAL (1993), and THE NATURE OF ECONOMIES (2000).

Throughout her career, Ms. Jacobs has emphasized that the use of eminent domain for the ostensible purposes of "urban renewal" and "economic development" usually serves to benefit powerful private interests at the expense of the poor and working class communities it is supposedly intended to help. *See, e.g.*, JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5, 270-90, 311-14 (1961) (hereinafter "JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES") (describing massive harms inflicted on poor neighborhoods by the use of eminent domain in urban renewal programs). Indeed, *amica* believes that the clear-cutting of neighborhoods like Fort Trumbull is antithetical to the development of healthy, vibrant mixed-use communities she espouses.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amica* states that no counsel for a party authored this brief in whole or in part. Counsel for *amica* further states that the costs associated with printing, filing, and serving this brief were paid by David Humphreys and that no other person, other than *amica* and their counsel, made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been fiied with the Clerk.

## STATEMENT OF THE CASE

*Amica* adopts by reference the statement of the case presented by the Petitioners.

## SUMMARY OF ARGUMENT

Economic development takings impose enormous economic and social costs on property owners and neighborhoods, sometimes destroying entire communities, as in the case of *Poletown Neighborhood Council v. City of Detroit,* 304 N.W.2d 455 (Mich. 1981), *overruled County of Wayne v. Hathcock,* 684 N.W.2d 765 (Mich. 2004), in which some 4200 people lost their homes and numerous businesses, churches, and other community institutions were destroyed so that General Motors could build a new factory. *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DET. NEWS, Jan 8, 2004, at 11 (hereinafter "Somin, *Michigan*").

The costs of development takings are disproportionately inflicted on poor and minority communities, because these groups are disadvantaged in the political process, especially relative to the powerful corporate and private interests that benefit from economic development condemnations.

Far from furthering their supposed goal of promoting economic growth, development condemnations often inflict economic and social harms that far outweigh any possible benefits. Moreover, the use of eminent domain is not necessary to promote legitimate development projects because private developers have a variety of tools available to overcome the "holdout" problems that might otherwise prevent projects from going forward.

Even condemnations justified by the need to eliminate urban "blight" have caused extensive social harm, displacing hundreds of thousands of people. Economic development takings pose an even greater threat because they can be used to justify almost any condemnation that benefits commercial interests. As Jane Jacobs and other scholars have shown, urban renewal and economic development



condemnations are a perversion of "government powers that were intended for things like schools and roads and public things, [that] are used instead for the benefit of private organizations and individuals." Quoted in Bill Steigerwald, *City Views: Urban Studies Legend Jane Jacobs on Gentrification, the New Urbanism, and Her Legacy,* REASON, June 2001.

Condemnations that are justified solely by the prospect of "economic development" pose an especially grave threat to constitutional property rights because [The] 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock,* 684 N.W.2d 765, 786 (Mich. 2004). It is always possible to argue that a given property would be used more efficiently by a different owner, thereby generating increased employment and tax revenue. As a result, economic takings serve as a virtual license for exploitation of the eminent domain power on behalf of powerful interest groups such as large corporations and wealthy developers. The potential for abuse is exacerbated by the fact that Connecticut and other states that permit economic development takings do not impose binding obligations on the new private owners to actually produce the economic benefits that supposedly justified the condemnation in the first place. As a result, private interest groups and local governments can use bait and switch tactics to condemn property for economic development purposes and then use it to serve purely private interests.

Only a categorical ban on economic development takings can prevent the Public Use Clause from becoming a nullity that can be circumvented any time local governments seek to benefit a politically connected private business.

## ARGUMENT

### I. ECONOMIC DEVELOPMENT CONDEMNATIONS INFLICT MASSIVE ECONOMIC AND SOCIAL COSTS THAT ARE MISTAKENLY IGNORED BY STATE COURTS THAT UPHOLD DEVELOPMENT TAKINGS.

The ostensible justification of economic development takings lies in the economic benefits they supposedly create for the public. Yet courts that have upheld such condemnations routinely ignore the fact that they often inflict massive costs on those groups least able to bear them.

#### A. State court decisions upholding economic development takings ignore their vast economic and social costs.

The large scale condemnation of private homes and businesses for "economic development" creates enormous social and economic costs that state courts upholding economic development takings have chosen to ignore. In *Kelo,* the Connecticut Supreme Court admitted that the plaintiff property owners in the case would suffer serious harm if forced out of their homes and business properties. *See Kelo v. City of New London*, 843 A.2d 500, 511 (Conn.), *pet. cert. granted*, 125 S. Ct. 27 (2004) (noting that two of the plaintiffs' families have "lived in their homes for decades and others had put enormous amounts of time, effort, and money into their property). In addition, some $80 million in taxpayer money had been allocated to the development project of which the condemnations are a part, without any realistic prospect of a return that rises above a tiny fraction of this amount. *Id.* at 596-600 (Zarella, J., dissenting). Yet the court refused to even consider the significance of these massive costs because "the balancing of the benefits and social costs of a particular project is uniquely a legislative function." *Id.* at 541 n.58.

Contrary to the Connecticut court, the political process often cannot be depended on to give due to consideration to the "social costs" of economic development takings



because such condemnations generally benefit the politically powerful, while the costs fall on the poor and politically disadvantaged. *See* §§ I.C.2, II.A-B, *infra.*

Courts in other jurisdictions that permit economic development takings also fail to give any significant weight to social costs. The *Poletown* majority, for example, did not even mention the vast social costs imposed by the condemnation of 1400 homes and a large number of businesses, churches, and schools. Somin, *Michigan.* Those states that continue to permit economic development takings even after *Poletown's* recent demise also give little or no consideration to the harm they cause.[2]

#### B. Judicial indifference to the social costs of economic development takings eliminates any possible assurance that the condemnations are actually for a public use.

The failure to scrutinize the costs of economic development takings not only leads to severe harm to property owners, but also prevents courts from making any meaningful effort to ensure that economic development takings really do serve a public use, as is required by the Constitution. Even if we assume, arguendo, that economic development really is a public use, failure to scrutinize the costs of these takings enables government to exercise virtually unlimited condemnation power.

The Public Use Clause,[3] if it is to have any meaning, cannot be interpreted to give government unfettered power to condemn private property "for the benefit of

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[2] See cases cited in note 10, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

[3] The Public Use Clause was made applicable against the states through the incorporation of the Fifth Amendment under the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994) (reaffirming incorporation of the Takings Clause under the Fourteenth Amendment).

another private person." *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937).

Federal courts ordinarily accord great deference to legislative determinations of public use. Such determinations are upheld so long as they are "rationally related to a conceivable public purpose" and are not "palpably without a reasonable foundation." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). However, such deference cannot be extended to the point where the judiciary rubberstamps virtually any condemnation that transfer property to a private commercial enterprise. This "Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Id.* (quoting *Thompson*, 300 U.S. at 80). "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character . . . That principle grows out of the essential nature of all free governments." *Madisonville Traction Corp. v. St. Bernard Mining Corp.*, 196 U.S. 239, 251-52 (1905). Although great deference is granted to legislative determinations of public use, "[i]t is well established that . . . the question [of] what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

### C. The harms inflicted by economic development takings vastly exceed any possible public benefit.

#### 1. Economic development takings inflict enormous social and economic costs.

Economic development condemnations routinely impose enormous social costs that greatly exceed their putative benefits. Large-scale use of condemnation for development purposes began with the "urban renewal" programs of the 1950s and 1960s. Condemnations stimulated by these programs uprooted thousands of people, destroyed numerous communities, and inflicted enormous economic costs, with few offsetting benefits. *See, e.g.*, JACOBS, DEATH AND LIFE OF



GREAT AMERICAN CITIES, 270-90, 311-14 (describing enormous social and economic costs of urban development takings); MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964) (hereinafter ANDERSON, FEDERAL BULLDOZER) (same); HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 362-84 (2d ed. 1982) (documenting loss of community caused by condemnations); SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3-5 (1965) (hereinafter GREER, URBAN RENEWAL AND AMERICAN CITIES) (describing various harms caused by urban renewal condemnations). A recent study concludes that the use of eminent domain in "urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods and helped entrench racial segregation in the inner city." Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 47 (2003) (hereinafter Pritchett, *The "Public Menace" of Blight*). By 1963, over 600,000 people had lost their homes as a result of urban renewal takings. ANDERSON, FEDERAL BULLDOZER 8, 54. The vast majority ended up living in worse conditions than they had experienced before their homes were condemned. *Id.* at 57-70.

Many of these abuses occurred as a result of takings justified by the removal of "blight" rather than economic development per se. *See Berman v. Parker*, 348 U.S. 26 (1954) (holding that blight removal is a legitimate public purpose). Yet economic development takings pose the same dangers, and indeed greater ones, since they can be applied to any property, not just that located in "blighted" neighborhoods.

#### a. Economic development takings have high economic costs.

More recent economic development condemnations have had a similarly deleterious impact. The *Poletown* case dramatically illustrates how the promised economic benefits of condemnations often fail to materialize, and are

outweighed by the massive costs. Not only did the new GM plant create far fewer jobs than promised,[4] but the limited economic benefits that the plant did create were likely overwhelmed by the economic harm it caused to the city.

The "public cost of preparing a site agreeable to . . . General Motors [was] over $200 million." *Poletown,* 304 N.W.2d at 470 (Ryan, J., dissenting). GM paid the city only $8 million to acquire the property. *Id.* In addition to the cost to the city's taxpayers, we must also consider the economic damage inflicted by the destruction of some 600 businesses and 1400 residential properties. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City,* DOLLARS & SENSE, July 2001 (hereinafter "Michael, *Detroit*"). Although we have no statistics on the number of people employed by the businesses destroyed as a result of the *Poletown* condemnation, it is quite possible that more people lost jobs as a result of the decision than gained them. If we assume that the 600 eliminated businesses employed a modest average of slightly more than four workers, their total lost work force turns out to be greater than the 2500 jobs created at the GM plant by 1988. *Id.* And this calculation does not consider the jobs and other economic benefits lost as a result of the destruction of numerous nonprofit institutions such as churches, schools, and hospitals. Overall, even if we consider its impact in purely economic terms, it is likely that the *Poletown* condemnation caused more harm to the people of Detroit than good.

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance far beyond that case itself. In *Poletown,* the magnitude of the economic crisis facing Detroit and the detailed public scrutiny given to the city's condemnation decision led the Michigan Supreme Court to conclude that the economic benefit of the taking was particularly "clear and significant." *Poletown,* 304 N.W.2d at 459. The court even went so

[4] See discussion in Section II.D.2, *infra*.



far as to say that "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project." *Id.* If the claimed "public benefit" of even so "clear" a case as *Poletown* ultimately turned out to be a mirage, it seems unlikely that courts will do any better in weighing claims of economic benefit in more typical cases where the evidence is less extensive and less closely scrutinized.

In addition to direct economic costs arising from the destruction of homes and businesses and massive expenditure of public resources, economic development takings also impose large indirect costs by destroying diversified uses of property and replacing them with much more homogenous ones. In urban neighborhoods, diversity of land uses within a neighborhood is often essential to promoting sustained economic growth. *See* JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES chs. 8, 15. The employment of development condemnations to replace a wide range of uses with one or a small number of development projects results in "a static society" and "destroys neighborhoods where constructive and improving communities exist and where the situation calls for encouragement rather than destruction." *Id.* at 270-71, 289. In effect, economic development condemnations replace real neighborhoods with counterfeits.

**b. Economic development takings inflict massive nonfinancial costs that often go uncompensated.**

In addition to their massive economic costs to communities and homeowners, economic development takings also inflict major nonfinancial costs on their victims by destroying communities and forcing residents to relocate to less desired locations. As Jane Jacobs explained in her classic 1961 study:

> [P]eople who get marked with the planners' hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed . . . Whole communities are torn apart and sown to the winds,

> with a reaping of cynicism, resentment and despair that must be seen to be believed.

JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5.

While "fair market value" compensation may compensate homeowners for a part of the financial loss they suffer, it does not even begin to compensate them for the destruction of community ties, disruption of plans, and psychological harms they suffer. *See generally* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (describing extensive social and psychological costs of forced relocation); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 20-35 (1989) (hereinafter, "FRIEDEN & SAGALYN, DOWNTOWN") (same); *cf.* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82-85 (1986) (hereinafter, "Merrill, *Economics of Public Use*") (showing how the use of eminent domain systematically imposes "uncompensated subjective losses" because most property owners value their holdings at more than their market value). In recent years, scholars from a wide range of ideological perspectives have reinforced Jacobs' conclusion that development condemnations inflict enormous social costs that go beyond their "economic" impact, narrowly defined.[5] The existence of these large uncompensated costs strengthens the case for stringent scrutiny of

[5] See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); David R.E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L.Q. 671, 673-74 (1988) (same); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 62 n.60 (1992) (criticizing *Poletown* as a "notorious" decision that "sustained a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed" and arguing for strict judicial constraints on similar condemnations).



economic development takings under the Public Use Clause.

### 2. Development condemnations disproportionately victimize the poor and minorities.

Economic development condemnations "seriously jeopardize . . . the security of all private property ownership." *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting). But poor and minority property owners face especially grave risks.

The properties of poor and politically weak owners are more likely to be targeted for condemnation than those of wealthy and influential ones. The Poletown neighborhood, for example, may have been targeted in part because its people were "largely lower-income and elderly" and many "assumed that these people would not have the resources or the know-how to fight back." JEANNIE WYLIE, POLETOWN: A COMMUNITY BETRAYED 58 (1989). Relatively affluent citizens and major corporations have far greater political influence than the poor do. *See generally* SIDNEY VERBA, ET AL., VOICE AND EQUALITY (1995) (providing extensive evidence of the strong correlation between affluence and political activism and influence). Thus it is not surprising that the poor often chosen for condemnations that benefit wealthy corporations and developers. *See, e.g.*, JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 311-14; Pritchett, *The "Public Menace" of Blight* 45-49. Affluent corporate and developer interests are "repeat players" in the eminent domain system who have the resources and expertise to lobby effectively in support of their objectives. Kochan, *"Public Use" and the Independent Judiciary* 79-83. Poor and lower middle class property owners, by contrast, have little ability or incentive to develop similar lobbying power.

African-American and other minority property owners are also particularly likely to be targeted by economic development condemnations. Between 1949 and 1963, sixty-three percent of all families displaced by urban renewal condemnations were nonwhite. FRIEDEN &

SAGALYN, DOWNTOWN 28; *see also* ANDERSON, FEDERAL BULLDOZER 7-8 (noting that urban renewal takings disproportionately victimized minorities). So many poor African-Americans were dispossessed by urban renewal condemnations in the 1950s and 1960s, that "[i]n cities across the country urban renewal came to be known as 'Negro removal.'" Pritchett, *"Public Menace" of Blight* 48; *see also* GREER, URBAN RENEWAL AND AMERICAN CITIES (documenting dispossession of black homeowners).

In a particularly dramatic example of the racial impact of massive condemnations, the takings approved by this Court in *Berman v. Parker* displaced some "5012 persons, of whom 97.5% were Negro." *Berman,* 348 U.S. at 30. Although the condemnations were ostensibly intended to benefit the area's residents, in fact only 310 of the 5900 new residences constructed after the condemnations were classified as affordable to the displaced residents of the area, and within a few years the neighborhood became majority white. HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163-64 (1995).

Racial and class bias have continued to infect more recent condemnations as well. As one study finds:

> In essence, the powers and internal pressures [of the condemnation process] create a mandate to gentrify selected areas, resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction. Numerous past experiences indicate that the process has been driven by racial animosity as well as by bias against the poor. The net result is that a neighborhood of poor people is replaced by office towers, luxury hotels, or retail centers. The former low-income residents, displaced by the bulldozer or an equally effective increase in rents, must relocate into another area they can – perhaps – afford. The entire process can be viewed as a strategy of poverty concentration and geographical containment to protect the property values – and entertainment choices – of downtown elites.



Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control,* 27 U. MICH. J.L. REFORM 680, 740-41 (1994).

More generally, economic development condemnations tend to target groups that, due to lack of resources, collective action problems, or prejudice against them, have little power in the political process. *See generally* Bruce A. Ackerman, *Beyond Carolene Products,* 98 HARV. L. REV. 713 (1985) (describing factors that lead some groups to be disadvantaged in the political process relative to others). These are precisely the kinds of groups that most need protection from a strong independent judiciary. *Id.*; *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "special conditions, which tend . . . seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry").

### 3. Condemnation is not necessary to promote real economic development.

The case against economic development condemnations is further strengthened by the fact that they are not necessary to achieve their ostensible objectives. Large-scale development projects can and do succeed without recourse to the coercive power of eminent domain. As the Michigan Supreme Court pointed out in its recent major decision in *Hathcock,* development projects are not "enterprises whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving. To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain . . . for their formation." *Hathcock,* 684 N.W.2d at 783-84. If a project is sound enough that its owners can reasonably

expect to make a profit, there is usually no reason why they cannot acquire the necessary land through voluntary transactions.

Despite the existence of numerous successful development projects that did not require the use of eminent domain powers, some continue to argue that the use of eminent domain is necessary to facilitate economic development in situations where large scale projects requires the assembly of a large number of lots previously owned by numerous different individuals. If the coercive mechanisms of eminent domain cannot be employed, the argument goes, a small number of "holdout" owners could either block an important development project or extract an extremely high price for their acquiescence. *See* Merrill, *Economics of Public Use* 72-81 (describing the "holdout" rationale for use of eminent domain).

However, as the existence of numerous successful development projects that did not rely on eminent domain suggests, private developers have a variety of tools for dealing with holdout problems without recourse to government coercion. In many cases, developers can negotiate with individual owners in secret or use specialized agents to assemble the properties they need without alerting potential holdouts to the possibility of making a windfall profit by holding the project hostage. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 43-44 (2d ed. 1977) (describing these methods).

A second mechanism by which developers can prevent holdout problems without recourse to eminent domain is by means of "precommitment" strategies or "most favored nation" contract clauses. The developers can sign contracts with all the owners in an area in which they hope to build, under which they commit themselves to paying the same price to all. By this means, the developer successfully "ties its hands" in a way that precludes it from paying inordinately high prices to the last few holdouts, because it would be legally required to pay the same high price to all the previous sellers. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 35-43, 120-31 (1960) (classic



explanation of the ways in which tying one's own hands can give an advantage in negotiations); *see also* Kochan, "*Public Use and the Independent Judiciary* 88-90 (explaining how precommitment strategies used to prevent holdouts in corporate transactions can be applied to economic development projects that might otherwise need to resort to eminent domain).

Finally, it is essential to realize that even if there is a small subset of desirable economic development projects that can only be undertaken with the assistance of eminent domain power, there is no way of confining the use of economic development condemnations to these circumstances. Once the economic development rationale is allowed to justify takings, it can and will be used by powerful interest groups to facilitate projects that either fail to provide economic benefits that justify their costs or could have been undertaken without resorting to coercion or both. The political power of the beneficiaries of condemnation is likely to be a far more potent determinant of the decision to condemn than any objective economic analysis of holdout problems.[6]

## II. ECONOMIC DEVELOPMENT TAKINGS VIOLATE THE PUBLIC USE CLAUSE BY FACILITATING ABUSE OF THE POWER OF EMINENT DOMAIN FOR THE BENEFIT OF POLITICALLY INFLUENTIAL PRIVATE INTERESTS.

### A. The Public Use Clause does not allow government unlimited power to condemn property.

This Court has long recognized that the power of eminent domain is a "despotic power" that can easily be abused. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Penn. 1795). As Justice John Marshall Harlan explained in the case that first incorporated the Takings Clause against the states, "[A] government, by whatever

[6] See discussion in §§ I.C.1-2, II.C-D, *infra*.

name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 237 (1897).

"It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character . . . That principle grows out of the essential nature of all free governments." *Madisonville Traction Corp. v. St. Bernard Mining Corp.*, 196 U.S. 239, 251-52 (1905). Although great deference is granted to legislative determinations of public use, "[i]t is well established that . . . the question [of] what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). Economic development condemnations violate these fundamental principles because they can be used to justify virtually any condemnation of property for transfer to private commercial interests.

### B. The economic development rationale can justify almost any taking that benefits a commercial enterprise.

Allowing "economic development" to justify condemnation of private property is a blank check for the abuse of government power on behalf of powerful private interests. As the Supreme Court of Michigan explained in its recent decision to forbid the use of "economic development" as a justification for takings:

> [The] 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use then the ownership of real property is perpetually threatened by the expansion of plans of any large discount retailer, 'megastore,' or the like.

*Hathcock*, 684 N.W.2d at 786.



In *Hathcock*, the Michigan Supreme Court overruled its notorious 1981 *Poletown* decision – which used the economic development rationale to uphold the condemnation of some 4000 people's homes, so that General Motors could build a new factory. *See* Somin, *Michigan* (describing massive deleterious impact of the *Poletown* condemnations). Dissenting in that case, Justice Fitzgerald warned that "[t]he decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently 'public' to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses." *Poletown*, 304 N.W.2d at 464 (Fitzgerald, J., dissenting).

Unfortunately, the Connecticut Supreme Court in the present case, decided a few months before *Hathcock*, relied heavily on *Poletown* to justify its holding that economic development qualifies as an acceptable public use. *See Kelo*, 843 A.2d at 528 n.39 (describing *Poletown* as a "landmark case . . . [that] warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit"). As in *Poletown*, the *Kelo* condemnations were initially undertaken in large part to serve the interests of a powerful private corporation. According to James Hicks, executive vice president of RKG Associates, the firm that helped New London prepare the development plan that resulted in the condemnations, Pfizer was the "'10,000 pound gorilla' and a 'big driving point' behind the development project." Quoted in *id.* at 537.

Like the Michigan Supreme Court in *Hathcock*, the Supreme Court of Illinois has recently explained the grave danger to constitutional property rights inherent in allowing a mere "contribu[tion] to economic growth in the region" to justify takings. *Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002). Such a standard could justify virtually

any taking that benefited a private business because "incidentally, every lawful business does this." *Id.* The Illinois court echoed Justice Fitzgerald's warning that the economic benefit criterion provides virtually a blank check for takings because "[a]ny business enterprise produces benefits to society at large." *Poletown,* 304 N.W. 2d at 464 (Fitzgerald, J., dissenting). "Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." *Id.* at 464.[7]

Numerous cases from other states support the conclusion that condemnation cannot be justified where the only public benefit is the possibility of increased economic growth.[8]

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[7] Similarly, the Supreme Court of Kentucky has pointed out that:

> If public use were construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

*Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 711 (Ky. 1990).

[8] *See, e.g., Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1175 (E.D. Mo. 2003), *rev'd on other grounds,* 2004 WL 190439 (8th Cir. Feb. 3, 2004) (owner likely to prevail on claim that condemnation of shopping center for transfer to Target so that Target would keep its economic benefits in the city lacked public use); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp.2d 1123, 1129-31 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003) (finding that condemnation to replace one store with another, more lucrative one,

(Continued on following page)



### C. Condemnation decisions are likely to be driven by the demands of politically powerful interest groups rather than by public benefit.

There is no reason to believe that genuine economic benefits will be the true determinant of condemnation decisions, and much reason to conclude that decisions will be driven by the political influence of private interests that

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was not a public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *Ga. Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "substantial . . . projected economic benefit" cannot justify a "condemnation"); *Merrill v. City of Manchester*, 499 A.2d 216, 217-18 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) ("We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other shopkeepers"); *City of Little Rock v. Raines*, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential properties so that agency could "devote it to what it considers a higher and better economic use," *id.* at 187); *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *Sweetwater Valley Civic Ass'n v. City of National City*, 555 P.2d 1099, 1103 (Cal. 1976) (holding that eminent domain "never can be used just because the [city] considers that it can make better use or planning of an area than its present use or plan" and that "it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses" to justify condemnation of property). *See also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 464-65 (7th Cir. 2002) (replacing residential uses with economically more efficient commercial ones did not bear substantial relation to a public purpose because the condemnation "only benefits the public if [the private party] benefits first, and even then if the commercial development is completed and successful. . . . ").

benefit from them. *See, e.g.*, Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 79-83 (1998) (hereinafter Kochan, *"Public Use" and the Independent Judiciary*) (explaining how powerful private interests can use the condemnation process to their advantage); Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 289-91 (1992) (explaining how the political process advantages private beneficiaries of condemnations over victimized property owners).

Politically powerful private interests such as General Motors in *Poletown* and Pfizer in the present case are much more likely to succeed in persuading politicians of the merits of their condemnation projects than politically weaker groups whose projects might serve the public interest more. *See Kelo*, 843 A.2d at 537 (noting that Pfizer was the "'10,000 pound gorilla' and a 'big driving point' behind" the New London condemnations).

### D. The danger of abuse is heightened by the lack of any requirement that the new owners of condemned property actually provide the public benefits that supposedly justified condemnation in the first place.

The danger of abuse of the eminent domain power is greatly exacerbated if neither the government nor the new private owners of the condemned property have any obligation to actually provide the "development" that was used to justify the use of eminent domain.

If there is no such binding requirement, then nothing prevents government officials and private interests from justifying a taking on the basis of economic development and then using the property purely for the benefit of private interests, after the condemnation has obtained judicial sanction. As the Seventh Circuit recently held "[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if [the new] landowner chooses to



use his property in a beneficial, but not mandated, manner." *Daniels*, 306 F.3d at 466.

#### 1. Connecticut and other states that permit economic development takings do not impose any binding obligation on the new owners to actually produce any economic benefits for the community.

Courts in many jurisdictions have explicitly held that property cannot be condemned without advance assurances that it will be employed only for specified public uses.[9] Unfortunately, states that permit economic development takings depart from this sensible principle by

[9] *See, e.g., Cincinnati v. Vester*, 281 U.S. 439, 447-48 (1930) (holding that "private property could not be taken for some independent and undisclosed public use"); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (en banc) (invalidating agreement that lacked controls over the use of the condemned property because "[s]uch controls are designed to assure that use of the property condemned will be in the public interest."); *State ex. rel. Sharp v. 0.62033 Acres of Land*, 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd*, 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time") (emphasis in the original); *Alsip Park Dist. v. D & M P'shp*, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "[I]f the facts" in a condemnation proceeding "established that . . . [the condemnor] had no ascertainable public need or plan, current or future for the land, defendants [property owner] should prevail"); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a "public agency acquires . . . property for the purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

allowing condemnations transferring property to private entities despite the lack of a binding agreement requiring them to actually provide the alleged economic benefits used to justify the condemnation in the first place.

In the present case, "[t]here are no assurances of a public use in the development plan [under which Petitioners' property was condemned]; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized." *Kelo*, 843 A.2d 602 (Zarella, J., dissenting). In this respect, *Kelo* is similar to *Poletown*, where there was no binding obligation on General Motors to provide any of the alleged economic benefits to Detroit that justified the massive condemnation of property in that case. *Poletown*, 304 N.W.2d at 479-80 (Ryan, J., dissenting); *see also City of Detroit v. Vavro*, 442 N.W. 2d 730, 731 (Mich. App. Ct. 1989) (holding that *Poletown* does not require the new private owner of condemned property to "enter . . . into a binding commitment . . . to construct the project" that was used to justify condemnation).

The other states that allow economic development condemnations also fail to require either the government or the new owners to actually provide the alleged public benefits.[10] This aspect of economic development condemnations

[10] *See, e.g., Gen. Bldg. Contractors v. Bd. of Shawnee Cty. Comm'rs*, 66 P.3d 873, 881-83 (Kan. 2003) (upholding economic development condemnation for purpose of building industrial facility for later transfer to private owners with whom no development agreements had as yet been reached); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W. 2d 365, 373-74 (N.D. 1996) (following *Poletown* approach and concluding that economic development takings will be upheld so long as the "primary object" of the taking is "economic welfare"); *City of Minneapolis v. Wurtele*, 291 N.W. 2d 386, 390 (Minn. 1980) (holding, in a case endorsing the constitutionality of economic development takings, that "a public body's decision that a [condemnation] project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); *Cf. Vitucci v. New York City Sch. Constr. Auth.*, 289 A.D. 2d 479, 480-81 (N.Y. App. Div. 2001) (holding that an economic development taking passes muster despite the fact that the property

(Continued on following page)



gives corporations and local governments an effective blank check to use bait and switch tactics to justify condemnation on the basis of the supposed public use of economic development and then utilize the property for their own private purposes.

### 2. Private interests exploit the lack of binding obligations to acquire property on the basis of inflated estimates of economic benefits that they then fail to deliver on.

In the absence of any binding obligations to actually deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners.

The notorious *Poletown* decision illustrates the dangers of allowing courts to accept dubious estimates of economic benefit at face value. In that case, the City of Detroit and General Motors claimed that the construction of a new plant on the expropriated property would create

was originally condemned to build a school, because "as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose"). The Maryland Court of Appeals decision endorsing economic development condemnations was partly based on the fact that the government "will maintain significant control over the industrial park" that the new owner used the condemned property to build. *Prince George's County v. Collington Crossroads*, 339 A.2d 278, 283 (Md. 1975). However, the control in question involved merely the right to regulate the facility to ensure "health, safety, and welfare, control . . . hazards and nuisances, and guidelines for assuring a high quality physical environment; and a guarantee that part of the project would be used as "open space." *Id.* It did not create a binding obligation to produce any actual economic benefits for the community of the kind that were used to justify condemnation in the first place.

some 6150 jobs. *Poletown,* 304 N.W.2d at 466-67 (Ryan, J., dissenting). The estimate of "at least 6000 jobs" was put forward by both Detroit Mayor Coleman Young and Thomas Murphy, Chairman of the Board of General Motors. *Id.* at 467-68 (citing statement of Mayor Young and reprinting letter from Thomas A. Murphy, Chairman of the Board, General Motors, to Coleman A. Young, (October 8, 1980)).

Yet, as Justice Ryan warned in his dissent, "there are no guarantees from General Motors about employment levels at the new assembly plant . . . [O]nce [the condemned property] is sold to General Motors, there will be no public control whatsoever over the management, operation, or conduct of the plant to be built there." *Id.* at 480. He pointed out that "General Motors will be accountable not to the public, but to its stockholders," and would therefore make decisions as to the use of the property based solely on stockholder interests rather than the economic interests of the general public that the condemnation was intended to further. *Id.*

Justice Ryan's warning was prescient. The GM plant opened two years late, and, as of 1988 – seven years after the *Poletown* condemnations – it employed "no more than 2500 workers." Michael, *Detroit.* Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3600" workers, less than 60% of the promised 6150. *Id.*

Ironically, the court below in the present case praised *Poletown's* deference to legislative and administrative determinations of public benefit, and indeed concluded that condemning authorities deserve even *greater* deference to their judgment than that granted in *Poletown*! *See Kelo,* 843 A.2d 528 n.39. As *Poletown* itself dramatically demonstrated, such blind deference is sadly misplaced.

Both corporate interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation. Courts are in a poor position to second-guess plausible-looking financial and job estimates provided by



officials. Even if the governments and corporations involved do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and likelihood of success of projects that advance one's own private interests. See STEVEN H. PINKER, HOW THE MIND WORKS 421-23 (1999) (explaining how evolutionary selection pressures lead to the development of a strong tendency to believe that what is in our own self-interest is also beneficial for society). Whether corporate and government leaders deliberately lie or honestly believe that "what is good for General Motors is good for America," the outcome is likely to be the same.

## III. THIS COURT SHOULD CATEGORICALLY FORBID THE USE OF "ECONOMIC DEVELOPMENT" AS A JUSTIFICATION FOR CONDEMNATION UNDER THE PUBLIC USE CLAUSE.

### A. A categorical ban on economic development condemnations is necessary to ensure that the power of eminent domain is not routinely abused for the benefit of private interests.

Economic development takings are vulnerable to abuse that is virtually impossible to prevent because the development rationale can be used to justify almost any condemnation that benefits a private business. *See* Part II *infra.* Furthermore, their economic and social harms that vastly outweigh any possible benefits, and are rarely if ever necessary to promote legitimate development projects. *See* Part I *infra.* For these reasons, the best approach for the Court to take would be to forbid the use of economic development as an independent rationale for the use of eminent domain in cases where private property is condemned for transfer to other private parties. Alternatively, it should at the very least hold that courts permitting economic development takings should take into account the economic and social costs of condemnation and require the new owners to accept a binding obligation to actually produce the economic benefits that allegedly justify condemnation in the first place.

Obviously, a ban on economic development takings would not prevent condemnations undertaken for legitimate public purposes that have an incidental effect of promoting economic development. It also would fall far short of banning all condemnations that transfer property to private parties. It would, however, eliminate a rationale for condemnation that if permitted would virtually gut the Public Use Clause as a meaningful restriction on the condemnation power.

### B. A categorical ban on economic development takings is consistent with this Court's decisions in *Hawaii Housing Authority v. Midkiff* and *Berman v. Parker*.

The result urged by *Amica* is perfectly compatible with this Court's decisions in *Midkiff* and *Berman*. In both cases, there were special circumstances that justified the use of condemnation in those situations, but would not justify using the power to condemn property solely for purposes of economic development.

#### 1. The *Midkiff* decision does not sanction an unlimited condemnation power of the sort that would result from permitting economic development takings.

The *Midkiff* decision grants great deference to legislative judgments of public use. Such determinations are upheld so long as they are "rationally related to a conceivable public purpose" and are not "palpably without a reasonable foundation." *Midkiff*, 467 U.S. at 241. However, deference cannot be extended to the point where the judiciary rubberstamps virtually any condemnation that transfer property to a private commercial enterprise. As the *Midkiff* opinion emphasizes, this "Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Id.* (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)). Therefore, *Midkiff* deference cannot justify a public use



rationale that would result in the establishment of a virtually unlimited power to condemn property for the benefit of private businesses. *See* Part II *infra*.

Furthermore, *Midkiff's* deferential approach should not be unthinkingly applied to cases arising in vastly different contexts. *Midkiff* arose in an unusual situation in which a mere seventy-two private landowners had control over some forty-seven of the state's land, including ninety-two percent of the private owned land. *Id.* at 232.[11] The Hawaii legislature had determined that the use of eminent domain was the only way "to reduce the perceived social and economic evils of [this] land oligopoly." *Id.* at 241-42. It emphasized that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242.

By contrast, economic development takings are a comparatively more recent innovation, and one that is much more easily abused "for the benefit of another private person" than is the regulation of monopolies. *Id.* at 241. The Seventh and Ninth Circuits have both held that full *Midkiff* deference does not apply in contexts where there is an unusually great risk of abuse of the eminent domain power. *See Daniels*, 306 F.3d at 465-66 (striking down condemnation where the public purpose used to justify it was "a speculative future benefit that could accrue only if a landowner chooses to use his property in a beneficial but not mandated manner"); *Armendariz v. Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996) (en banc) (holding that deference is inappropriate in a case where a taking resulted from "a raw misuse of government power"). As the Ninth Circuit points out, "[i]f officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those

[11] The seventy-two property owners controlled 47% of the state's landed, while federal and state governments owned some 49%. *Id.* Thus, we can calculate that the seventy-two big landowners controlled ninety-two percent of the privately owned land.

officials could later justify their decisions in court merely by positing a 'conceivable public purpose' to which the taking is rationally related, the 'public use provision' of the Takings Clause would lose all power to restrain government takings." *Armendariz*, 75 F.3d at 1321. Similarly, the Public Use Clause would likewise "lose all power to restrain government takings" if this Court sanctions a rationale for condemnation that would license virtually any taking that benefits a private business.

### 2. *Berman v. Parker* does not sanction condemnation of private property in unblighted areas purely for purposes of facilitating development.

In *Berman v. Parker*, this Court held that condemnations adopted for the purpose of eliminating "slums" do not violate the Public Use Clause. *Berman*, 348 U.S. at 32-35. Although the Court held that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive," it also made clear that such deference to condemning authorities is only appropriate when the state adheres to "specific constitutional limitations." *Id.* at 32. Thus, the *Berman* Court emphatically did not sanction an unlimited power to designate property as blighted and then condemn it for the purpose of transferring it to private interests.

The area designated for redevelopment and the use of the eminent domain power in *Berman* was characterized by "[m]iserable and disreputable housing conditions." *Id.* Surveys demonstrated that "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating." *Id.* at 30. Such conditions are a far cry from the use of eminent domain in order to promote potential development in nonblighted areas.

Although the *Berman* Court, in dicta, noted that the legislature may seek to make the "community . . . beautiful



as well as healthy, spacious as well as clean," it did not hold that purely esthetic or economic gains are by themselves sufficient to justify the use of condemnation for the alleged purpose of alleviating blight. *Berman*, 348 U.S. at 33. Instead, it limited itself to considering the use of eminent domain to revitalize areas that are characterized by persistent "slum" conditions, "as though possessed of a congenital disease." *Id.* at 34; *see also Opinion of the Justices*, 126 N.E.2d 795, 803 (Mass. 1955) (holding that *Berman* applies only to "slum" areas, and that where "[t]he project is not a slum clearance one, . . . the principle on which rest such cases as . . . *Berman v. Parker*, 348 U.S. 26, is not applicable"); *cf. Hogue v. Port of Seattle*, 341 P.2d 171, 184-87 (Wash. 1959) (en banc) (citing *Opinion of the Justices* to invalidate a taking where the area in question was not a "slum or blighted area").

## C. If this Court chooses not to ban economic development condemnations, it should at least require courts to consider the social costs of condemnation and compel the new owners of expropriated property to accept a binding obligation to produce the economic benefits that justify condemnation in the first place.

If this Court chooses to hold that economic development is a legitimate public use, it should not give condemning authorities untrammeled power to condemn whatever properties they might want to transfer to powerful private interests. Instead, the Court should impose two restrictions in the interest of ensuring that economic development takings really do promote the supposed public use of economic advancement rather than merely serve private interests.

First, the Court should require lower courts weigh the social and economic costs of economic development condemnations and disallow condemnations that have costs that exceed their benefits. Otherwise, we are likely to see more *Poletown*-style condemnations that inflict vastly

greater costs on the community than they do benefits, thus actually undermining economic development rather than promoting it. *See* § I.C.1.a *infra*. The political process cannot always be trusted to balance costs and benefits objectively because many economic development takings are designed to benefit the politically powerful at the expense of the weak; obviously, political leaders have strong incentives to favor the former at the expense of the latter even if by so doing they undermine longterm development. *See* § I.C.2.

Second, it is essential that the new private owners of condemned property be legally required to actually provide the economic benefits to the community that allegedly justified the condemnation. Otherwise, even if courts do weigh costs and benefits, private interest groups and their political allies can force through harmful takings simply by providing inflated estimates of their likely benefits. *See* § II.D.2.

Even if these two requirements are imposed, the resulting system will still permit many abusive condemnations. Courts will often find it difficult to assess plausible-sounding claims of economic benefit, and it will often be impossible to accurately measure the nonfinancial burden that condemnation imposes on those whose property is expropriated. Moreover, even if a project's measurable benefits do outweigh its costs, that conclusion does not eliminate the possibility that development would have advanced still more if a neighborhood were left undisturbed or if local governments sought to promote development through noncoercive means.

Nonetheless, closer judicial scrutiny of economic development takings would be a step forward from a system where government has virtually unlimited power to use "economic development" as an all-purpose justification to condemn the property of the weak for the benefit of the strong.

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and enter judgment in favor of the Petitioners.

Respectfully submitted,

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# Supreme Court of the United States

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*v.*

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*Respondents.*

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## BRIEF OF *AMICUS CURIAE* K. HOVNANIAN COMPANIES, LLC IN SUPPORT OF RESPONDENTS

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## INTERESTS OF *AMICUS CURIAE*

The parties to this case have filed letters with the Clerk of the Court consenting to the filing of *amicus curiae* briefs in this matter.[1]

K. Hovnanian Companies, LLC ("K. Hovnanian") is a leading national homebuilder that has housed over 145,000 families in the United States. K. Hovnanian operates in the States of New Jersey, New York, Pennsylvania, Maryland, Virginia, West Virginia, Ohio, North Carolina, South Carolina, Texas, Arizona, Florida and California.

K. Hovnanian is the largest homebuilder in the State of New Jersey, a densely populated State with limited availability of undeveloped land on which to house a growing population. New Jersey's response to these circumstances – identifying "area[s] in need of redevelopment" and enabling private companies such as K. Hovnanian to provide housing and other economic opportunities in such areas – illustrates that in appropriate circumstances, the use of eminent domain for so-called "private economic development" satisfies the public use requirement of the Fifth Amendment's Takings Clause.

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* state that their counsel authored this brief and *amicus curiae* paid for the preparation of this brief. This brief was not written in whole or part by counsel for a party, and no one other than *amicus curiae* made a monetary contribution to its preparation.

## SUMMARY OF THE ARGUMENT

New Jersey is the most densely populated state in the nation. Due to environmental constraints, New Jersey has a limited availability of undeveloped land on which to provide housing and on which to address employment and the other needs of a growing population. The State has adopted a policy of "smart growth," which seeks to address these public needs while conserving natural and environmental resources by promoting development in areas without significant environmental constraints, and by encouraging redevelopment and revitalization in areas that are already developed. A key component of this strategy is New Jersey's Local Housing and Redevelopment Law, which addresses the public's need for housing, jobs, and economic development by identifying "area[s] in need of redevelopment," creating plans for the appropriate redevelopment of these areas, and authorizing private parties to implement these redevelopment plans. One element of this redevelopment effort is the use of eminent domain.

While the designation of an "area in need of redevelopment" focuses on redevelopment of blighted areas, the need to provide housing, jobs and other economic opportunities in a state such as New Jersey may require going beyond the "elimination of blight" in the narrowest sense of that term. New Jersey's experience illustrates that the use of eminent domain for so-called "private economic development" is sometimes necessary in order to provide for essential public needs – housing, jobs, and protection of fragile environmental resources. This Court should reject an overly narrow "elimination of blight" standard for determining whether and



when the use of eminent domain for "private economic development" satisfies the "public use" requirement of Takings Clause of the Fifth Amendment.

## LEGAL ARGUMENT

### AS THE NEW JERSEY SITUATION DEMONSTRATES, THE USE OF EMINENT DOMAIN TO ENABLE PRIVATE REDEVELOPMENT TO MEET VITAL PUBLIC NEEDS, SUCH AS HOUSING, JOBS, AND OTHER ECONOMIC OPPORTUNITIES, MAY SATISFY THE "PUBLIC USE" REQUIREMENT OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE.

This Court has granted certification to determine the limits imposed by the Fifth Amendment's public use requirement on the condemnation of private property not solely to eliminate slums or blight, but to provide housing, jobs and other economic benefits through "private economic development." This *amicus curiae* contends that in appropriate circumstances, condemnation of private property to enable redevelopment by private parties need not be tied to a narrow requirement of "elimination of blight" in order to pass constitutional muster. Circumstances in a state such as New Jersey demonstrate that condemnation of areas determined to be in need of redevelopment may enable the private sector to provide housing, jobs and other economic opportunities for a growing population faced with a dwindling supply of undeveloped land. The use of condemnation in such circumstances readily satisfies the "public use" requirement.

### A. New Jersey is the Most Densely Populated State in the Union.

New Jersey is the most densely populated State in the nation. *N.J. Stat. Ann.* § 52:18A-196 (West 2001 & Supp. 2004) (State Planning Act, legislative findings). As of 2003, there were 1,164 people per square mile in the State of New Jersey. Sen-Yuan Wu, N.J. Dep't of Labor and Workforce Dev., *2003 State Population Estimates* 1, http://www.wnjpin.net/OneStopCareerCenter/LaborMarket-Information/lmi02/stest03.pdf (last modified Oct. 8, 2004). By contrast, the national average was a population of 82.2 per square mile. *Id.* By the year 2025, New Jersey will have a projected population of 1,381.6 per square mile, with an ever increasing density in the ensuing years.[2]

Both the State's Legislature and Courts have recognized the challenges faced by this population density. *See N.J. Stat. Ann.* § 52:18A-196 (West 2001 & Supp. 2004) (State Planning Act, legislative findings); *N.J. Stat. Ann.* § 4:1B-1 (West 1998) (Agricultural Preserve Demonstration Program Act, legislative findings); *N.J. Stat. Ann.* § 13:1E-213 (West 2003) (Clean Community and Recycling Grant Act, legislative history); *N.J. Stat. Ann.* § 40:55D-114 (West 1991), *N.J.S.A. Stat. Ann.*§ 40:55D-138 (West, WESTLAW through L. 2004, c. 1 to 155) (State transfer of development rights to municipality, legislative findings); *N.J. Stat. Ann.* § 55:19-20 (West 2001) (New Jersey Urban Redevelopment Act); *see generally, Aversano v. Palisades Interstate Parkway Comm'n*,

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[2] Calculation based on the projected population in 2025, *infra*, divided by the square mileage of the State of New Jersey.



832 A.2d 914, 930 (N.J. Super. Ct. App. Div. 2003) (Wefing, J., dissenting), *modified on other grounds*, 851 A.2d 633 (2004) (recognition that New Jersey is densely populated); *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 545, 577 (N.J. 1972), *cert. den.*, 414 U.S. 989 (1973) (recognition that New Jersey is the most densely populated State in the nation); *Cappture Realty Corp. v. Bd. of Adjustment, Elmwood Park*, 313 A.2d 624, 630 (N.J. Super. Ct. Law Div. 1973), *aff'd on other grounds*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975).

### B. New Jersey has a Growing Population.

New Jersey's population continues to grow. As of July 1, 2003, New Jersey's population reached 8,638,396. Wu, *supra* at 1; *see also* U.S. Census Bureau, *State and County QuickFacts*, http://quickfacts.census.gov/ qfd/states/34000.html (last revised on July 9, 2004). The State experienced a 0.7% rate of growth from the 2002 total population of 8,575,252. Wu, *supra* at 1. In 2000, the State's population was 8,414,350. *State and County QuickFacts, supra.* Since the 2000 census, New Jersey experienced an estimated annual increase in population of 0.8%. Wu, *supra* at 2.

Overall, New Jersey is the nation's tenth most populous state in the nation. *Id.* at 1 (citing U.S. Bureau of Census, *Population Division* (Dec. 2003)). From 2002 to 2003, New Jersey had the greatest population growth of any State in the Northeast region, with an increase in population of 63,144, compared to New York and Pennsylvania, which grew by 0.3 percent each from 2002-2003. *Id.* at 2. By the year 2025,

New Jersey's population is expected to increase by more than 18% to 10,250,100. Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Population, Labor Force, Industry Employment and Occupational Employment Projections for New Jersey*: 2002 to 2012 (Aug. 2004), http://www.wnjpin.net/ OneStopCareerCenter/ LaborMarketInformation/lmi03/highlights.doc; *See* Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Table 1, Projection of Total Population by Projection Model, New Jersey 1990 to 2025*, http://www.wnjpin.net/OneStopCareerCenter/LaborMarket Information/lmi03/Sptab1.pdf (Aug. 2004).

Foreign immigration is the largest source of New Jersey's population growth. Wu, *supra* at 2. The State ranked 6th among all states in foreign immigration from 2002 to 2003. Wu, *supra* at 2. The net gain of foreign immigration from 2000 to 2003 was 192,044 in population growth. *Id.* at 3. In 2000, 15% of New Jersey's population consisted of foreign born immigrants. Sen-Yuan Wu, N.J., Dep't of Labor and Workforce Dev., *Estimate of Foreign-Born Population in New Jersey*: 2000, http://www.wnjpin.net/OneStopCareer Center/LaborMarketInformation/lmi19/ eifbp.pdf (last revised June 28, 2004). In 2003, New Jersey's foreign born population was 17.5% and growing. *State and County QuickFacts, supra.*



### C. New Jersey Lacks the Housing Needed to Shelter its Growing Population.

New Jersey has a growing need for housing. For example, from 1990 to 2000, the growth in the number of housing units did not keep pace with the State's population growth. N.J. State Data Ctr., Div. of Labor Mkt. and Demographic Research, N.J. Dep't of Labor and Workplace Dev., *Housing Units, Households and Families New Jersey, Counties and Selected Municipalities: 1990 and 2000* 4 (Aug. 2001), http://www.wnjpin.net/OneStopCareerCenter/ LaborMarketInformation/lmi25/pub/NJSDC-PH1.pdf. From 1990 to 2000, the State's total housing units increased by 7.6%, compared with the nation-wide increase of 13.3%. *Id.*

New Jersey's lack of an adequate housing supply is attributable to the rise in population growth, the limited availability of land, and the tendency for larger families among foreign immigrants. *Id.* Both the State's Legislature and Courts have recognized that New Jersey suffers from a housing shortage. *See N.J. Stat. Ann.* § 2A:18-61.1 to -61.12 (West, WESTLAW throughl.2004, c. 1 to 155) (Anti-Eviction Act, legislative findings); *224 Jefferson St. Condo. Ass'n v. Paige*, 788 A.2d 296 (N.J. Super. Ct. App. Div.), *certif. den.*, 796 A.2d 896 (N.J. 2002); *Kuzuri Kijij, Inc. v. Bryan*, 852 A.2d 1136 (N.J. Super. Ct. App. Div. 2004).

### D. Due to Environmental Constraints, New Jersey has a Limited Availability of Undeveloped Land Suitable for Development.

New Jersey has a limited availability of undeveloped land suitable for development, due largely to environmental constraints. New Jersey has 4.8 million acres of land, of which 1.35 million acres are developed. Ctr. for Urban Policy Research, Rutgers, The State Univ. of N.J., *The Costs and Benefits of Alternative Growth Patters, The Impact Assessment of the New Jersey State Plan* 111 (Sept. 2000). When public park lands, forest lands, preserved farm land, fish and wildlife management areas, and other lands earmarked for preservation are accounted for, fewer than 1 million acres of undeveloped land remain. *Id.* And much of this is environmentally constrained.

The State Planning Commission, in the 2001 State Development and Redevelopment Plan, has designated 833,282 acres as environmentally sensitive planning areas, comprising 17.3% of the land in New Jersey. N.J. State Planning Comm'n, *The New Jersey Development and Redevelopment Plan, Executive Summary* 34 (Mar. 1, 2001). Of that, 127,892 acres are developed, 338,904 acres are unprotected and undeveloped land, 139,446 acres are preserved, and 223,139 acres are environmentally sensitive and unsuitable for development under the State Development and Redevelopment Plan. *Id.* Lands in the environmentally-sensitive planning areas are so designated due to wildlife habitats, geological features and sensitive ecosystems. *Id.* In addition, the State Development and Redevelopment Plan has designated rural/environmentally sensitive planning areas comprised of 395,400 acres, which is 8.2% of New Jersey's



land. *Id.* at 34. Of that land, 57,721 acres are developed, 255,887 acres are unprotected and undeveloped, 39,141 acres are preserved, and 42,651 acres are unsuitable for development. *Id.*

Additionally, the Legislature has recognized that there are various regions of the State with sensitive environmental features that warrant special protection. For example, earlier this year the Legislature enacted the Highlands Water Protection and Planning Act. *N.J. Stat. Ann.* § 13:20-1 (West, WESTLAW through L.2004, c. 1 to 155), *et seq.* The Legislature recognized that the "portion of the national Highlands Region contained within the State of New Jersey is nearly 800,000 acres, or about 1,250 miles." *N.J. Stat. Ann.* § 13:20-2 (West, WESTLAW through L.2004, c. 1 to 155). The Highlands region contains thirteen percent of the land in New Jersey. *Id.* Of this, the 139,446 most critical acres have been designated as the "Highlands Preservation Region" in which development is severely limited in order to protect the water supplies for the State's urban population centers. The New Jersey Highlands are part of the interstate Highlands Region that also extends into Pennsylvania and New York. The United States Department of Agriculture Forest Service, and recently the United States Congress, have recognized that the Highlands Region is of special environmental significance because it ensures clean and plentiful drinking water for the citizens of the region, and provides other natural resources including "clean air, contiguous forest lands, wetlands, pristine watersheds and habitat for fauna and flora." *Id.*; Highlands Conservation Act, H.R. 1964, 108th Cong. (2004).

Congress has also recognized the national significance of the New Jersey Pinelands, and has encouraged State preservation efforts. National Parks and Recreation Act of 1978, 16 *U.S.C.A.* § 471i (West 2000). In response, the New Jersey Legislature enacted the Pinelands Protection Act. *N.J. Stat. Ann.* § 13:18A-1 (West 2003) *et seq*. The pinelands area contains important surface and ground water resources and provides a habitat for "rare, threatened and endangered plant and animal species" and other "special natural, ecological, agricultural, scenic, cultural and recreational resources." *N.J. Stat. Ann.* § 13:18A-2 (West 2003). The pinelands area comprises approximately 1.1 million acres, approximately 22% of the land in the State, with a core preservation area of 295,000 acres where minimal development is permitted. *Id; see also* N.J. Pinelands Comm'n, *A Summary of the New Jersey Pinelands Comprehensive Management Plan*, http://www.nj.gov/pinelands/cmp.htm (last updated Nov. 16, 2004); N.J. Pinelands Comm'n, *Highlights of the Pinelands, Size*, http://www.nj.gov./pinelands/pnrpc.htm (last updated Nov. 16, 2004).

Moreover, the State of New Jersey protects its environmentally-sensitive coastal waters and the nearby land pursuant to the Waterfront Development Law, *N.J. Stat. Ann.* § 12:5-3 (West 1979 & Supp. 2004), *et. seq*., the Wetlands Act of 1970, *N.J. Stat. Ann.* § 13:9A-1 (West 2003), *et seq*., and the Coastal Area Facility Review Act, *N.J. Stat. Ann.* § 13:19-1 (West 2003), *et seq*. The land area regulated by the Coastal Area Facility Review Act alone consists of 880,640 acres, approximately 18.3 % of the land within the State. *See In re Egg Harbor Assocs*., 464 A.2d 1115, 1120-21 (N.J. 1983). The State's Department of Environmental Protection



regulates development in these areas pursuant to the New Jersey Coastal Permit Program rules, *N.J. Admin. Code. tit.* 7, § 7 (2004) and the Coastal Zone Management Rules, *N.J. Admin. Code. tit.* 7, § 7E (2004).

There are a variety of other statutes that regulate and restrict development in environmentally-sensitive areas of New Jersey. *See e.g.* Freshwater Wetlands Protection Act, *N.J. Stat. Ann.* § 13:9B-1 (West 2003), *et seq*.; Hackensack Meadowlands Reclamation and Development Act, *N.J. Stat. Ann.* § 13:17-1 (West 2003), *et seq*.

In summary, much of the undeveloped land in New Jersey is environmentally sensitive, and the State has acted to protect the public health, safety and welfare by restricting and regulating development in these areas.

### E. New Jersey has adopted a "Smart Growth" Policy for Future Development.

In response to a growing population and environmental constraints on much of the State's undeveloped land, New Jersey has adopted a policy of promoting "smart growth," a term used to describe planned and managed growth that adds new homes and creates new jobs, while preserving open space, farmland and environmental resources. In 1985, the Legislature enacted the State Planning Act, finding that:

> a. New Jersey, the nation's most densely populated State, requires sound and integrated Statewide planning and the coordination of Statewide planning with

> local and regional planning in order to conserve its natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable costs while promoting beneficial economic growth, development and renewal; . . .

*N.J. Stat. Ann.* § 52:18A-196 (a) (West 2001 & Supp. 2004). The State Planning Act established the State Planning Commission, and directed that it prepare a "State Development and Redevelopment Plan designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation[.]" *N.J. Stat. Ann.* § 52:18A-196 (c) (West 2001 & Supp. 2004).

The Legislature has also declared that:

> d. It is in the public interest to encourage development, redevelopment and economic growth in locations that are well situated with respect to present or anticipated public services and facilities, giving appropriate priority to the redevelopment, repair, rehabilitation or replacement of existing facilities and to discourage development where it may impair or destroy natural resources or environmental qualities that are vital to the health and well-being of the present and future citizens of the State; . . .



*N.J. Stat. Ann.* § 52:18A-196(d) (West 2001 & Supp. 2004). The State Development and Redevelopment Plan encompasses the State's land use and development policies, and is intended to promote economic growth, urban revitalization, adequate housing and transportation, agricultural promotion and preservation, and preservation of natural, environmental, historical and cultural resources. The "smart growth" policy is intended to ensure that "all of New Jersey's citizens benefit from growth, development and redevelopment." *N.J. Stat. Ann.* § 52:18A-196 (g) (West 2001 & Supp. 2004).

Most recently, the Legislature enacted the Smart Growth Law, *N.J. Stat. Ann.* § 13:1D-145 (West, WESTLAW through L.2004, c. 1 to 155), *et seq.*, which establishes a variety of policies and procedures to facilitate development in the "smart growth" areas. For example, the law requires that the State's Departments of Environmental Protection and Transportation expeditiously review applications for development permits in "smart growth" areas. *N.J. Stat. Ann.* § 13:1D-146a (West, WESTLAW through L.2004, c. 1 to 155). The Law defines a "smart growth" area as an area designated by the State Development and Redevelopment Plan as a Metropolitan or Suburban Planning Area. These areas include the State's existing urban and older suburban areas. "Smart growth" areas also include designated growth centers, an "area[s] in need of redevelopment" pursuant to Local Redevelopment and Housing Law, *infra*, a regional growth areas designated in the management plan prepared and adopted by the Pinelands Commission, and various other designated areas. *N.J. Stat. Ann.* § 13:1D-144 (West, WESTLAW through L.2004, c. 1 to 155).

## F. The Local Redevelopment and Housing Law Enables Municipalities to Identify Areas in Need of Redevelopment, Promulgate Plans to Redevelop Those Areas and, When Necessary, Exercise Eminent Domain to Accomplish These Plans.

The New Jersey Legislature has enacted the Local Redevelopment and Housing Law ("LRHL") to promote the policy of "smart growth." *N.J. Stat. Ann.* § 40A: 12A-1 (West 1993 & Supp. 2004), *et seq.* The Legislature determined that:

> a. There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amendable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort. . . .

*N.J. Stat. Ann.* § 40: 12A-2 (West 1993 & Supp. 2004). The goals of the LRHL are to cease the deterioration of housing, commercial and industrial facilities through redevelopment at the local level.



The Legislature has designated the criteria and procedural safeguards for designating an "area in need of redevelopment." *N.J. Stat. Ann.* § 40A:12A-5 (West 1993 & Supp. 2004) in part states:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in [*N.J. Stat. Ann.*] 40A:12A-6[] [(West 1993 & Supp. 2004)], the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found: . . .

The LRHL then goes on to describe a variety of conditions that undoubtedly fall within any common understanding of a "blighted" or "slum" area, including a "generality of buildings [that] are substandard, unsafe, unsanitary, dilapidated, or obsolescent, . . ."; buildings with "unwholesome living or working conditions"; areas where buildings are abandoned or are in "so great a state of despair as to be untentantable"; and areas "with buildings or improvements which. . . are detrimental to the safety, health, morals, or welfare of the community." *N.J. Stat. Ann.* 40A:12A-5a, b, d (West 1993 & Supp. 2004).

Yet an "area in need of redevelopment" need not be limited to a narrow finding of blight, but, rather, may include areas where:

> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.
>
> . . . .
>
> h. The designation of the delineated area is consistent with smart growth planning principals adopted pursuant to law or regulation.

*N.J. Stat. Ann.* § 40A:12A-5e, h (West 1993 & Supp. 2004). Moreover, the LRHL provides that an "area in need of redevelopment" or "redevelopment area" "may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part." *N.J. Stat. Ann.* § 40A:12A-3 (West 1993); *see Hirth v. City of Hoboken*, 766 A. 2d 803, 809 (N.J. Super. Ct. App. Div. 2001).

Thus, New Jersey Courts have held that "an area in need of redevelopment" as defined in the LRHL is synonymous with the term "blighted area" as used in the State Constitution, N.J. Const. of 1947, art. VIII, §3, ¶1 (1963), which provides authority for the LRHL. *Concerned Citizens of Princeton, Inc. v. Borough of Princeton*, 851 A.2d 685, 689 (N.J. Super.



Ct. App. Div. 2004); *see also N.J. Stat. Ann.* § 40A:12A-6(c) (West 1993 & Supp. 2004). Yet the Supreme Court of New Jersey has recognized that the State's redevelopment law "'goes far beyond the elimination of the perceptually offensive slums'" and "an area does not have to be a slum to make its redevelopment a public use...." *Levin v. Township Comm. of Tp. of Bridgewater*, 274 A.2d 1, 5 (N.J.), *appeal dismissed*, 404 U.S. 803 (1971) (quoting *Jersey City Chapter of Prop. Owner's Protective Ass'n v. City Council of Jersey City*, 259 A.2d 698, 704-05 (N.J. 1969) (pre-LRHL case)); *see also Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 700.

Even prior to the enactment of LRHL, the policy of New Jersey revealed a broad objective of redevelopment as benefiting the general community. *Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 703. "[S]pecifically, the Legislature recognized that at times, usually over a long period, potentially useful land reaches a stage of stagnation and unproductiveness . . . ." *Levin, supra*, 274 A.2d at 18-19; *see also Forbes v. Township of S. Orange Vill.*, 712 A.2d 255, 258-59 (N.J. Super. Ct. App. Div.), *certif. den.*, 719 A.2d 642 (N.J. 1998). The New Jersey Legislature determined that the total "unproductivity of unimproved vacant lot and commercial blight embraced not only economic deterioration in tax revenues but also all the adverse physical conditions of the property that individually or in combination impeded its reasonable productivity and resulted in its negative impact upon the general welfare and economic well-being of the community." *Forbes, supra*, 712 A.2d at 258-59. The New Jersey Legislature sought to encompass a broad range of circumstances that will determine when an "area is in need of

redevelopment." Even "[t]he relative affluence of a municipality or its residents is irrelevant in that calculus as long as the determination that an area is in need of redevelopment" met the statutory factors and was supported by substantial credible evidence. *Concerned Citizens of Princeton, Inc., supra*, 851 A.2d at 699.

New Jersey's LRHL includes substantive and procedural safeguards to protect those who may be affected by the designation of an area as one in need of redevelopment. The municipality must conduct a preliminary investigation, followed by a public hearing with the requisite public notice pursuant to *N.J. Stat. Ann.* § 40A:12A-6 (West 1993 & Supp. 2004), prior to making a determination that an "area is in need of redevelopment." *N.J. Stat. Ann.* § 40A:12A-5, -6 (West 1993 & Supp. 2004). The requirements of public notice must be satisfied for a determination that an "area is in need of redevelopment." *See Concerned Citizens of Princeton, Inc.*, 851 A.2d at 709-11. At the public hearing, the municipality or governing body receives written or oral objections. *N.J. Stat. Ann.* § 40A:12A-6(b) (5) (West 1993 & Supp. 2004). A redevelopment plan must be drawn in accordance with all of the statutory requirements. *N.J. Stat. Ann.* § 40A:12A-7 (West 1993 & Supp. 2004).

A municipal government's finding that an "area is in need of redevelopment" is subject to judicial review, and such a determination will be upheld where the determination is "supported by substantial evidence," and is not "arbitrary, capricious or contrary to law." *N.J. Stat. Ann.* § 40A:12A-6 (b) (5) (West 1993 & Supp. 2004); *Concerned Citizens of*



*Princeton, Inc., supra*, 851 A.2d at 700 (quoting *Lyons v. City of Camden*, 243 A.2d 817 (N.J. 1968)).

After the redevelopment plan has been adopted by the governing body, the plan can be implemented by contracting with private parties for the development and construction of the redevelopment project. *N.J. Stat. Ann.* § 40A:12A-8 (f) (West 1993 & Supp. 2004). When the designated developer is unable to acquire land in the redevelopment area by purchase, the municipality may acquire the land through eminent domain and convey it to the private redeveloper. *N.J. Stat. Ann.* § 40A:12A-8 (c).

In summary, as a small, densely populated State with a growing population and limited availability of undeveloped land suitable for development, planned redevelopment is essential to the New Jersey's policy of "smart growth." To provide a growing population with shelter, jobs, and other economic opportunities, the public interest mandates that New Jersey use available land and infrastructure in a fully productive manner. New Jersey cannot permit such land to remain in a stagnated, unproductive or underproductive condition, while the population and needs of the citizens of the State are growing. Accordingly, the designation of an area as one in need of redevelopment is not limited to situations where there is an immediate public benefit in elimination of blighted conditions, but, rather, focuses on the benefits that the redevelopment of an area will provide to the public at large.

## G. This Court Should Reject a Narrow "Elimination of Blight" Standard for Determining Whether and When the Fifth Amendment Allows the Use of Condemnation for Private Economic Development.

This Court has held that it is for the Legislature to determine the public purpose served by the exercise of eminent domain. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court upheld the District of Columbia Redevelopment Act of 1945. The Act provided for the use of eminent domain power to redevelop slums for aesthetic considerations and health considerations. When determining whether the use was a "public use," the Court stated:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such case the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress



> legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether the power is being exercised for a public purpose is an extremely narrow one.

*Id.* at 32; *see also Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 239-41 (1984) (citations omitted) (upholding Hawaii Land Reform Act of 1967 as "public use" under the Fifth Amendment of the Constitution for the taking of private property). Furthermore, this Court has held that once the Legislature has declared the public purpose, all other aspects of effecting that purpose rest in the discretion of the legislative branch. The exercise of eminent domain must be "rationally related" to the conceivable public purpose. *Berman, supra*, 348 U.S. at 33-36; *Haw. Housing Auth., supra*, 467 U.S. at 240-41.

This Court should reject an overly narrow "elimination of blight" standard for determining whether and when the use of eminent domain for "private economic development" satisfies the public use requirement of the Takings Clause of the Fifth Amendment, for reasons illustrated by New Jersey's efforts to address essential public needs. New Jersey is the most densely populated State in the nation. Due to environmental constraints, New Jersey has a limited availability of undeveloped land to address the needs of the growing population, such as housing, employment and the protection of the fragile environmental resources. New Jersey has adopted a policy of

"smart growth" which encourages addressing these public needs, while also providing for the conservation of natural and environmental resources by promoting development and redevelopment in areas already developed and in areas without significant environmental constraints. The New Jersey Local Redevelopment and Housing Law addresses the public needs of the State, by allowing municipalities to designate areas in need of redevelopment, create plans for the designated redevelopment areas, and by encouraging private parties to implement these redevelopment plans. The public needs of a state such as New Jersey require going beyond a narrow "elimination of blight," standard. Rather, in appropriate circumstances condemnation for "private economic development" serves to provide essential public needs and thus readily satisfies the public purpose requirement of the Takings Clause.



## CONCLUSION

For the foregoing reasons, this Court should reject a narrow interpretation of the "public use" requirement of the Takings Clause of the Fifth Amendment to the Constitution.

DATED: December 2, 2004.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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SUSETTE KELO, ET AL.,
*Petitioners,*

v.

CITY OF NEW LONDON, ET AL.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Connecticut**

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## BRIEF OF *AMICUS CURIAE* KING RANCH INC. IN SUPPORT OF PETITIONERS

---

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**On Petition for a Writ of Certiorari to the Supreme Court of Connecticut**

---

## BRIEF OF *AMICUS CURIAE* KING RANCH INC. IN SUPPORT OF PETITIONERS

---

## IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

King Ranch, Inc. is the owner of a large tract of land in South Texas with unique cultural, historical, and environmental importance. King Ranch is larger than the entire state of Rhode Island. It is spread across 825,000 acres, and covers almost 1,300 square miles. A significant portion of the ranch

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[1] Pursuant to Supreme Court Rule 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, it members, or its counsel, made a monetary contribution specifically for preparation or submission of this brief. Counsel of record for the parties has consented to the filing of all amicus briefs in this case, and those letters of consent are on file with the Clerk.

property has been in continuous family ownership for over 150 years and has been designated a National Historical Landmark. The ranch property contains habitat suitable for many threatened and endangered species in the region, including ocelot and aplomado falcon. In the past, King Ranch has had portions of its property taken for public use through the exercise of the government's eminent domain power. King Ranch anticipates that state and local governmental entities may seek to acquire additional portions of the ranch in the future through the exercise of eminent domain.

The Texas Legislature has recently enacted legislation to begin an ambitious project, known as the Trans-Texas Corridor, for constructing new highways, railways, pipelines, etc. across the state of Texas. TEX. TRANSP. CODE § 227.001, *et seq.* At this time, it is uncertain where, if ever, the Trans-Texas Corridor will be built. There are numerous outstanding questions, including whether there will be sufficient funding to support that project, as well as the scope of the final project. Nevertheless, the Texas Legislature authorized acquisition of options to purchase property "for possible use as part of the Trans-Texas Corridor even if it has not been finally decided that the Trans-Texas Corridor will be located on that property." TEX. TRANSP. CODE § 227.041(a). The Legislature also authorized acquisitions of options to purchase property "along alternative potential routes for the Trans-Texas Corridor even if only one of those potential routes will be selected as the final route." *Id.*

As a responsible steward of the land, King Ranch believes that the governmental power of eminent domain should not be exercised for purposes other than public necessity. The government should not be allowed to acquire property or options to purchase property (which would limit the owner's ability to use its property for its own purposes) unless and until the government can show its present need for that property, and that its use of the property will be for a public



purpose, not a private one. King Ranch submits this brief in support of the Petitioners, urging reversal of the Connecticut Supreme Court's decision in this case, and requesting that this Court adopt a definition of "public use" under the Taking Clause of the United States Constitution, that will ensure that private property is not condemned by the government for private, speculative, hypothetical, or uncertain uses.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[E]minent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent."[2] As early as 1789, this Court explained that state legislatures could not "violate … the right of private property" without committing "a political heresy." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798) (Chase, J.). Justice Chase wrote that it would be "against all reason and justice" to presume that the people intended to give the state governments the power to enact "a law that takes property from A. and gives it to B." *Id.* at 388. The "public use" limitation on the state's eminent domain power was intended to protect private property against such a "public heresy." That rule has been recognized for two hundred years. The Connecticut Supreme Court's decision should be reversed because it violates the rights of private property by transferring that property to another based entirely upon the hope of future economic gain.

Following this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), courts, including the Connecticut Supreme Court, have struggled with the scope of the state's eminent domain powers. Admittedly, this Court has endorsed

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[2] James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

a broad view of the eminent domain power, equating the "public use" limitation with the government's expansive police power: "The 'public use' requirement is thus coterminous with the scope of the sovereign's police powers." *Midkiff*, 467 U.S. at 240. *See also National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422 (1992) ("We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power . . ."). But even if the Court accepts that the ability to take property for a "public use" is coterminous with the police power,[3] that power does not include the ability to take private property for use for private purposes. Moreover, it does not include the right to take private property for uncertain, theoretical, or speculative economic gain. To hold otherwise would require this Court to excise the words "public use" from the Constitution. The only reason that the "public use" requirement and the state police power may be considered coterminous is that the "public use" requirement is a check on the police power that defines its outer limits.

When defining the "public use" limitation on the scope of the government's eminent domain authority, this Court should recognize the continued role of the judiciary in protecting private property against excessive encroachment by the government. *See Midkiff*, 467 U.S. at 240 ( "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use. . ."). The judiciary's role should require the court to ask, at a minimum, two interrelated questions: (1) whether the government has articulated a legitimate public purpose to justify use of its eminent domain power, that is, a use that is not primarily for the benefit of private persons; and (2) whether the government has shown a present intent to use or a present need to take the particular property in question in furtherance of that public purpose. This test would require the government to articulate its specific purpose in seeking to condemn property and to show that the taking of a particular piece of property is actually part of the plan to achieve that public purpose.[4] Thus, this test would avoid the needless taking of private property for a speculative, hypothetical, private, or otherwise improper purpose. When this standard is applied in the present case, this Court should conclude that the decision of the Connecticut Supreme Court must be reversed.

[3] King Ranch believes that scope of the Takings Clause should be more limited, to recognize that the ability to take property for a "public use" was intended to be a limitation upon the government's police and regulatory powers.



## ARGUMENT

In this brief, King Ranch will briefly trace the history of the police power to show that the "public use" requirement should be recognized as a limit on the state police power that, among other things, prevents the taking of private property from one person to use for the benefit of another private person. Recognizing the "public use" exception as a limit on the government's authority, this Court should easily conclude that the condemnation of property in this case is not for a "public use." At a minimum, this Court should reverse the Connecticut Supreme Court's decision allowing the condemnation of Parcel 4A because the government does not have a current plan to "use" that parcel in support of its claimed public purpose.

[4] Vanderbilt law professor and historian, James W. Ely, Jr., has written: "Generalized statements as to the necessity for a taking, sometimes veering toward mere speculation, should not be regarded as adequate." James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

## I. THOUGH THE SCOPE OF THE STATE POLICE POWER HAS CHANGED OVER TIME, THAT POWER CANNOT TRUMP THE CONSTITUTION'S "PUBLIC USE" LIMITATION ON THE ABILITY TO TAKE PROPERTY.

The "public use" requirement of the Takings Clause and the state's police power have been compared for decades. But it was not until *Berman v. Parker*, 348 U.S. 26 (1954) that those two terms were held to be coterminous. Previously, this Court, through the writings of Justice Holmes, recognized that the "public use" requirement and the state police power, while related, are not the same. *See Block v. Hirsh*, 256 U.S. 135, 156 (1921) (". . . there comes a time when the police power ceases and leaves only that of eminent domain . . ."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection [the public use requirement] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."). Since the 1930s, this Court has interpreted the police power expansively up to the limits allowed by the Constitution. The police power and the "public use" requirement may be described as coterminous, though, only because the "public use" requirement is one of constitutional dimensions beyond which the police power may not expand.

This Court first recognized a limitation on the government's ability to transfer ownership of private property to another in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (opinion of Chase, J.). Justice Chase explained that it would be "against all reason and justice" to presume that the people intended to give the state governments certain powers, among them the power to enact "a law that takes property from A. and gives it to B." *Id.* at 388. The state legislatures could not



"violate . . . the right of private property" without committing "a political heresy." *Id.* at 388-89. Similarly, Justice Iredell opined that the courts must be able to restrain the legislative branch to its "marked and settled boundaries." *Id.* at 399.

Soon thereafter, the Court began to explain the scope of state sovereignty. Chief Justice Marshall referred to "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824). This power was an "immense mass of Legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." *Id.* at 203. Chief Justice Marshall later called this regulatory power the "police power," and noted that it permitted the state legislatures to order "the removal or destruction of infectious or unsound articles," such as gunpowder. *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 443-44 (1827).

This Court then expanded the police power beyond the mere prevention of harm. Justice Barbour explained that the "internal police" power was "not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends." *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837). And in *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847), Chief Justice Taney expressed the view that the police powers "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." Throughout this expansion, though, this Court did not waiver from Justice Chase's holding: "The right of eminent domain nowhere justifies taking property for a private purpose." *Olcott v. The Supervisors*, 83 U.S. 678, 694 (1872).

The mid to late 1800's marked a period of flux for the police power. Following Chief Justice Shaw's opinion in *Commonwealth v. Alger*, 61 Mass. 53 (1851), scholars began describing a more limited role for the police power.[5] In 1866, Thomas Cooley contended that "the police of a State" was intended to "prevent a conflict of rights" between citizens, as well as to preserve public order and prevent offenses against the state.[6] In 1873, future Justice Oliver Wendell Holmes, Jr. explained that "acts which can only be justified on the ground that they are police regulations, must be so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by public necessity, that they must be taken to be impliedly excepted from the words of the constitu tional prohibition."[7] In 1886, Professor Christopher Tiedeman emphasized that the police power rested on "such a restraint as will prevent the infliction of injury upon others in the enjoyment" of private rights.[8] This Court also strug-

[5] Chief Justice Shaw concluded that the police power permitted regulation of things that "tend to injurious consequences," even those that are "not . . . wrong in themselves, or necessarily injurious and punishable as such at common law," because of the practical need for "a definite, known, and authoritative rule which all can understand and obey." *Alger*, 61 Mass. at 96.

[6] Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown & Co. 1866), *quoted in* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 479 (2004).

[7] 2 James Kent, COMMENTARIES ON AMERICAN LAW 340 n.2 (12th ed. O.W. Holmes Jr., ed., 1873), *quoted in* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations For A New Century*, 27 HASTINGS CONST. L. Q. 511, 516 (2000).

[8] Christopher G. Tiedeman, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (St. Louis, F.H. Thomas Law Book Co. 1886), *quoted in* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 485 (2004).



gled to find the proper scope of the police power. *Compare Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (articulating a broad definition of police power) *with Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (adopting a narrower view). In *Mugler*, the Court explained that "it does not at all follow that every statute enacted ostensibly for the promotion of these ends [the public morals, health or safety] is to be accepted as a legitimate exertion of the police powers of the state." *Id.* The courts had the duty to adjudge whether a statute passed under the police power has a "real or substantial relation" to the claimed benefit, and whether it is "a palpable invasion of rights secured by the fundamental law." *Id.* Thus, this new line of thinking regarding the scope of the police powers did not change prior understandings that the police power did not authorize a state to exercise its eminent domain authority in excess of the "public use" limitation imposed by the Constitution.

By 1894, the Court settled upon the broader definition of the police power, that included everything "essential to the public safety, health, and morals," which were "necessary" for the protection of those interests, and which "require" interference by the government. *Lawton v.* Steele, 152 U.S. 133, 136-37 (1894). During the *Lochner* era, the Court briefly retreated to a more restrictive view of the governmental power. *Lochner v. New York*, 198 U.S. 45, 54 (1905). But, by 1934, the Court rejected *Lochner* and embraced its former cases holding that the police power includes "the power to promote the general welfare." *Nebbia v. New York*, 291 U.S. 502, 523-25 (1934). During this time period, though, the Court did not waiver from its view recognizing the important principle that private property may not be taken for the benefit of a private purpose. *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

In 1954, this Court decided the landmark case of *Berman v. Parker*, 348 U.S. 26 (1954). The Court explained that the

police power *included* public safety, morals and health, but was not *delimited* by those concepts. *Id.* at 32. Indeed, though the issue before the Court was a noxious and dangerous slum, the Court explained that the police power would even extend to mere beautification projects. *Id.* at 33. The Court then explained that the power of eminent domain was merely a means to the police power's ends, ignoring the distinctions drawn in prior cases between the police power and the power of eminent domain. *Id. Berman* is the case in which this Court blurred the "public use" requirement articulated in the Constitution with the "public purpose" requirement more traditionally associated with police power jurisprudence.

Since *Berman*, this Court has reaffirmed the scope of the "police power" as: "the time-tested conceptional limit of public encroachment upon private interests," which can be more or less equated with "reasonableness." *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 594-95 (1962). A later case explained that the limit on the police power was "justice and fairness." *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-26 (1992), this Court rejected the argument that the police power must be based on a finding of "harm." Notably, though, the Court continued to recognize that private property may not be taken to serve another's private purposes. *See Midkiff*, 467 U.S. at 241.

The history of the police power, as it relates to the government's eminent domain power, teaches two important lessons. First, the police power has been defined over time by the judiciary. The judiciary should not be able to define that power in a way that trumps the express language of the Constitution that limits the taking of private property to circumstances involving a legitimate "public use." Second, regardless of the scope of the police power, that power cannot authorize the government to transfer private property from



one private person to another, absent some guarantee that the property will be used for the public benefit. This Court cannot affirm the Connecticut Supreme Court's decision without rejecting these two settled principles.

Here, the government condemned property for the purpose of creating new jobs and hopefully generating new taxes. In other words, the government decided to take property from one person, who was not engaged in any conduct harmful to the community, and decided to give it to another whom the government felt would make better use of the property. The articulated benefits to the public flow incidentally, if at all, from the property recipient's use of the property for its own pecuniary gain. If this justification for a taking is sufficient to constitute a "public use," it will be difficult, if not impossible, to prevent other obviously impermissible takings. For example, the same justification could be asserted for the taking of a mom and pop store to replace it with a Wal-Mart, given its greater size and ability to generate revenues, and thus more taxes. Or, this justification could arguably support the taking of a beach-front home to transfer the property to the developer of condos or apartments, on the basis that more dwellings will result in more residents in the community and, thus, more tax revenues. Indeed, when the legislature is left alone to decide what use of a given property serves the public interest, there is no meaningful check on the majority's ability to take property from A and give it to B.

King Ranch urges the Court to adopt a standard for the "public use" requirement that provides meaningful protection to private property owners.

## II. THE "PUBLIC USE" LIMITATION ON THE GOVERNMENT'S EMINENT DOMAIN POWER SHOULD BE INTERPRETED TO REQUIRE A PRESENT INTENT OR NEED TO USE THE PROPERTY BEING CONDEMNED.

Property owners are entitled to assurance that they will not be needlessly displaced from their property. Even under *Berman* and *Midkiff*, there is a role for the judiciary to evaluate whether a taking of property is for a public use. *See Midkiff*, 467 U.S. at 240. The first assurance provided is that private property may not be taken for a private purpose. *See id.* at 241; *Calder*, 3 U.S. at 388. In other words, the government must have a legitimate public purpose in mind when it decides to act. But the plain language of the Takings Clause requires more protection—it requires a "public *use*." U.S. CONST. Amend. V. Thus, the plain language of the Takings Clause also anticipates an inquiry into whether the government actually has a present intent to use or need to take the particular property in question in furtherance of that public purpose. *See* 2A NICHOLS ON EMINENT DOMAIN § 7.01[9] (3d ed. 2004) ("When property is taken for a public use by eminent domain, the proper exercise of the power is predicated upon the promise that within a reasonable period of time it will be devoted to the public use for which it was taken."). King Ranch anticipates that the parties and other amici will adequately address whether the taking of property for "economic development" is a legitimate public purpose. Accordingly, King Ranch will devote the remainder of its brief to explain why this Court should require the government entity taking property to articulate specifically how the particular property will be used to further the asserted public purpose. Absent a specific plan for the use of property, there can be no meaningful judicial review of the taking of that property.



First, this Court has repeatedly reiterated that the police power/eminent domain power are only permitted where interference is *necessary* or *required*. "To justify the state in thus interposing its authority in behalf of the public, it must appear . . . that the interest of the public generally, as distinguished from those of a particular class, require such interference." *Lawton*, 152 U.S. at 137; *see also Goldblatt*, 369 U.S. at 594-95 (quoting this language). "[T]he state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton*, 152 U.S. at 136. With no present, specific plan to use the property, the state cannot honestly determine that the condemnation is "necessary," "required" or "demanded." In such a case, the state is merely speculating with other peoples' property.

Second, this unprecedented situation should be considered by analogy to this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those cases concerned a taking, in that the government refused to grant a building permit until the landowner conveyed title to a part of the property. *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80. In *Nollan*, this Court explained that stated government purpose was legitimate, but that there nevertheless had to be an "essential nexus" between that purpose and the taking. *Nollan*, 483 U.S. at 837. No "essential nexus" existed between the purpose (the public's impeded view of the beach) and the taking (an easement for people to walk from one beach to another). *Id.* In *Dolan*, this Court explained that even where such a nexus existed, the amount of the dedication had to be "roughly proportional" to the governmental interest. *Dolan*, 512 U.S. at 391. Of course, those cases dealt with a type of regulatory taking under the police power, whereas this case presents a physical seizure of property

under the Takings Clause. But that only means the principles in *Nollan* and *Dolan* should be *more* strenuously enforced, not less. If the state has no firm purpose for the property (not even concrete plans for future expansion), then the taking of that property has no "nexus" with the original purpose of the development. Additionally, there would be no way to measure the "rough proportionality" of the taking where the specific purpose for the land remains unknown. This Court should look to the common-sense constitutional guidelines set forth in *Nollan* and *Dolan*, and find that the Fifth and Fourteenth Amendments do not permit the taking of property for speculative purposes.

Finally, this Court's decision in *Cincinnati v. Vester*, 281 U.S. 439 (1930) supports the addition of a requirement that the state assert a present plan or need to use the property. In *Vester*, the Court recognized that the local government needed "to specify definitely the purpose of the appropriation." *Id.* at 447. *See id.* at 448 ("To define is to limit. . ."). Otherwise, the Court found that any articulation of a public purpose for a taking would justify the condemnation of excess land that was "wholly unrelated to the immediate improvement." *Id.* This Court declined to render meaningless the "public use" limitation on the exercise of eminent domain. *Id.* at 447-48. Recently, the Seventh Circuit recognized the continued validity of *Vester* when it refused to allow a local governmental entity to condemn private property based upon speculation about the future public benefits that could be achieved through the use of that property.[9] *Daniels v. The Area Planning Commission*, 306 F.3d

[9] In *Morley v. Jackson Redevelopment Auth.*, 632 So.2d 1284, 1290 (Miss. 1994), the Mississippi Supreme Court questioned whether *Vester* is still good law in light of more recent decisions from the Court. Nevertheless, recognizing the wisdom of this Court's decision in *Vester*, the Mississippi Supreme Court adopted *Vester* as the appropriate manner to view a takings claim under Mississippi law. *Id.* To the extent that the Mississippi Supreme Court is correct regarding its assessment of *Vester* as a matter of federal law, King Ranch submits that the principles articulated in that decision should be elevated to the law of the land.



445, 464-66 (7th Cir. 2002). When the condemning authority cannot specify how particular property will be used, there is no assurance that the private property is being taken for a "public use" as required by the Constitution.

The common theme running through this Court's decisions upholding the exercise of the eminent domain power is that the governmental entity exercising that authority must articulate a current, non-speculative, non-hypothetical need or intent to use the property being condemned. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32 (2003) (use of interest earned on IOLTA accounts to fund legal services for the poor); *National Railroad Passenger Corp.*, 503 U.S. 407 (1992) (acquisition of a railway that was being poorly maintained which negatively impacted Amtrak service); *Midkiff*, 467 U.S. at 241-42 (use of condemnation to redistribute property to minimize effects of land oligopoly in Hawaii); *Berman*, 348 U.S. at 32-36 (taking of property to remedy problems with urban blight); *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925) (condemnation of interests in land previously leased by the government on an emergency basis to protect the government's interest in improvements built on the land); *United States v. Gettysburg Ry. Co.*, 160 U.S. 668, 681-83 (1896) (acquisition of historic battlefield to protect it from imminent harm due to construction of railway across that field). This case presents an attempt to stretch the Constitution beyond its prior boundaries.

Admittedly, this Court has held that a governmental entity may condemn land to address anticipated needs for the future. *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923). But, even in those circumstances, this Court has evaluated the proposed acquisition of land in relation to the present plans to

use and develop the property. *Id.* (evaluating the proposed condemnation of land to build a highway in anticipation of the future growth of Los Angeles). Notably, though, this Court's decisions have not upheld the condemnation of land when the government has no specified need or intent to use the land, *Vester*, 281 U.S. at 447-48, or where the government's need or intent to use the land is speculative, uncertain, or hypothetical.

This Court has explained that courts should not be placed in the position of second-guessing legislative judgments about the boundaries or scopes of integrated public projects, or about the need for acquiring each piece of property within an integrated project. *See Berman*, 348 U.S. at 35. Before any deference should be afforded to government decisions to acquire property, however, the government should be required to articulate its plan showing where the particular property fits within the plan. Otherwise, there is no check upon the government's ability to acquire property. Simply put, the government cannot show a "public use" if it cannot articulate a "use" of any kind.

An example illustrates why this restraint is necessary. Imagine that Congress wants to address a problem with urban blight in Southeast Washington D.C. After receiving its mandate to act, the local government begins to condemn *non-blighted* property that is in Southeast D.C., and is not in the blighted area nor is it within the area being redeveloped. In other words, unlike the property at issue in *Berman,* the property in this example is *not* located in the blighted neighborhood. If the government is required to explain how the property is part of its plan to address urban blight, the fact that the property is not needed for the stated government purpose is readily apparent, and the attempt to condemn the property would fail. However, if the government decision to condemn this property is given the deference stated in *Berman*, without an inquiry into the actual use of that



property, the government would be able to take the property without a showing that the property would be employed for the public use. In other words, the government may be able to take that additional property even if the government was engaging in land speculation or in other types of pretextual acquisitions.

Similarly, imagine if the government decides to construct a new highway, which, in the abstract, appears to be an obvious public purpose. If the government's articulation of such a broad purpose were sufficient to trigger the deferential review described in *Berman*, then the government could acquire any property it desires in the name of the highway plan, regardless whether that property is properly related to the highway project, or even whether the government knows what route the highway will take. Thus, the government could take multiple parcels of property, and even multiple alternative routes, even though it ultimately will only use one. This could result in a massive interference with private property rights, even though the need for the highway project is far more limited. If, on the other hand, the government is required to articulate its plan showing how property would be used, a government seeking to construct a highway would need to show its intended route before it could acquire property. That showing would prevent the unwarranted interference with property rights that are not actually associated with the highway project.

As the present case shows, it is not unrealistic to think that a government would seek to acquire property now on the belief that it may find a use for that property in the future. Private property rights should not be subject to the government's whim, nor should a state government be permitted to use the power of eminent domain for land speculation. If a proposed use of property is speculative, hypothetical or uncertain (such as the acquisitions of parcel 4A in this case), the government's ability to condemn that property should be

deferred until there is a present need or certainty about the plan to use the parcels in question for the public purpose. Deferral of the right to condemn property until there is a present and certain plan for that property has several benefits, including (1) protecting private property holders from being needlessly displaced from their property, and (2) allowing the marketplace to determine what is the best use of that property when government is uncertain.

## CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be reversed. This Court should adopt an interpretation of the "public use" requirement of the Takings Clause that restores meaning to the provision as a limitation on the government's eminent domain power.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

SUSETTE KELO, *et al.*,

*Petitioners*,

*v.*

CITY OF NEW LONDON, CONNECTICUT, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

## BRIEF AMICI CURIAE OF LAURA B. KOHR AND LEON P. HALLER, ESQUIRE, TRUSTEE, OWNERS OF LAUXMONT FARMS, IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Amici curiae will address the following question:

**WHETHER IN CONDEMNATION ACTIONS THE COURTS SHOULD VERIFY STATEMENTS BY LEGISLATIVE BODIES THAT A PARTICULAR USE OF THE CONDEMNED PROPERTY IS A "PUBLIC USE" IN ORDER TO GUARANTEE FEDERAL CONSTITUTIONAL RIGHTS OF THE PROPERTY OWNER.**

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## IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of the Rules of this Court, Laura B. Kohr and Leon P. Haller, Esquire, Trustee as owners of Lauxmont Farms, respectfully submit this Brief Amici Curiae in support of petitioners.[1] This Brief is filed with the parties' written consent.

In 1973, Ronald C. and Laura B. Kohr ("Kohr Family") purchased about 1,400 acres of land in Lower Windsor Township, York County, Pennsylvania. The property was named Lauxmont Farms and it has been continuously used, in particular, to breed, raise and board horses. In 1989, the Kohr Family filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Ronald C. Kohr has since died. The Kohr Family Chapter 11 bankruptcy is now closed and unsecured creditors are being paid 100% of their claims pursuant to the confirmed plan of reorganization. The Kohr land – Lauxmont Farms – remains under the administration of Bankruptcy Trustee, Leon P. Haller. (For purposes of this Brief, Mr. Haller, as Bankruptcy Trustee, is also included within the definition of "Kohr Family.") Since 1973, the Kohr Family has sold some of their land and today the Kohr Family owns about 900 acres of land.

Lauxmont Farms is unusually beautiful. Located on the steep western shore of the Susquehanna River, it has a majestic overlook of the river that goes for miles. One small area of Lauxmont Farms contains archaeological remains of

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1. No party or counsel for a party to this case authored this Brief in whole or in part, and no person or entity other than amici curiae, its members, or its counsel has made a monetary contribution to the preparation or submission of this Brief.

an Indian village. The Farm has been used traditionally for breeding, raising and boarding horses. It also is used for the breeding of cattle. More recently the Kohr Family has transformed a portion of Lauxmont Farms into a reception center at which weddings and other functions take place. The Kohr Family has proposed developing approximately 300 acres of excess land at Lauxmont Farms (not including the archaeological site). As a result of this proposed development, the Kohr Family has applied for approval of its subdivision plans from the local Township authorities. The subdivided parcel would then be sold by the Trustee to fully implement the reorganization plan.

The response from York County has been to threaten to utilize state and federal "economic stimulus" funds to condemn a large portion of Lauxmont Farms and to turn that into a public park. The park would encompass 915 acres (including land owned by others). York County has not conducted any study to assess the need for an additional park. Instead, the Commonwealth of Pennsylvania has committed to funding the project with "economic stimulus" grants. Paradoxically, the so-called economic stimulus would have just the opposite effect, by taking land off of the tax roles, making the remainder useless for economically viable agricultural use and significantly reducing the value of the Kohr Family holdings. If permitted to proceed, the Kohr Family believes it will lose significant value based on the limited agricultural value of its land versus the developed value of its land. Furthermore, it believes that any review by a court of the "public use" alleged by the county government will be cursory at best under the current legal standard.

To further compound the situation, York County is contemplating condemning an 80-acre parcel formerly owned



by the Kohr Family known as "Highpoint" (which currently is owned by a developer named Peter Alecxih). It is believed that York County would rely again on "economic stimulus" grants from the Commonwealth to fund this land grab.

Because it is intensely interested in ensuring that any declaration of "public use" made by a condemning authority be subject to thorough judicial review and because it is a property owner whose land may be subject to a condemnation that claims there is a "public use" associated with the taking, the Kohr Family believes that its perspective will aid this Court in considering this case.

## SUMMARY OF THE ARGUMENT

This Court has held that it is the obligation of the courts, in particular the Federal Courts, to protect the Federal Constitutional rights of individuals against governmental action. With respect to condemnations and takings, it is clear that the Federal Courts protect the property rights of individuals against the government. Regarding the Takings Clause, this Court said it most succinctly when it stated that "courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands."

The Supreme Court has recognized in a number of takings cases that "[t]he concepts of 'fairness and justice' . . . underlie the Takings Clause. . . ." "Fairness and justice" is one way of stating that the courts must review the actions of legislative bodies when they act under the Takings Clause. If the courts do not have this role, then "fairness and justice" is nothing more than a platitude. Given this Court's repeated statements that the Takings Clause is governed by "fairness and justice," and given that nothing in the cases remotely

implies that it is for the legislative or executive branches to decide that fairness and justice have been achieved, the only logical conclusion is that the courts decide when the legislature has acted in a manner consistent with fairness and justice.

This Court should acknowledge, as it has with cases under the Contract Clause, that blind deference to legislative determinations of public purpose is not always appropriate. As in cases where the state itself is a contracting party, the state has a significant self-interest which is at stake when the state is proposing to take non-blighted, economically viable and productive land for the purpose of economic development. In such cases, a less deferential standard of review ought to apply.

The *Berman* standard fails to adhere to the ordinary level of review for the protection of Constitutional rights. The *Berman* standard fails to adhere to the general level of review afforded for the protection of rights under the Takings Clause. The *Berman* standard is neither fair nor just and in this case, and others dealing with non-blighted property, the Court should revise that standard. Because *Kelo* relies extensively on *Berman*, this Court should reverse *Kelo*.



## ARGUMENT

### IN CONDEMNATION ACTIONS, THE COURTS SHOULD VERIFY STATEMENTS BY LEGISLATIVE BODIES THAT A PARTICULAR USE OF THE CONDEMNED PROPERTY IS A "PUBLIC USE" IN ORDER TO GUARANTEE THE FEDERAL CONSTITUTIONAL RIGHTS OF THE PROPERTY OWNER.

#### A. The Courts – not the Legislatures – are the Protectors of Federal Constitutional rights.

On numerous occasions this Court has held that it is the obligation of the courts, in particular the Federal Courts, to protect the Federal Constitutional rights of individuals against governmental action.[2] This is true not only in criminal or prisoner cases, but in all types of cases where administrative and regulatory actions were under scrutiny.[3] Justice Stevens

2. *Overton v. Bazzetta*, 539 U.S. 126, 138, 156 L. Ed. 2d 162, 174 (2003) (Stevens, J. concurring) ("[W]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."); *Johnson v. Avery*, 393 U.S. 483, 21 L. Ed. 2d 718 (1969) (protection of the constitutional rights of prisoners to petition the government for redress of grievances); *Lee v. Washington*, 390 U.S. 333, 19 L. Ed. 2d 1212 (1968) (protection of prisoners from invidious racial discrimination under the Equal Protection Clause of the Fourteenth Amendment).

3. *California v. Grace Brethren Church*, 457 U.S. 393, 417 n.37, 73 L. Ed. 2d 93, 112 n.37 (1982) (citing *Stone v. Powell*, 428 U.S. 465, 494 n.35, 49 L. Ed. 2d 1067, 1088 n.35 (1976)) (stating federal courts are constitutionally obligated to safeguard personal liberties and to uphold federal law); *Wolff v. McDonnell*, 418 U.S. 539, 557, (Cont'd)

perhaps said it best when he stated, "[i]n my opinion, the federal courts– and particularly this Court– have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267, 103 L. Ed. 2d 308, 320 (1989) (Stevens, J. concurring). Although the degree of scrutiny may vary from Constitutional right to right, it is clear that the courts, and primarily the Federal courts, have the obligation of protecting the Constitutional rights of citizens. It is recognized, however, that owing to the vast number of cases that are filed and the limited number of cases that physically could ~~be re~~viewed by the Supreme Court, this Court "rel[ies] primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. . . . Unfortunately, such review [that is faithful to the letter of the Constitution and cognizant of the principles underlying it] is not always forthcoming." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 499, 125 L. Ed. 2d 366, 406 (1993) (O'Connor, J., dissenting). Nevertheless, it is the responsibility of the Federal Courts, in particular, to guarantee the Federal Constitutional rights of citizens.

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(Cont'd)

596, 41 L. Ed. 2d 935, 968, 974 (1974) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97, 3 L. Ed. 2d 1377, 1391 (1959)) (treating a person's liberty as equally protected, even when the liberty itself is a statutory creation of the state, and holding that the touchstone of due process is protection of the individual against arbitrary government action); *Dent v. West Virginia*, 129 U.S. 114, 124, 32 L. Ed. 623, 626 (1889) (the definition of due process of law includes securing a citizen against arbitrary legislative power); *see Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 98 L. Ed. 873 (1954) (protection of equal educational rights of minority children).



With respect to condemnations and takings, it is clear that the Federal Courts protect the property rights of individuals against the government. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327, 37 L. Ed. 463, 468 (1893)

> The legislature may determine what private property is needed for public purposes – that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

*Id.* at 327, 37 L. Ed. at 468; *see First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9, 96 L. Ed. 2d 250, 264 n.9 (1987) ("[I]t is the Constitution that dictates the remedy [of judicial review] for interference with property rights amounting to a taking."); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 151, 57 L. Ed. 2d 631, 665 (1978) (Rehnquist, J. dissenting) (ascertainment of the amount that constitutes just compensation is a judicial inquiry); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 67 L. Ed. 664, 669 (1923) ("[A]scertainment [of just compensation] is a judicial function."); *see also Bush v. Gore*, 531 U.S. 98, 115 n.1, 148 L. Ed. 2d 388, 405 n.1 (2000) (Rehnquist, C.J., concurring)

> [O]ur jurisprudence requires us to analyze the "background principles" of state property law to

> determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

*Id.* at 115 n.1, 148 L. Ed. 2d at 405 n.1. Thus, it is clear that the Fifth Amendment requires that the courts – and not the legislature – ultimately make the determination of the amount of compensation that will be awarded under a condemnation. With respect to compliance with the Takings Clause (and perhaps all other Constitutional rights), this Court said it most succinctly when it stated that "courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands." *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 151 n.39, 42 L. Ed. 2d 320, 358 n.39 (1974). The reason for this particular protection of property rights, as one court has recently called it, is these rights are one of the "bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property." *County of Wayne v. Hathcock*, 471 Mich. 445, 450, 684 N.W.2d 765, 769 (2004).

The Takings Clause is a mere twelve words: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This Court has repeatedly held that "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314, 96 L. Ed. 2d at 263; *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 143-44 (1985); *Hodel v. Virginia Surface Mining &*



*Reclamation Assn.*, 452 U.S. 264, 297 n.40, 69 L. Ed. 2d 1, 29 n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104, 76 L. Ed. 637, 642-43 (1932); *Monongahela Nav. Co.*, 148 U.S. at 336, 37 L. Ed. at 471; *United States v. Jones*, 109 U.S. 513, 518, 27 L. Ed. 1015, 1017 (1883). While this Court has explicitly insisted that the courts determine what constitutes "just compensation," it nevertheless has deferred to the legislature when determining what constitutes a "public use." *Berman v. Parker*, 348 U.S. 26, 32, 99 L. Ed. 27, 37 (1954) (citations omitted)

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.

*Id.* at 32, 99 L. Ed. at 37. Thus in the space of the few words of the Takings Clause, the Court has parsed the clause to determine that both the courts are the guardians of the Constitutional right to just compensation, and that it is the legislature that determines whether a use constitutes a public use.

The Court's self-imposed dichotomy and parsing of the Takings Clause admits of no consistency. Nothing in the clause indicates why one determination is almost exclusively for the courts, yet the other is almost exclusively for the legislature. Commentators from across the political spectrum have had a field day due to the inconsistency that is apparent from this dual system of review. *Compare* Gideon Kanner, *Developments in the Right-To-Take Law: Is the End of the*

*Redevelopment Scam Coming?*, Eminent Domain and Land Valuation Litigation, ALI-ABA Course of Study Materials SG059, American Law Institute at 25 (Jan. 2002)

> Thus, the courts have evolved a Catch-22 system. First they provide incentives to reckless exercise of the eminent domain power by their extreme *laissez faire* attitude when it comes to reviewing whether the taking is consistent with the "public use" constitutional limitation and the statutory authorization to condemn. They also assert that when it comes to fixing minimal standards of "just compensation," they are supreme.

*Id.* at 25; *with* Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207, 208 (2004) (footnotes omitted) ("The courts have come to interpret the 'public use' requirement in a way that renders it meaningless, essentially giving governments carte blanche to take property for any reason whatsoever, including crass political purposes or speculative, transient economic purposes."); *see* Jennifer J. Kruckeberg, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 Minn. L. Rev. 543, 582 (2002) ("The modern treatment of the public use requirement badly needs reform.").

While it is entirely consistent with the jurisprudence of this Court for courts to be designated as the arbiter of the question of Just Compensation, it is completely inconsistent for the courts to abdicate that responsibility on the question of Public Use.



**B. Because the Concepts of "Fairness and Justice" Underlie the Takings Clause, Those Concepts Should Guide the Court in Determining Whether a So-Called "Public Use" is Consistent with Federal Constitutional Rights.**

The Supreme Court has recognized in a number of takings cases that "the concepts of 'fairness and justice' . . . underlie the Takings Clause. . . ." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336, 152 L. Ed. 2d 517, 548 (2002); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 633, 150 L. Ed. 2d 592, 617 (2001) (O'Connor, J., concurring); *see also Penn Central*, 438 U.S. at 123-24, 57 L. Ed. 2d at 648; *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 1561 (1960). Although *Tahoe-Sierra* dealt with another aspect of the Takings Clause, namely a regulatory taking, that does not diminish the principle stated by this Court that "the concepts of fairness and justice underlie the Takings Clause." Indeed, it is axiomatic that the concepts of fairness and justice should govern all aspects of review of all claims under the Takings Clause. Certainly nothing in the Takings Clause or in this Court's jurisprudence would suggest that "fairness and justice" ought to apply in some cases under the Takings Clause, yet some other standard should underlie other cases under the same clause.

As the Court identified in *Penn Central*, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124, 57 L. Ed. 2d at 648. The Court ruled that in making a determination of "whether a particular restriction will be rendered invalid by

the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id.* (citations omitted). The Court recognized that the determination that must be made is an "essentially ad hoc, factual inquir[y]." *Id.* With respect to regulatory takings, the Court recently has endorsed the requirement of "'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S. at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 533 U.S. at 636. (O'CONNOR, J., concurring)." *Tahoe-Sierra*, 535 U.S. at 322, 152 L. Ed. 2d at 540. Thus, "fairness and justice" is one way of stating that the courts must review the actions of legislative bodies when they act under the Takings Clause. If the courts do not have this role, then "fairness and justice" is nothing more than a platitude.

While the Court in *Tahoe-Sierra* acknowledged significant differences between condemnations and physical takings (with respect to which the Court stated that the Court's jurisprudence was "as old as the Republic") and regulatory takings, once again, nothing in the Clause admits to anything less than the "fairness and justice" standard for review for all cases under the Takings Clause. *Id.* One area of the Court's jurisprudence that is not "as old as the Republic" in condemnations cases is the question of the level of review of a legislative determination of a "public use" under the Takings Clause. Fifty years ago, in *Berman v. Parker*, the Court set out a new standard of almost complete deference to the legislature in which the legislative determination of "public use" is "well-nigh conclusive." 348 U.S. at 32, 99 L. Ed. at 37. In such cases, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."



*Id.* Subsequently, the Court further elucidated the role of the courts in reviewing "public use" determinations:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, . . . which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, . . . which emphasized that "[any] departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

*Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-42, 81 L. Ed. 2d 186, 197 (1984) (citations omitted).

This Court has recognized that the courts play the preeminent role in determining whether a legislature has properly determined that a use is consistent with the Constitution. That role is limited to a determination of

whether the taking "is rationally related to a conceivable public purpose." *Id.* at 240-41, 81 L. Ed. 2d at 198. In a subsequent condemnation case, this Court has asserted that the condemnation power is constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23, 118 L. Ed. 2d 52, 69 (1992). In *National Railroad Passenger Corp.*, the Court examined a statutory condemnation scheme that transferred 48.8 miles of tract from one privately owned railroad company to another. The Court made a superficial examination (that is to say, it did not make "a specific factual determination" *Id.*) of whether the ICC was "irrational" in determining that the condemnation at issue would serve a public purpose and determined that it did serve a public purpose. On that basis, the Court held that this cursory review "suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objectives." *Id.*

In a regulatory takings case, a plurality of this Court directly equated the justice and fairness requirement as requiring a review, presumably by a court, of governmental action:

> Government regulation often "curtails some potential for the use or economic exploitation of private property," . . . and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," . . . In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental



> action. . . That inquiry, by its nature, does not lend itself to any set formula, . . . and the determination whether 'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive.

*Eastern Enterprises v. Apfel*, 524 U.S. 498, 523, 141 L. Ed. 2d 451, 470-71 (1998) (citations omitted) (per O'Connor, J.).

In a somewhat earlier case, the Court again intimated that the courts determined when a governmental action that resulted in a take was fair and just:

> The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" [*Penn Central*, 438 U.S. at 124]; *see Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. *See Penn Central, supra*, at 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

*Andrus v. Allard*, 444 U.S. 51, 65, 62 L. Ed. 2d 210, 222 (1979). Given this Court's repeated statements that the Takings Clause is governed by "justice and fairness," and given that nothing in the cases remotely implies that it is for

the legislative or executive branches to decide that justice and fairness have been achieved, the only logical conclusion is that the courts decide when the legislature has acted in a manner consistent with justice and fairness.

It is hard, if not impossible, to justify the minimal review afforded by the Court of the constitutionality of whether a use is a "public use" when one compares that to the significant level of review afforded of whether compensation is "just compensation" – let alone the level of review provided by the courts in the protection of other fundamental constitutional rights. Unfortunately, the role currently allowed by the Court to examine the constitutionality of public use determinations is so narrow as to constitute virtually no role. How can this negligible role square with the concepts of fairness and justice? It cannot.

The Federal Courts cannot abdicate the important role of reviewing the actions of the states whenever important Federal constitutional rights are at stake. In order to guarantee that fairness and justice play a role in all cases under the Takings Clause – as the Court has stated on many occasions – then it is logical that the Court should allow a thorough judicial review of the legislative body's determination that a use meets the constitutional requirements for a public use. That is not to say that the courts should make "public use determinations," only that the courts ought to carefully review the legislative determination to insure that it meets the requirements of the Federal Constitution. The only way that the courts can ensure that there has been fairness and justice, is for the courts to play an active role in reviewing the determinations of the state legislatures.



### C. This Court Should Apply Reduced Deference to Determinations of "Public Use" Consistent With the Test Applied Under the Contract Clause to Takings of Non-Blighted Property.

To achieve fairness and justice when a court is reviewing a taking of a non-blighted property by the exercise of eminent domain for economic development, a reduced standard of deference should be applied by the courts to the review of any legislative determination that the taking is for a public use and in the public interest. The exercise of police power and of eminent domain has an outer limit, though the Court has observed that the fact sensitive nature of such cases make it "fruitless" to attempt to define that limit. *Berman*, 348 U.S. at 32, 99 L. Ed. at 37. Nonetheless, the Court should acknowledge, as it has with cases under the Contract Clause, U.S. Const. art. I, § 10, cl. 1, that blind deference to legislative determinations of public purpose are not always appropriate.

Under the Contract Clause, this Court has held, "[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[4] A different standard applies, however, when the sovereign is itself a contracting party:

> When the State is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."

4. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13, 74 L. Ed. 2d 569, 581 (1983), quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 52 L. Ed. 2d 92, 110 (1977).

*Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 n.14, 74 L. Ed. 2d 569, 581 n.14 (1983), citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 52 L. Ed. 2d 92, 112 (1977). As in cases where the state itself is a contracting party, the state has a significant economic self-interest which is at stake when the state is proposing to take non-blighted, economically viable and productive land for the purpose of economic development. Under this circumstance a less deferential standard of review ought to apply.

In *Berman*, the Court essentially declined to exercise any analysis of the taking at issue, stating that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman*, 348 U.S. at 32, 99 L. Ed. at 37. Such complete deference to legislative determinations involving non-blighted properties must end. In *Berman*, the one property at issue was not blighted, but was in an area to be condemned in which the majority of properties were "beyond repair"[5] and the character of the area was such that the Court commented that:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men

5. *Berman v. Parker*, 348 U.S. 26, 30, 99 L. Ed. 27, 36 (1954).



> turn. The misery of housing may despoil a community as an open sewer may ruin a river.

*Id.* That case was decided in 1954, at the vanguard of the movement to redevelop blighted property in order to create clean, safe public housing.

Today, the interests of the state in taking of non-blighted property for economic development are not, in the main, in preventing the spread of "disease, crime and immorality," but in increasing the tax base and providing jobs, as in *Kelo*, or in preserving the aesthetics of an area for tourism, as in Lauxmont Farms. The interests of the state in takings like the one at issue in *Kelo* and the threatened taking of Lauxmont Farms are more analogous to those in Contract Clause cases, where the interest of the state is purely financial. The more stringent standard of review applied in such cases under the Contract Clause was first articulated in *United States Trust Co.*, 431 U.S. at 26 n.25, 52 L. Ed. 2d at 112 n.25, which harkened back to the cases involving the federal abrogation of gold clauses in 1935 in which the Court drew a distinction and applied a dual standard of review:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

*Perry v. United States*, 294 U.S. 330, 350-351, 79 L. Ed. 912, 917 (1935).

Similarly, there is a clear distinction between the taking of property for economic or other development which is blighted, an "ugly sore" suffocating the spirit and "reducing the people who live there to the status of cattle,"[6] and the taking of property comprised of middle class neighborhoods with proud property owners who happen to be in the path of desirable developable land along waterfront targeted for upscale redevelopment, as in *Kelo*, or valuable farm land surrounded by ten acre mini-farmettes with mini-mansions targeted for a tourist attraction as in the case of Lauxmont Farms.

A reduced standard of deference, similar to that owed to the state in Contract Clause cases in which the state is a party should be applied to takings of non-blighted property for economic development. The test under the Contract Clause is whether the law or regulation at issue has in fact "operated as a substantial impairment of a contractual relationship"; if so, whether the state has a "significant and legitimate public purpose" behind the law or regulation; and finally, if there is a significant and legitimate public purpose, whether the "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Energy Reserves*, 459 U.S. at 411-412, 74 L. Ed. 2d at 581 (internal quotation marks and citations omitted).

The test that should be applied in the takings context should be first for the court to determine whether the property to be taken is blighted. If the court determines the property is not blighted, then it ought to decide whether the proposed

6. *Id.* at 32, 99 L. Ed. at 37.



economic development or other justification for the taking amounts to a significant and legitimate *public* purpose. Finally, if the court determines that there is a significant and legitimate public purpose, it should then decide whether the scope of the taking is appropriate (i.e., whether the taking is or ought to be an easement, fee, or some other interest in land). By utilizing a less-deferential standard, the Court will reasonably protect the constitutional rights of property owners. Such a test would infuse "fairness and justice" into a system in which this standard has been lacking for fifty years.

### D. *Berman* (and its Progeny) and *Kelo* Unnecessarily Defer to the Legislature for Determining Whether a "Public Use" Determination is Constitutional.

Since *Berman v. Parker*, the U.S. Supreme Court has deferred to the statements of the legislature regarding whether or not a particular use constitutes a public use. *Berman* and its progeny, including *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), show unnecessary deference to the legislature in determining that a condemnation constitutes a public use.

The Connecticut Supreme Court in *Kelo* reviewed with approval the language of *Berman* and *Midkiff*, and agreed that the court should provide the most deferential review of the City of New London's determination that the proposed use was a "public use." *Kelo*, 268 Conn. at 36-38, 843 A.2d at 525-26. The *Kelo* court, referring to state cases in addition to *Berman* and *Midkiff*, held that "[b]oth federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial

deference to the legislative determination of purpose."[7] On the basis of the (primarily) federal authority requiring only limited review of the legislative determination, the court found that the economic development asserted by the city and a private redevelopment corporation as the "public use determination" justifying the condemnation, "constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions." *Kelo*, 268 Conn. at 40, 843 A.2d at 528.

Nothing in *Kelo* indicates that the properties that were condemned by the city and the private redevelopment corporation were blighted. *See id.* at 5-11, 843 A.2d at 507-11. As the *Kelo* court itself stated, quoting the trial court, "each of the plaintiffs testified and said they wished to remain in their homes for a variety of personal reasons." *Id.* at 11; 843 A.2d at 511. These reasons included that they and their families had lived in their homes for decades, they

7. The court's reference to the legislative statement of purpose and motive call to mind this Court's admonition:

> In [the dissent's] view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, *the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.* We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12, 120 L. Ed. 2d 798, 819 n.12 (1992) (emphasis added) (citation omitted).



"loved their homes," and other strongly personal reasons. *Id.* The real reason for the condemnation was set out by the court in the opening sentence of its opinion and expressed fairly clearly the issue it was seeking to resolve:

> The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

*Id.* at 5, 843 A.2d at 507.

The *Kelo* dissent (in a 4-3 decision), authored by Justice Peter T. Zarella, acknowledged that the requirement of "judicial deference to determinations of public use by state legislatures is appropriate." *Id.* at 134, 843 A.2d at 581 (Zarella, J., dissenting). Nevertheless, the dissent advocated that "judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility." *Id.* at 134-35, 843 A.2d at 582. The dissent urged that "the taking of nonblighted property in a blighted area is subject to additional scrutiny to determine whether the taking is 'essential' to the redevelopment plan." *Id.* at 143, 843 A.2d at 587. Furthermore, "a heightened standard of judicial review [should] be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for the purpose of private economic development." *Id.* The dissent took a strong position that the record was lacking in support of the

taking of the plaintiffs' properties and would have held the takings unconstitutional. *Id.* at 268, 843 A.2d at 600.

The court in *Kelo* permitted a condemnation of private property, in part, by a private redevelopment corporation, that will benefit one set of private individuals and which takes away private property from other private individuals without significantly reviewing the determination that the use was a "public use." The court merely defaults to the *Berman* standard regarding whether a sufficient public purpose has been stated, saying it will "give substantial deference to the legislative determination of purpose." *Id.* at 40, 843 A.2d at 527-28. The *Berman* standard fails to adhere to the ordinary level of review for the protection of Constitutional rights. The *Berman* standard fails to adhere to the general level of review afforded for the protection of rights under the Takings Clause. The *Berman* standard is neither fair nor just. By limiting the review of "public use" determinations, essentially, to the language contained in the preamble of a condemnation or statute, this Court denies the kind of review that ought to exist for this "bedrock principle[] of our legal tradition: the sacrosanct right of individuals to dominion over their private property." *County of Wayne*, 471 Mich. at 450, 684 N.W.2d at 769.



## CONCLUSION

The judgment of the Supreme Court of Connecticut should be reversed.

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IN THE

# Supreme Court of the United States

SUSETTE KELO, ET AL.,

*Petitioners,*

*v.*

CITY OF NEW LONDON, CONNECTICUT, ET AL.,

*Respondents.*

On Writ of Certiorari to the Supreme Court of Connecticut

## BRIEF FOR THE MASSACHUSETTS CHAPTER OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICUS CURIAE*

The issue before this Court—whether the Takings Clause of the Fifth Amendment to the United States Constitution precludes states[1] from advancing the public welfare through the power of eminent domain when the land taken will be used for a private development project—has profound implications for property owners, real estate developers and the public.

The National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") is an association of over 900 professionals and organizations in Massachusetts, large and small, with an interest in the responsible ownership, development, management and financing of properties throughout the Commonwealth.[2] NAIOP is actively involved in the process affecting legislation and regulations concerning zoning, permitting and all other aspects of land use controls throughout Massachusetts. NAIOP's long and continuing experience with land use laws and regulations, and the perspective that experience brings, enables it to speak broadly and with depth on land use and related public policy issues.

As an entity whose membership includes property owners, NAIOP has an interest in ensuring that the government (federal and state) does not exercise its eminent domain

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[1] As used herein, "states" includes states and their subdivisions, such as municipalities.

[2] By letters on file with the Court, counsel for petitioners and counsel for respondents provided their consent to the filing of any amicus brief in this case. Pursuant to Supreme Court Rule 37.6, NAIOP states that counsel for a party did not author this brief in whole or in part and that no person, other than NAIOP, its members and counsel, made a monetary contribution to the preparation or submission of this brief. The undersigned counsel note that members of their law firm, Goodwin Procter LLP, represent Corcoran Jennison, which is not a party to this proceeding but is the project developer of the development contemplated in *Kelo*.

power in an arbitrary manner and that property owners are justly compensated to the extent their property is properly taken. NAIOP is aware that condemnations may be controversial, and believes that they should only be used sparingly.

As an entity whose membership includes real estate developers and professionals involved in real estate development, NAIOP is also well aware that modern real estate development projects have the potential substantially to advance the public welfare through, among other things, providing places .o live and work; improving safety, aesthetics, and quality of life; increasing employment; and expanding the tax base.

NAIOP supports the ability of state and local governments to exercise the power of eminent domain, as a tool of last resort, to enable development projects to proceed in those communities that have decided to facilitate the projects for purposes of advancing the public welfare.

## SUMMARY OF THE ARGUMENT

NAIOP focuses on rebutting the assertion of the Property Rights Foundation of America, Inc. ("PRFA") that the Takings Clause precludes states from promoting the public welfare by transferring taken property to private parties for the purpose of economic development. *See generally* Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners ("PRFA Br."). PRFA's assertion cannot prevail because (1) this Court has held that taken property may be transferred to private parties to further the public welfare; and (2) real estate developments like the one in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004)[3] further the public welfare even more

[3] Both the *Kelo* Court and the dissenting judges agreed that property may be taken and transferred to private parties to further the public welfare. 843 A.2d at 531; *id.* at 576 (Zarella, J., concurring in part and dissenting in part).



substantially than do uses that this Court has found sufficient to satisfy the "public use" requirement. NAIOP does not address some of the other issues implicated by this appeal, such as the level of scrutiny that courts should apply to legislative determinations concerning the public welfare.

Throughout this nation's history, states have had the power to promote the public welfare through a variety of means, including eminent domain. The plain language of the Takings Clause, its legislative history, and the larger historical context surrounding the Clause demonstrate that duly constituted legislatures were presumed to have the authority to exercise eminent domain to advance the public welfare so long as they paid "just compensation" to those from whom they took the property.

Further, although state courts have developed various interpretations of "public use" as used in their respective state constitutions and the United States Constitution, this Court has never construed the Takings Clause in a manner that would prevent a state from exercising its eminent domain power by providing land to a private party in order to further the public welfare. To the contrary, this Court has stated that a narrow "public use" test is inadequate,[4] that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment,"[5] and that "public use" means "public welfare."[6] This Court has upheld takings that transferred property from one private party to another.[7] Moreover, this Court has stated that the eminent domain power is "coterminous with the scope of a sovereign's police powers."[8]

[4] *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906).

[5] *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923).

[6] *See Berman v. Parker*, 345 U.S. 26, 32-33 (1954).

[7] *See id.*; *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

[8] *See Midkiff*, 467 U.S. at 240.

As demonstrated through two recent real estate development projects in the City of Boston, Massachusetts that involved the use of eminent domain and the transfer of taken land to private parties, modern, large-scale development projects, like the one in *Kelo*, have the ability to further the public welfare in a variety of important ways, such as by providing places to live and work; improving aesthetics and community safety; revitalizing the economy; increasing community identity and pride; providing additional goods and services, housing and retail; and adding jobs, including construction and permanent jobs. Development projects can also assist in uniting communities by providing public space that can be used for community meetings and by organizations that provide community services. And, development projects may increase tax revenue, a benefit that should not readily be discounted because taxes support the very pillars of the public welfare, such as schools, police, fire departments, sanitation, and other services.

The Takings Clause places only two limitations on the eminent domain power: (1) the government may only exercise the power to further the public welfare, and (2) the government must pay "just compensation" when it takes property. Nothing prevents states from restricting this power further. But this Court should not rewrite the Takings Clause to place further restrictions in the Constitution.



## ARGUMENT

### I. The Fifth Amendment's Plain Language, Its Legislative History and Historical Context Do Not Support PRFA's Construction.

The history surrounding the Fifth Amendment sheds light on its purpose.[9] "[B]oth the colonial and confederation governments made extensive use of the power to expropriate property for all manner of social and economic ends, many of which involved the transfer of land from one private party to another,"[10] and "[t]here was little disagreement that these uses were public and that eminent domain could be used in their assistance."[11]

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[9] PRFA relies heavily on *City of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). PRFA Br. at 2, 8, 18-19. *Hathcock* is inapposite because, among other reasons, it involved the construction of the Michigan constitution's public use clause. *See* 684 N.W.2d at 785-86. The history behind that provision, which the Court discusses in depth, is very different from the history behind the Fifth Amendment's Takings Clause. *See id.* at 779-83 (discussing history behind Michigan provision).

In construing the federal provision, it is appropriate to look to the intent of the framers of the Takings Clause as opposed to the intent behind the Fourteenth Amendment, which made the Takings Clause applicable to states, because "passage of the Fourteenth Amendment does not reflect a separate consideration of what specific property interests needed protection from the government. . . . The period in which the Fifth Amendment's Takings Clause was proposed and ratified is the only time at which the nation considered which property rights needed protection from the government." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 862 (1995).

[10] Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1253 (2002); *see also* 2A J. Sackman, Nichols on Eminent Domain (rev. 3d ed. 2004), § 7.01[3] ("Eminent domain was employed quite extensively in the colonial and early America for purposes including but not limited to mills, private roads, and the drainage of private lands.").

[11] 2A Nichols, *supra* note 10, at § 7.01[3].

The understanding that a duly constituted legislature had broad power to advance the public welfare – through eminent domain as through other means – was consistent with the "republican" concept that predominated during the American Revolution and remained influential thereafter.[12] Benjamin Franklin succinctly captured republican sentiment: "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing . . . ."[13]

Over the course of the American Revolution and the period of the Articles of Confederation, James Madison and others grew skeptical of pure republican principles, and became increasingly concerned with the tyranny of legislative majorities.[14] Madison grew particularly concerned with potential infringements on property rights.[15] Madison,

[12] *See* Treanor, *supra* note 9, at 818 ("republicanism, which values the right to property but subjects it to majority delineation, was . . . extremely influential"); *id.* at 825 ("Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections – land could be taken only with the consent of the individual or of the legislature.").

[13] Treanor, *supra* note 9, at 824-25 (quoting Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), *in* 10 The Writings of Benjamin Franklin 54, 59 (Albert H. Smyth ed., 1907)).

[14] *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) *in* The Writings of James Madison at 30 (Gaillard Hunt, ed. 1904) ("It remains then to be enquired whether a majority having a common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority."); *see also* The Federalist No. 10, at 16-23 (James Madison) (R. Fairfield ed., 2d ed., 1966).

[15] *See* 2 Records of the Federal Convention of 1787, at 203-04 (Max Farrand ed., 1911) ("In future times a great majority of people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . ."); (footnote omitted); The Federalist No. 10, *supra* note 14, at 18 ("[T]he most common and durable source of factions has been the



therefore, designed the Constitution and the bill of rights to provide, among other things, some protection to legislative minorities without entirely subverting republican principles.[16] With respect to the eminent domain power, Madison achieved this by inserting the "just compensation" requirement.

The "just compensation" requirement, which legislatures had not universally applied before Madison drafted the Takings Clause,[17] forces the government, in any given instance, to consider more carefully whether to exercise the eminent domain power and minimizes the risk that a legislative majority will arbitrarily exercise it to confiscate and redistribute the property of a legislative minority.[18] It also

various and unequal distribution of property. Those who hold, and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation . . .") (footnote omitted).

[16] *See* Gordon S. Wood, The Radicalism of the American Revolution 230-32, 327 (1993).

[17] Harrington, *supra* note 10, at 1268 ("it was left to Parliament to determine . . . whether fairness required some value for the taking"); *cf.* Treanor, *supra* note 9, at 785 ("In colonial America, government routinely acted in ways that affected private property, and the political process determined when compensation was due. No judicially enforceable compensation requirement existed during this period. . . . Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment."); *id.* at 825 ("The constitutionalization of the compensation requirement . . . reflects a break from . . . republican tradition. In certain circumstances, compensation was now mandated and no longer a matter to be determined by majoritarian deliberations. . . . Thus, the story of the rise of the compensation requirement accords with historical accounts of revolutionary era ideology. As the revolution era progressed, people lost faith in legislatures and liberal ideas became increasingly prevalent.").

[18] *See* Harrington, *supra* note 10, at 1297 ("[T]he compensation

ensures that condemnees do not bear a disproportionate burden in promoting the public welfare. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

But neither Madison's original draft of the Takings Clause ("[n]o person shall be ... obliged to relinquish his property, where it may be necessary for public use, without a just compensation"[19]) nor the final version, which was passed without any recorded debate[20] ("nor shall private property be taken for public use, without just compensation"[21]), purports to raise any other impediments to the furtherance of the public welfare. Had Madison or those who edited the Takings Clause intended to confine more radically the eminent domain power, such as by preventing the legislature from transferring taken property to a private party for the purpose of furthering the public welfare,[22] they surely would have said so in a less

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clause was protective of minority rights, and thus satisfied federalist fears that a landless majority might gain control of the national legislature and impose confiscating regulations on property in the way state legislatures had done during the confederation."); Treanor, *supra* note 9, at 878 ("Although its only literal legal effect was to require the federal government to compensate when it physically took property, the Takings Clause also stood as a statement of the principle that both the state and federal government should refrain from acting in a way that arbitrarily redistributed wealth.").

[19] 4 Documentary History of the First Federal Congress: Legislative Histories at 10 (Charlene B. Bickford & Helen E. Veit eds., 1986).

[20] *See* Treanor, *supra* note 9, at 791.

[21] U.S. Const. amend. V

[22] The change would have been radical because it would have gone beyond the protections afforded by the "just compensation" language and would have enabled a minority of one to thwart the will of the many in an important category of cases. *See* Harrington, *supra* note 10, at 1300-01 ("Such a limit would have been a monumental alteration in the nature of representative government as understood by the members of the founding generation. That is to say, read as a limit on the power of expropriation, the term "public use" would effectively change the relationship of Congress as a representative institution to the body politic, thereby preventing Congress from giving consent in an important category of cases.").



ambiguous fashion. This is particularly true given that none of the state ratifying conventions requested the Takings Clause, indicating that there was little desire to alter the eminent domain power as it was then understood.[23]

## II. This Court Has Construed "Public Use" Broadly.

This Court's decisions reflect an increasing recognition over time that the term "public use" is consistent with "public welfare," and that "public welfare" includes all the things that large real estate development projects enhance (such as design of the urban environment, housing, jobs, the economy, and community identity, to name a few).

### A. This Court Has Not Held That the Takings Clause Precludes States from Taking Property and Transferring It to Private Parties To Further the Public Welfare.

The eighteenth and nineteenth century Supreme Court cases to which PRFA cites support the proposition that legislatures may not use eminent domain to transfer property from one private party to another for the sole purpose of benefiting the latter, but they do not address whether such a transfer may be made *for the purpose of advancing the public welfare*. *See, e.g., Vanhorne's Lessee v. Dorrance*, 2 Dall. (2 U.S.) 304 (1795); *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798); *Wilkinson v. Leland*, 2 Pet. (27 U.S.) 627 (1829); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896). *Missouri Pac. Railway Co.* is also distinguishable because it marked the first and last time that the Court ever reversed a state supreme court's decision that a physical taking was for a

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[23] Treanor, *supra* note 9, at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government. Indeed, none of the state ratifying conventions requested a just compensation clause or a contract clause binding on the federal government."); *see also id.* at 791 ("State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights *except the Takings Clause*.") (emphasis added).

"public use."[24]

### B. This Court Has Equated "Public Use" with Public Welfare.

In *Head v. Amogkeag Manufacturing Co.*, 113 U.S. 9 (1885), the Court addressed a taking under New Hampshire's Mill Act. The owner of land adversely affected by a private mill owner contended that the Mill Act, which authorized the private mill owner to construct a dam that flooded the landowner's property (provided the mill owner compensated him), violated the Fourteenth Amendment. *See id.* at 15-16. Although PRFA correctly notes that the *Head* Court chose to sustain the taking based on law regarding the rights of riparian owners, PRFA Br. at 14, the importance of *Head* here is its focus on whether the legislature acted to advance the "public good." 113 U.S. at 21 ("[T]he manner in which the rights of proprietors and lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, *and to the public good*, is within the constitutional power of the legislature.") (emphasis added).

In *United States v. Gettysburg Railway Co.*, 160 U.S. 668 (1986), the Court upheld a taking by the federal government to preserve land involved in the Battle of Gettysburg, explaining as follows:

> "Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some or all of the powers granted by Congress must be valid." 160 U.S. at 681.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906), the Court upheld a condemnation wherein a

[24] *See* Lawrence Berger, *The Public Use Requirement In Eminent Domain*, 57 Or. L. Rev. 203, 213 (1978).



mining corporation condemned a right of way for an aerial bucket line across the condemnee's property. Utah's legislature had declared that the development of the mining wealth of the state was a public necessity (thus, the taking advanced a particular industry, mining). *See id.* at 530. The condemnee argued that the taking violated the Fifth Amendment because it was for a private purpose, but the Court disagreed:

> "In the opinion of the legislature and the Supreme Court of Utah the *public welfare* of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong." *Id.* at 531 (emphasis added).[25]

In *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), landowners contended that a municipality's condemnation of their land to construct a road that few people would use violated their rights under the Fourteenth Amendment. 262 U.S. at 706. The Court upheld the taking, reasoning that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of *public health, recreation, and enjoyment*." *Id.* at 707 (emphasis added); *see also id.* at 708 ("A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are

[25] *Strickley* also expressly rejected one of the narrow constructions of "public welfare," pursuant to which some courts focused on whether the public "used" the taken property. *Id.* at 531 (noting "[t]he inadequacy of use by the general public as a universal test."); *see also Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (same); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use.").

important to the *general health and welfare*: pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery.") (emphasis added).[26]

Thus, *Head, Gettysburg Railway Co.*, *Strickley*, and *Rindge* support the conclusion that states may exercise the eminent domain power to advance the "public good," "public welfare," "general health and welfare," and "public health, recreation and enjoyment."

### C. *Berman* and *Midkiff* Conclusively Establish that Land Taken Pursuant to the Eminent Domain Power May Be Transferred to Private Parties in Order To Advance the Public Welfare.

*Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), remove any doubt regarding whether the Takings Clause imposes a limitation – over and above the "just compensation" requirement – on the government's ability to advance the public welfare through eminent domain.[27]

In *Berman*, much of the land taken went to private entities.[28] The Court upheld the takings, stating that the

[26] The Court's comments that "public uses" are not "limited to matters of mere business necessity" and that they "need not be for the purpose of a business to create a public exigency," presume that takings for the "purpose of business" (and hence economic development) are valid.

[27] Although state law decisions are not particularly helpful given the Supreme Court authority directly on point, it is worth noting that the state law construing the Takings Clause narrowly, much of which arose in the nineteenth century concerning the mill acts, has been described as "irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification." Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L. J. 599, 606 (1949).

[28] 348 U.S. at 31 ("[I]t will be put into the project under the management of a private, not public, agency and redeveloped for private, not public, use."); *id.* at 33 ("Here one of the means chosen is the use of private enterprise for redevelopment of the area."); *id.* at 34-35 (The plan



eminent domain power is part of Congress's "police power," which encompasses "[p]ublic safety, public health, morality, peace and quiet, law and order." *Id.* at 32. The Court noted that the "public welfare" concept and "[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary," and that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. The Court stated that the rights of those whose property was taken "are satisfied when [the owners] receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36.

PRFA suggests that *Berman* is distinguishable because Congress's use of eminent domain was "'merely the means to the end' of addressing the social problems that were within the scope of the state's police powers to address." PRFA Br. at 17. However, the same situation exists in *Kelo*: the state attempted to promote an economic development project to cure many of the ills that resulted from the area's depressed condition.

Moreover, the *Berman* rationale is not confined to the context of "blight," as not all of the taken property in *Berman* was blighted in any meaningful sense.[29] Additionally, the Court's analysis did not hinge on whether blight technically existed, but instead focused on whether the takings advanced the public welfare by improving the surrounding community.[30] Nothing in the Takings Clause suggests that

for the condemned property included "not only new homes but also schools, churches, parks, streets, and *shopping centers*.") (emphasis added).

[29] *Id.* at 31 ("It is not used as a dwelling or place of habituation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that the property may not be taken constitutionally for this project. It is commercial, not residential property; it is not slum housing . . . .").

[30] *See id.* at 35 ("it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Among the

legislatures have the authority to improve the "physical, aesthetic [and] monetary condition" of "blighted" areas only. Indeed, without adequate planning and appropriate governmental intervention – financial or otherwise – many decent areas may become blighted.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the statutory scheme's main purpose was to transfer land from one small group of private property owners to another larger one. 467 U.S. at 232-33. The Court of Appeals for the Ninth Circuit held that the Act violated the Takings Clause because it was "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Midkiff v. Tom*, 702 F.2d 788, 798 (9th Cir. 1983).[31]

This Court, however, reversed the Ninth Circuit, stating that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. The Court also noted that "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose," *id.* at 243-44; that "what in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair;" *id.* at 244 (quoting *Block v. Hirsh*, 256 U.S. 135 (1921)); and that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause," *id.* at 241.

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reasons that *Hathcock*, *supra* note 9, is inapposite here is that it *reversed Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), which had applied *Berman's* rationale in construing the eminent domain power. In doing so, *Hathcock* noted that *Berman* did not apply to Michigan's construction of its State Constitution. 684 N.W.2d at 785-86.

[31] *See also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) ("In both *Midkiff* and *Berman*, as the present case, condemnation resulted in the transfer of ownership from one private party to another . . . .").



The Court also reiterated the instruction, contained in *Berman*, that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 240 (quoting *Berman*, 348 U.S. at 33); *see also id.* at 244 ("[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

Despite PRFA's suggestion to the contrary, PRFA Br. at 19, the clear language of *Midkiff* reveals that its rationale is not limited to situations where oligopolies exist,[32] and that states may transfer taken property to private parties where doing so furthers the public welfare.

## III. Modern Real Estate Development Projects Promote the Public Welfare.

*Berman* and *Midkiff* held that the government can use eminent domain to achieve an "object . . . within [its] authority," and that furtherance of the public welfare is within its authority. *Berman*, 348 U.S. at 33; *Midkiff*, 467 U.S. at 240.[33] As discussed below, modern real estate developments advance the public welfare in several important ways.[34]

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[32] The Takings Clause does not state or imply that the elimination of oligopolies is more important to the public than are other public benefits, and there is no legitimate basis in the Constitution for a rule that (1) prohibits takings involving the transfer of property to private parties for the purpose of advancing the public welfare generally, but (2) affords exceptions in the case of oligopolies and, as in *Berman*, blight.

[33] It is worth noting that zoning is one of the states' police powers, *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and that modern zoning often seeks to encourage private developments for the purpose of improving the quality of life. *See generally* E. H. Ziegler, Rathkopf's The Law of Zoning and Planning § 1.2 and § 15:10 (2001). If real estate development may properly be deemed to further the public interest in the context of zoning, then it must do so in the context of eminent domain. *See* Nichols, *supra* note 10, at §§ 7.03[8][d], pp. 7-56 to 7-57 ("case law regarding the police power may help clarify what a valid pubic use is for the sake of eminent domain").

[34] Even petitioners acknowledge that economic development may be

### A. Recent Examples of Successful Developments in Boston, Massachusetts Involving the Use of Eminent Domain and the Transfer of Taken Land to Private Parties

Although there are numerous real estate developments in Massachusetts that have substantially furthered the public welfare, two specific, recent examples of projects that involved use of the eminent domain power in Boston illustrate the ways in which these projects benefit the public.

#### 1. The Metropolitan Building in Boston's Chinatown

In 2002, the Boston Redevelopment Authority ("BRA"), a public entity established by the Boston City Council and Massachusetts Legislature with broad development authority (including the power to buy and sell property and the power to acquire property through eminent domain), exercised its eminent domain power to assemble a full city block of just under one acre for the construction of "The Metropolitan." This project resulted in a 23-story building in Boston's Chinatown neighborhood that houses 253 residential units, an underground parking garage, and ground floor space for commercial uses as well as for not-for-profit organizations providing social services to Chinatown residents in the areas of housing, youth and family services, and economic development.

Occupancy of The Metropolitan commenced in early 2004. In addition to the aforementioned benefits, the BRA,

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a valid public policy goal. *See* Pet. Br. at 11 ("This case is not about whether economic development is a valid public policy goal... Government may pursue tax revenue and economic development ..."). Additionally, in *Hathcock*, *supra* note 9, the Michigan Supreme Court, which construed its "public use" clause differently than does this Court, recognized that real estate developments further the public welfare. *Hathcock*, 684 N.W.2d at 778 ("There is ample evidence in the record that the [proposed development] would benefit the public.").



through a land disposition agreement with the private developer, has ensured realization of the following public benefits: (1) at least 81 of the 133 rental units at the project must be rented to households earning less than 60% of the Boston area median income (and 11 of such rental units must be targeted to formerly homeless persons); (2) at least 34 of the 118 residential condominiums at the project have been sold to households earning between 80% and 120% of the Boston area median income, and such units are restricted as affordable housing for a term of fifty years; (3) the project includes an approximately 8,500 square foot courtyard that is open to the public; and (4) the developer is required to convey to the BRA two condominium units for community use. The project also includes construction of a 23,000 square foot building to house another social services organization that formerly occupied a building on the site.

In addition to all of these public benefits, The Metropolitan will also result in additional tax revenue for Boston, improve the neighborhood aesthetically, and add 253 first class housing units to Boston's housing stock—particularly in Chinatown, one of Boston's most densely populated neighborhoods.

#### 2. The South Boston Convention Center and Hotel Complex

Eminent domain was also used in the development of the Boston Convention and Exhibition Center complex ("Convention Center and Hotel Complex"), a $750 million project consisting of 1.7 million square feet of convention and exhibition space and a new privately-owned hotel on a 60-acre parcel of land. A special act of the Massachusetts legislature, Chapter 152 of the Acts of 1997, authorized the project. All of the taken land was acquired at the same time, and some of it was transferred to the private owners of the hotel, which is an integral part of the complex.

The Convention Center and privately owned Hotel provide numerous public benefits, over and above additional

tax revenue, to the South Boston community in which they are located and to the City of Boston overall. The site, which was previously comprised of underutilized industrial and office space, vacant lots, and surface parking areas, has been transformed into a vibrant and prospering area. Coupled with billions of dollars of public infrastructure improvements to the area, including creation of a new mass transit Silver Line and the Third Harbor Tunnel, the Convention Center and Hotel Complex is helping to solidify the area's new identity as a place in which to live and work. The conventions and trade shows that will come to the area as a result of the project will also bring new income into the community when attendees eat in Boston restaurants, shop in retail stores in the City's neighborhoods, and take advantage of other private and public facilities.

**B. The Type of Public Benefits that Arise from Modern Real Estate Developments Are Sufficient To Justify the Use of Eminent Domain.**

PRFA suggests that construction jobs and increased tax revenue alone cannot "be a sufficient basis for public use," PRFA Br. at 18, but that does not properly credit all the benefits expected to flow from the *Kelo* development project. Indeed, as noted below, the public benefits that result from large private developments like the one in *Kelo* and those discussed above are similar to, but even more broad and dramatic than, ones that resulted from uses that have validated takings in the past.

While grist mills may have improved the ability of farmers to grind grain and make it publicly available and while the aerial mining bucket in *Strickley* helped an industry that the state deemed important, modern developments often promote and facilitate numerous businesses (in *Kelo*, the businesses include not only high technology, but also commercial fishing, offices and retail shops).

The memorial in *Gettysburg Railway Co.* may have inspired members of the public to feel pride in their country,



the road that was to be available to a precious few people in *Rindge* may have preserved or enhanced the "natural scenery," and the urban renewal project in *Berman* may have improved the "physical, aesthetic [and] monetary condition of the city." Modern development projects such as *Kelo* (and The Metropolitan and the Convention Center and Hotel Complex, discussed above) have the capacity to do precisely the same things and positively impact even more members of the public, regardless whether placed in areas that technically have been deemed "blighted."[35]

The *Midkiff* takings were effectuated to improve the prospect of private home ownership. Modern real estate developments, like the one in *Kelo* (and The Metropolitan in Boston, discussed above), often involve a substantial number of residential units, many of which may be reserved for low and moderate income individuals, which will help alleviate housing shortages and, by attracting residents with a stake in the community, lead to other improvements as well, including increased support for commercial, retail and cultural uses in the neighborhood.

Although PRFA may have a point that tax revenue should not necessarily be a sufficient basis, standing alone, to justify use of the eminent domain power, *see* PRFA Br. at 18, the

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[35] Also, the *Kelo* project involves elements that will be available for use by all interested members of the public, including a public walkway and marina (as noted above, The Metropolitan (with its courtyard) and the Convention Center and Hotel Complex (with its improvements to the transportation system and Third Harbor Tunnel), contain similar elements). Indeed, the *Kelo* project is designed to "encourage public access to and use of the city's waterfront." 834 A.2d at 509. Such features are common in modern developments. Further, while it "is not essential that the entire community or even a considerable portion, . . . directly enjoy or participate in any improvements," *Midkiff*, 467 U.S. at 244 (quoting *Rindge*, 262 U.S. at 700), it is noteworthy that things like housing, retail shops and hotels, while privately owned, are available to the "public" in a meaningful sense, as the public consists of private individuals who benefit from the availability of such resources.

benefits from increased tax revenue are substantial. Increased tax revenues can have a ripple effect, as they may enable communities to improve the quality of life of its citizens in a host of ways, including improved schools, police, fire departments, and sanitation.

In any event, when it comes to many modern development projects – like the one in *Kelo* and the two Boston projects discussed above – it is not simply the increased tax revenue that furthers the public welfare, it is also such public benefits as the improved housing, retail services, hotel space, public recreation areas, business environment and urban design that are directly connected to the projects. These benefits raise any private aspects of the development to "the class or character [of] a public affair." *Midkiff*, 467 U.S. at 241 (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)).

### C. Eminent Domain Is an Important Tool with Which States May Further the Public Welfare.

Whether a taking is for a private development or for a highway, the people whose property is taken may not like the fact that they have to part with it, even with the compensation they receive, and may honestly (and perhaps with some legitimacy) believe that the public could do without the use or could do just as well if the use were relocated. If such individuals could effectively bar the state from exercising eminent domain by steadfastly refusing to sell their property,[36] the state's ability to improve the public welfare in the manner the states deem appropriate would be substantially

[36] There may be several reasons why a property owners would refuse to sell for "just compensation" if given the opportunity to do so, including that the owner (1) wants to extort an exorbitant price; (2) has a sentimental attachment to the property; (3) wants to stop the project for selfish reasons; or (4) wants to stop the project because owner believes it is not in the public interest. Because the result is the same regardless of the property owner's motive – the public interest as determined by the state is thwarted – the property owner's reasons for not accepting "just compensation" are irrelevant.



diminished. This is no less true for real estate development projects than it is for highways or any other use.

As the two Boston examples discussed above help demonstrate, it is often the case that important development projects could not proceed, or could not provide the full range and scope of public benefits that they are capable of providing, if states could not exercise their eminent domain powers to facilitate them. For instance, at the time the BRA assembled the land for The Metropolitan, the project site comprised ten different parcels of land.[37] Through eminent domain, the BRA was able to condemn out ancient passage rights that had been created in the 19th century and hampered the redevelopment of the project site through the ordinary operations of private enterprise.

Similarly, to build the 60-acre Convention Center and Hotel Complex discussed above, an affiliate of the City of Boston had to acquire vacant and underutilized office and industrial space, relocate tenants, and demolish existing structures, for the Convention Center and for the privately owned hotel. Nearly 100 tenants were relocated and over 50 separately owned public and private parcels were taken and consolidated to provide the necessary parcel of land. Development of this magnitude and significance in the South Boston neighborhood would not have been possible through ordinary private development because of the difficulty of creating such a large site in a downtown district.

The facts differ in every case. But if states could not exercise the power of eminent domain to facilitate private developments that will result in the same kinds of public

[37] The fact that a single acre of land encompassed ten different parcels shows that, in congested urban environments such as those in many northeast cities, numerous property interests can be at issue with respect to any significant development project. This increases the chances that at least one person will refuse to sell, and makes it all the more important that the state have the power to exercise eminent domain to further the public welfare.

benefits that flowed from takings that this Court has sustained, then a small minority could trump the greater welfare of the many. The Takings Clause was not intended to permit that result, and this Court has never so construed it. Nor should this Court do so now.

## CONCLUSION

For the foregoing reasons, NAIOP respectfully submits that, while states are free to impose additional restraints on their eminent domain power, the Fifth Amendment's Takings Clause does not preclude states from using eminent domain to transfer land to private parties for the purpose of furthering the public welfare by facilitating private real estate developments, provided "just compensation" is paid.

Respectfully submitted,

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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## BRIEF OF *AMICUS CURIAE* MAYOR AND CITY COUNCIL OF BALTIMORE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS

The petitioners have asked this Court to hold that, as a constitutional matter, economic development is not a "public use," and, therefore, that governments may not exercise the power of eminent domain for the "sole purpose" of economic development. The Mayor and City Council of Baltimore (the "City of Baltimore" or the "City") respectfully submits this brief in support of respondents, because the petitioners' proposed restriction of the concept of "public use" would have a profound adverse impact on economic and urban development in Baltimore and in other cities around the country.[1]

Over the last fifty years, the City of Baltimore has undertaken an ambitious program of urban renewal. The centerpiece of this process was the transformation of the city's Inner Harbor, over several decades, from a largely (but not completely) blighted remnant of nineteen and early twentieth century mercantile activity into what is now sometimes described as the city's "front porch."

Today, the Inner Harbor attracts millions of local residents and visitors each year; it is the home of the National Aquarium, the Maryland Science Center, the American Visionary Arts Museum, the Rouse Company's two glass pavilions at water's edge known as Harborplace, several of the most prominent office towers in the Baltimore skyline, a number of successful hotels, and an assisted living facility serving hundreds of low-income

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[1] Pursuant to Supreme Court Rule 37.4, consent to the filing of this brief is not required as the brief is submitted on behalf of the City by its authorized law officer, the City Solicitor.

senior citizens; it has been a magnet for private development downtown; it has been the impetus for the creation of tens of thousands of new private sector jobs; and its impact has spread outward, allowing, among other things, for the development of Oriole Park at Camden Yards just a block beyond the boundaries of the Inner Harbor West renewal area. In 1984, the American Institute of Architects described the Inner Harbor as "one of the supreme achievements of large-scale urban design and development in U.S. history."

While the removal of blight was an important impetus for the redevelopment of the Inner Harbor, removing blighted properties was only the prelude to the achievement of the project's central objectives of revitalizing the city's downtown and reviving its economy. Today, the achievements of the Inner Harbor project are not understood primarily in terms of numbers of blighted properties removed, but rather, far more broadly, in terms of positive economic development – jobs created, investment dollars attracted, tax revenues generated, and public institutions built – as well as being an enormous source of civic confidence and pride.

As the City looks ahead, it must address a new, but related set of challenges. There are neighborhoods in Baltimore, only a few miles from the Inner Harbor, that demonstrate as well as any in the country the consequences for residents of being isolated, over many decades, from any substantial economic development. In these neighborhoods, as in parts of every other industrial city in the country, the absence of economic development – the disappearance of jobs – has been at the root of an array of social problems that are now not easily solved. *See* William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (1997). The cycle of disinvestment and joblessness has affected an ever-larger swath of urban geography over the last thirty years. *See id.* at 14 (reporting that, in the nation's one hundred largest cities, one in seven census tracts is at least forty percent poor, more than double the proportion in 1970).



The City of Baltimore has an intense interest in the outcome of this case because this Court's decision will have far-reaching ramifications for the City's much-needed economic development activities. Petitioners' arguments, if accepted, would threaten the ability of Baltimore and other cities to use the power of eminent domain to stimulate economic development in places where, for many decades, there has been little or no such development. If cities are prohibited from using the power of eminent domain to stimulate economic development, then cities will not develop; and if cities do not develop, if they do not adapt to changing times and changing economic circumstances, city residents suffer.

## SUMMARY OF ARGUMENT

The petitioners ask this Court to hold that economic development alone is not a "public use" under the Takings Clause. The apparent simplicity of the petitioners' proposed holding is based, in turn, on an equally simple, but misleading premise: that urban renewal (the removal of urban blight) and economic development are distinct processes, the former being a legitimate "public" purpose, the latter not. This premise does not fit with actual patterns of development and abandonment in American cities, particularly older industrial cities like Baltimore. In these

cities, urban renewal and economic development are almost always inextricably linked. It is the absence of economic development that gives rise to urban blight and to the need for urban renewal.

The petitioners' reliance on their neat (but untenable) distinction between urban renewal and economic development allows them to avoid having to ask this Court explicitly to overrule its decision in *Berman v. Parker*, 348 U.S. 26 (1954). However, the petitioners make a number of arguments that, upon close examination, strike directly at the core of the opinion in *Berman*. These arguments, if adopted by this Court, would erect substantial, perhaps insurmountable, barriers to the achievement of projects on the scale of Baltimore's Inner Harbor.

Most importantly, the petitioners would drastically reduce the deference that the courts now afford to legislative determinations that the acquisition of a particular property is for a "public use." Under the petitioners' formulation, a determination by an elected legislature, such as the Baltimore City Council, that the condemnation of property serves a public purpose represents "a mere *claim*," *see* Br. of Pet. at 48 (emphasis in original) – a "claim" that would be subjected to ultimate verification by the courts.

Further, the petitioners identify two particular applications of this principle of legislative deference with which they particularly take issue. First, the petitioners would require the government to certify, "at the time that condemnation is sought," *see* Br. of Pet. at 42, the specific future use of particular parcels of property within an area slated for redevelopment. Although the City of Baltimore had well-defined plans for the redevelopment



of the Inner Harbor when, in 1967, the City Council enacted an ordinance that made hundreds of properties around the Harbor subject to condemnation, those plans were refined further over the course of the next two decades. A certain amount of flexibility is crucial to the success of urban development projects, particularly those on the scale of Baltimore's redevelopment of the Inner Harbor.

Second, the petitioners' arguments seek to undermine the core holding of *Berman*. The petitioners maintain that "there is nothing in the act of condemning *non-blighted* properties that constitutes a public purpose." Br. of Pet. at 26 (emphasis added). The petitioners then proceed to argue that this Court should not permit the condemnation of "viable businesses" and "viable homes." *See id.* at 33. In other words, the petitioners at times argue for a regime under which an owner of any "viable" property in an otherwise blighted area could obstruct the implementation of an urban renewal plan, and under which the government would have to demonstrate the non-viability of each individual property that it seeks to condemn pursuant to an urban renewal plan. Although the Inner Harbor renewal area was characterized predominantly by blight, there were at least marginally viable commercial and residential properties on almost every block within the renewal area. The project would literally have ground to a halt if the owners of those properties had been permitted to refuse to relinquish their properties for just compensation.

This Court should reaffirm both the principle enunciated in *Berman v. Parker* that legislative determinations of "public use" are entitled to deference and *Berman*'s

particular application of that principle in the context of urban renewal.

## ARGUMENT

### I. Baltimore Revitalized its Downtown, and Rebuilt its Inner Harbor, According to the Constitutional Blueprint of *Berman v. Parker*.[2]

#### A. Baltimore develops around its harbor.

Founded in 1729 around what is today the Inner Harbor, the City of Baltimore was one of hundreds of settlements in Maryland and Virginia established during the colonial period along the Chesapeake Bay and its tributaries. Annapolis (1649) and Richmond (1737) became state capitals, but Baltimore became the Chesapeake's largest city and major industrial center. Throughout its history, Baltimore's economy had been linked to the productivity of the harbor. Between 1790 and 1800, after independence from Britain had removed the imperial straitjacket on international trade, Baltimore's harbor boomed, and its population doubled. Perhaps the most prominent witness to the harbor's development in the

[2] Except where noted, the facts in this section are drawn from discussions with M. J. Brodie, former Baltimore City Commissioner of Housing and Community Development and current President of the Baltimore Development Corporation; Martin L. Millspaugh, Chief Executive Officer of Charles Center-Inner Harbor Management, Inc. from 1965 to 1985; and Norman Waltjen, former general counsel of Charles Center-Inner Harbor Management; from city records; and from the following written materials: Martin L. Millspaugh, *The Inner Harbor Story*, Urban Land, April 2003, at 36; Baltimore City Department of Planning, *The Baltimore Harbor* (1985); and C. Fraser Smith, *William Donald Schaefer: A Political Biography* (1999).



early nineteenth century was Frederick Douglass, who learned to write in the 1820's, while still a slave, in the course of his work as a carpenter's assistant at Durgin and Bailey Shipyard at Fell's Point. *See* Frederick Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* (1845).

Eventually, the city developed on all sides of the Patapsco Basin, with more than 40 miles of waterfront, most today still dedicated to shipping and trade. The Inner Harbor comprises about 1.5 miles of waterfront at the end of the Basin's most protected finger of navigable water.

#### B. The Maryland Court of Appeals holds that the City may acquire property by eminent domain to promote harbor development.

The City of Baltimore has exercised its power of eminent domain for at least eighty years to promote economic development in the harbor. In 1920, the Maryland General Assembly authorized the City to borrow $50 million "for developing, extending, and improving the harbor of Baltimore and its facilities," and in 1924, to further this objective, the City's Port Development Commission acquired by eminent domain 5.75 acres of land on the southwest shore of the Patapsco. In condemnation proceedings, the owners of the property objected on the grounds that the development of the harbor generally was not a "public purpose," and that the leasing of specific portions of the property to other private owners for their exclusive use also rendered the taking not for a public purpose.

The Court of Appeals of Maryland rejected both of these arguments, observing:

> The development of the harbor of Baltimore according to a comprehensive plan, by which the commerce of the port will be most advantageously served, and its future growth encouraged, is a project of distinctively public interest and purpose. It is concerned with the improvement and extension of a harbor service which constitutes an essential part of a system of water transportation connecting the port of Baltimore with the markets of the world. The public character of the use to which harbor structures are devoted is not affected by the fact that they may not all be made available for the indiscriminate use of the public.

*Marchant v. Mayor & City Council of Baltimore*, 126 A. 884, 887 (Md. 1924).

Despite redevelopment efforts in the 1920's, by 1954 the harbor, and the city, were struggling. At the time, the Inner Harbor area was still dominated by warehouses and other facilities related to shipping. Most (but not all) of these facilities were blighted, due in part to the fact the largest ships required wider berth than the Inner Harbor can afford, and due in part to the fact that many of the facilities were owned by railroads, which at the time lacked the capital to update them for use in the contemporary shipping industry. In downtown Baltimore, which had arisen around the Inner Harbor, the post-war years brought steadily declining property values and business closures. For a period of twenty years during and after the war, downtown employment was stagnant. Six major employers moved out of downtown during the post-war decade. In 1954, there were two million square feet of vacant loft and warehouse space in the downtown area alone, with vacancy rates as high as 25 percent on many



downtown blocks. H.L. Mencken is reported to have described downtown Baltimore, his birthplace and beloved hometown, as "the ruins of a once-great medieval city."

### C. The revitalization of downtown begins.

The closure of O'Neill's department store in 1954, the year that this Court decided *Berman v. Parker*, became a catalytic event. A group of business leaders formed the Greater Baltimore Committee and the Committee for Downtown, which, in close partnership with the City, developed a plan for the revitalization of downtown Baltimore. Among the leaders from the business community was James Rouse, the real estate developer and visionary who would later found the Rouse Company. The renewal plan was to unfold in two stages. Its first phase involved the redevelopment of a 22-acre section of downtown that became known as Charles Center. In 1958, the City Council adopted an urban renewal plan for Charles Center pursuant to which the City provided $25 million in working capital and authorized the acquisition of any property within the redevelopment area by eminent domain. In the early 1960's, just as many of the elements of Charles Center were coming into place, the plan's second phase began. This second phase, even more ambitious than the first, was understood from the beginning to be the linchpin of the plan's overall success: the complete redevelopment of the Inner Harbor.

Throughout the redevelopment process, Baltimore voters consistently and directly reaffirmed their own determination that the Inner Harbor project served a "public" purpose by approving referenda to provide funding for the project. In the 1964 election, Baltimore voters

approved a $2 million bond issue to begin the implementation of the Inner Harbor Master Plan. In a 1966 referendum, the voters approved a loan of an additional $12 million.

The City also worked closely with the private and not-for-profit sectors. In 1964, the City entered into a contract with Charles Center-Inner Harbor Management, Inc. ("CC-IH"), which had been formed as a private corporation for the purpose of managing downtown redevelopment. Pursuant to that contract, CC-IH reported to the City's Commissioner of Housing and Community Development. In all acquisitions of land recommended by CC-IH, the City would hold title, and in all sales of land, the City would obtain the proceeds. All agreements with third parties, including real estate developers, would require approval of the City's Board of Estimates.

**D. The City Council adopts urban renewal plans for the Inner Harbor, permitting the City to acquire approximately one thousand properties by purchase or condemnation.**

In 1967, the Baltimore City Council approved the urban renewal plan for Inner Harbor Project I, which covered the area immediately surrounding the Inner Harbor that today contains, among other things, Harborplace, the Maryland Science Center, the home port of the historic U.S.F. Constellation, and the Christ Lutheran Church Harbor Apartments, which provide 288 units of housing for low-income senior citizens. In 1971, the Council approved a second renewal plan for an area described as Inner Harbor West – an area that today contains the Baltimore Convention Center and the Edward G. Garmatz United States Courthouse. Later that year, a third plan was



approved for an area known as Inner Harbor East, which today contains the National Aquarium. These renewal plans provided for the acquisition of approximately 240 acres, divided into approximately one thousand separate parcels, all of which would be subject to taking by eminent domain.[3]

The ordinances approving Inner Harbor Project I and Inner Harbor West both contained explicit findings of blighted and unhealthful conditions. In connection with Project I, the City Council found that "certain conditions exist within the downtown Inner Harbor Section of the City of Baltimore which constitute a serious and growing menace, injurious and inimical to the general welfare of residents of the City and that the redevelopment of [the area] represents the most effective way of halting the deterioration and beginning the revitalization." However, notwithstanding the predominance of blight both in the downtown and Inner Harbor areas, the Charles Center and Inner Harbor plans together entailed the relocation of more than seven hundred at least marginally viable businesses, including the Baltimore's main wholesale produce market, the state tobacco warehouse, and an operating fish-oil refinery.

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[3] The practice in Baltimore remains today for the City to develop a proposed comprehensive plan, designating specific parcels of land for acquisition by purchase or condemnation. The City Council may then adopt, reject, or amend the proposed comprehensive plan.

### E. The Maryland Court of Appeals reaffirms that the development of the Inner Harbor is a "public purpose."

Early in the implementation of the plan, the Court of Appeals of Maryland had occasion to determine whether the revitalization of the Inner Harbor was a "public purpose" under the provision of the state constitution allowing the State of Maryland to contract debt, give credit, collect taxes, and expend funds for such a purpose. Although the City was the primary mover in the redevelopment of the Inner Harbor, the Maryland Port Authority had undertaken the development of an office tower dedicated to shipping and trade at the harbor's edge, one of the project's most significant components. In holding that the Port Authority's development of the "World Trade Center" was a public purpose, the court deferred to legislative findings "that the unification at a single, centrally located site of servicing functions and activities connected with water-borne commerce and trade has the single object of preserving the economic well-being of the State and is in the public interest." *Lerch v. Maryland Port Auth.*, 214 A.2d 761, 765 (1965).

The Court of Appeals rejected the plaintiffs' suggestion that while the development of wharves, docks, piers, and warehouses approved in 1924 in the *Marchant* case, quoted above, represented a public purpose, the development of an office tower did not: "The short answer to this contention is that the methods by which a public purpose is served change with the times; in the world of today, services are often more important than edifices." *Lerch*, 214 A.2d at 766. Moreover, the court held that "the validity of the means chosen to carry out a public purpose does not depend upon proof that the means will be successful. The



favorable outcome of economic measures can no more be demonstrated in advance than can the postulates of social legislation. It is for the legislature, not the courts, to make the determination." *Id.* at 767. The Port Authority did not break ground at the World Trade Center site until 1973. Completed in 1977, the 28-story pentagonal structure, designed by I.M. Pei, remains today the signature architectural element of the Inner Harbor.

### F. With the approval of the voters, and in collaboration with the private sector, the City rebuilds the Inner Harbor.

Following the City Council's adoption of the Inner Harbor renewal plans in 1968 and 1971, the citizens of Baltimore directly approved the development of both the National Aquarium and Harborplace in referenda conducted in 1975 and 1979. Both votes were preceded by substantial grassroots activism and widespread public debate. The 1979 vote to approve the Rouse Company's development of Harborplace, in the face of strong and well-organized opposition, by a margin of 58 percent to 42 percent, garnered more public attention than that year's mayoral election. Today, the Aquarium alone receives 1.6 million visitors each year.

Throughout the redevelopment of the Harbor, the City worked in close collaboration with developers from the private sector, and, as in New London, much of the land that the City acquired was relatively quickly returned to private ownership. Immediately adjacent to the Harbor, and within the Project I renewal area, the City had created "superblocks," large parcels of land comprising entire city blocks that had been assembled from multiple smaller parcels of land and from internal networks of alleys and

backstreets that had divided those smaller parcels. These superblocks were created for the specific purpose of attracting large-scale private development.

The original Inner Harbor Master Plan in the 1960's had anticipated the development of a new hotel within the area of Inner Harbor Project I. At the personal insistence of then-Mayor William Donald Schaefer, among others, City developers sought to attract a hotel to one of the new superblocks. This proved to be one of the project's most difficult tasks. After deals with two developers fell through, and after intense personal negotiations between Mayor Schaefer and A.N. Pritzker, whose family then owned the Hyatt Corporation, the City made an extraordinary offer: the City would loan Hyatt $12 million at 7% interest, including $10 million obtained from the U.S. Department of Housing and Urban Development through an Urban Development Action Grant; the City would build a parking garage to service the proposed hotel at a cost of $4 million; and the City would guarantee to Hyatt a minimum occupancy rate during the initial years of the hotel's existence. In return, the City would be entitled to a share of the hotel's profits. In the first year of its existence, the Baltimore Hyatt was the most successful hotel in the Hyatt chain. Until Hyatt repurchased the City's interest, the City's share in the hotel brought it an average of $2.4 million in net profits per year. By the 1990's, as a direct result of the Inner Harbor redevelopment, the tourism industry had evolved from near-insignificance in Baltimore's overall economy into the second largest employer in the city.



### G. The courts ensure that property owners receive "just compensation."

During the acquisition phase of the project, the courts protected the interests of property owners by ensuring that no property was taken by the city without just compensation. For example, in 1972, pursuant to the Inner Harbor West project, the City acquired the land that is today home to the federal courthouse. At the time, these properties consisted mostly of loft buildings used for light manufacturing or wholesale trade. When the City condemned a parking lot in the area, the owner of the property objected to the City's offer of compensation. At trial, the City argued that, in 1972, the "highest and best use" of the property was, in fact, as a parking lot. On the other hand, the owner claimed that, by 1972, he had "looked around to the extensive redevelopment effort that had been going on in downtown Baltimore for some two decades, adjudged that his property and the block of which it was a part was next in line for major renewal and redevelopment, and thus believed that the highest and best use for the property was a high-rise office building." *Mayor & City Council of Baltimore v. Smulyan*, 41 A.2d 198, 200 (Md. Ct. Spec. App. 1979).

The City's experts testified at trial that the property was worth between $400,000 and $420,000 in 1972. The owner's experts testified that the property was worth between $745,880 and $840,000. In 1979, the Court of Special Appeals affirmed a jury verdict awarding the owner an even greater sum, $895,104. *See id.* In effect, the jury had determined that the mere existence in 1972 of redevelopment efforts to the east of Mr. Smulyan's property, in the Inner Harbor Project I renewal area, had more

than doubled the value of Mr. Smulyan's land, and the appellate court upheld this determination.

Even counsel for Ms. Kelo, *et al.* have recognized, in writings outside of this case, that the Inner Harbor has created substantial new economic opportunities for the citizens of Baltimore, and have argued for the expansion of those opportunities. According to counsel, "Baltimore during the early 1980's witnessed somewhat of a renaissance, spurred by the development of the Inner Harbor area into a major tourist attraction with shopping and a world class aquarium." Scott G. Bullock, Institute for Justice, *Baltimore: No Harbor for Entrepreneurs* (1997). Counsel's prescription for Baltimore is not to forego large-scale redevelopment projects, but instead to amplify the effects of these projects by removing restrictions on entrepreneurs. See *id.* (arguing that the City of Baltimore should promote economic development by deregulating pushcart vending, horse-drawn cart vending, newspaper vending, vehicles for hire, and cosmetology and hairbraiding businesses, and that deregulation would be particularly effective in the Inner Harbor, "the most potentially lucrative market in downtown Baltimore").[4]

By 2000, sixty projects of new construction or rehabilitation had been completed in the Inner Harbor renewal areas, including fifteen office buildings, twelve hotels, and ten museums. The project has stimulated private development in downtown Baltimore, leading to the creation of tens of thousands of new jobs. As architectural critics recognized in a 1992 article, "What 30 years ago was a

[4] Available at www.ij.org/pdf_folder/city_studies/ij_city_study_baltimore.pdf.



collection of decaying docks, empty sheds, and unsightly parking lots surrounding a debris-filled river has become the city's symbolic centerpiece, attracting millions of people a year from all over the world." Brian Kelly and Robert K. Lewis, *What's Right (and Wrong) About the Inner Harbor*, Planning, April 1992, at 28. The project has served as a model for waterfront redevelopment projects on a comparable scale in other port cities, including Sydney, Barcelona, Belfast, and Rotterdam.

## II. The Balance Struck by this Court in *Berman v. Parker* Enabled the Revitalization of the Inner Harbor and Should Not Be Disturbed.

This Court's central concern in its unanimous decision in *Berman v. Parker* was with striking the proper balance between legislative and judicial authority in determining what represents a "public use." The Court's holding could not have been more clear: "Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating local affairs." *Id.*, 348 U.S. at 32 (emphasis added);[5] *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241

[5] There were few people as well-acquainted with the problems facing industrial cities generally in 1954, and Baltimore in particular, than the lawyer who argued *Berman* on behalf of the District of Columbia. Simon Sobeloff, who was then Solicitor General of the United States, and who went on to serve as Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, had served as City Solicitor of Baltimore from 1943 to 1947.

(1984) ("[T]he court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'").

In Maryland, the citizens' elected representatives, both in the Baltimore City Council and in the Maryland General Assembly, repeatedly voted to devote public funds and to allow the exercise of the power of eminent domain to achieve the objectives of the Inner Harbor renewal plans. Moreover, on at least four occasions, the citizens of Baltimore themselves directly voted to authorize the issuance of bonds to finance various components of the project. In *Lerch v. Maryland Port Authority*, discussed above, the question of whether the construction of an office tower on the banks of the Inner Harbor constituted a "public purpose" reached the Court of Appeals, but the court recognized its limited role in providing an answer: citing both the enactment of legislation by the General Assembly and the City's overall redevelopment plan, the Court of Appeals acknowledged that "[i]t is for the legislature, not the courts, to make the determination." *Id.*, 214 A.2d at 767.

In the case presently before the Court, what is at stake, quite simply, is the *institutional locus* for determining, for example, in 1967 (when the Baltimore City Council adopted the urban renewal plan for Inner Harbor Project I), whether it was in the "public interest" for the City of Baltimore to undertake the redevelopment of the Inner Harbor. In urging a far more robust "public use" jurisprudence under the Takings Clause, the petitioners would shift central responsibility for determining whether an economic development project serves a public purpose from the legislature to the judiciary. Under this view, in 1967, it would have been for the Court of Appeals of



Maryland, or for this Court, to determine whether it served the public interest for the City of Baltimore to acquire 240 acres of old industrial and waterfront property and attempt to renew its downtown through a dramatic program of new construction and through intensive and shifting collaborations with the private sector.

The City of Baltimore respectfully submits that, as both a constitutional and a practical matter, it is for the people of Baltimore and their elected representatives to make that determination, not the courts. Under a system of separation of powers, the legislature's role *is* to determine what is in the public interest. However difficult to discern, or even inchoate, the "public interest" may be, it is the legislature's job to decide what the public interest is. No other institution can legitimately make that determination.

Moreover, making a sound decision about whether to go forward with a project like the Inner Harbor requires the collection of an enormous amount of information in an array of disciplines and the solicitation of a vast amount of expert advice. Ultimately, a legislature can acquire the essential knowledge more competently than a court. It is a necessary implication of the petitioners' argument that, in 1967, a judicial fact-finder, backed up by an appellate court reviewing factual findings for abuse of discretion, would have rendered a more effective decision about whether to revitalize the Inner Harbor than the citizens' elected representatives in the Baltimore City Council or the Maryland General Assembly. That is an untenable, and inherently undemocratic, proposition.

The judiciary's fundamental role, of course, is not to determine what the "public interest" is, but rather to

safeguard individual rights under the Constitution and the common law. The text of the Takings Clause itself explicitly denotes the judiciary's proper role in this context: to ensure that no "private property [shall] be taken for public use, *without just compensation*." In other words, the constitutional text itself reflects a particular vision of the proper allocation of institutional responsibility in the exercise of the power of eminent domain. The text does not explicitly proscribe the taking of property for something other than a "public use"; rather, *it assumes the validity of the legislature's determination that the taking is "for public use."* What the text instead proscribes is the denial of "just compensation" in the event of such a taking.

It is, of course, squarely within both the proper role and the competency of the judiciary to determine whether a property owner has been justly compensated. The *Smulyan* case, cited above, demonstrates this as well as any. There, the Court of Special Appeals of Maryland affirmed the determination of a jury that an owner of property in the Inner Harbor West renewal area was entitled to more than twice the dollar amount that he had been offered by the City of Baltimore. Indeed, in *Smulyan*, the court allowed the jury to ascribe value to the property that the owner himself acknowledged had been created by the very revitalization effort pursuant to which the property was being taken. *See id.*, 41 A.2d at 200 (crediting property owner's contention that he had "looked around to the extensive redevelopment effort that had been going on in downtown Baltimore for some two decades, adjudged that his property and the block of which it was a part was next in line for major renewal and redevelopment, and thus believed that the highest and best use for the property was a high-rise office building").



As *Smulyan* demonstrates, the judiciary has the primary role in ensuring just compensation, and, in a trial on this issue, a court properly treats the government's assertions regarding the value of the property just as those of any other litigant in a property dispute. On the issue of whether the taking is for a "public use," however, the government's "claims" must be regarded, for both practical and constitutional reasons, as "well-nigh conclusive." *Berman*, 348 U.S. at 32. As this Court recognized in *Berman*, "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.*, 348 U.S. at 32. The Court should reaffirm that principle.

The petitioners urge judicial skepticism of legislative determinations of the "public interest" in two particular respects that would have immeasurably complicated the revitalization of the Inner Harbor. First, the petitioners would require that a local government be able to identify with "reasonable certainty" the use to which an acquired property would be put. In Baltimore, the Inner Harbor project proceeded according to detailed plans, but flexibility nonetheless was required. Plans for the Inner Harbor were first drawn up in the late 1950's. The City Council did not authorize the acquisition of properties in the Inner Harbor renewal area until 1967. Construction of the Harbor's main elements continued into the early 1980's. To take a specific example, the land where the National Aquarium now stands was acquired by the City in the early 1970's, but it was not until 1975 that the voters authorized the issuance of bonds to fund the Aquarium's construction. The Aquarium opened its doors in 1981. To take another example, as late as 1985, the City's Planning Department predicted that the site where Oriole Park at

Camden Yards now stands would be used for residences, a hotel, and offices. The State of Maryland acquired the brick warehouse that became the signature architectural element of the ballpark in 1991, through condemnation (reaching a settlement with the property owner on "just compensation" of $11 million). The ballpark opened in 1994. Large scale projects require substantially greater flexibility than the petitioners would allow.

Second, under the petitioners' most extreme formulation of their argument, the legislature would be categorically barred from determining that the taking of a "viable home" or a "viable business" would serve the public interest. *See* Br. of Pet. at 26, 33. The adoption of this argument would essentially overrule the central holding of *Berman v. Parker* – that the legislature (Congress) was entitled to deference when it determined that the acquisition of an entire area for the purpose of removing urban blight was "for a public use," even if numerous individual properties within that area were not themselves blighted. Thus, the petitioners seek to undermine both the basic principle of legislative deference that emerged from *Berman v. Parker* and the precise application of that principle to the facts in the case. In 1982, after the Baltimore City Council had adopted an urban renewal plan for the Middle Branch, another waterfront area along the harbor, the Court of Appeals was asked by an owner of Middle Branch industrial property to hold that the City could not constitutionally take property pursuant to the urban renewal plan if the objective of the particular taking was industrial or economic development. The Court of Appeals rejected that argument, noting that such a holding "would eviscerate thirty years of the City's progress in combating the diseases of 20th century urban America." *Mayor & City*



*Council of Baltimore v. Chertkof*, 441 A.2d 1044, 1053 (Md. 1982). Had the petitioners' argument been the law for the past half-century, rather than *Berman v. Parker*, the present day Inner Harbor, quite simply, could not have emerged from the network of decaying warehouses and wharves that, in 1954, only harkened back to an earlier heyday.

## III. The Necessity for Government-Sponsored Economic Development Activity Is No Less Today Than When the Inner Harbor Was Redeveloped.

Despite the massive reinvestment and job creation in downtown Baltimore that occurred as a result of the revitalization of the Inner Harbor, the project has not, of course, been a panacea for Baltimore's problems. There are census tracts in both East and West Baltimore that today remain some of the poorest in the country, with high rates of poverty, addiction, and crime. The problems of these neighborhoods have primarily been caused by the disappearance of employment opportunities since World War II. *See* Wilson, *When Work Disappears*, *supra*, at xiii ("A neighborhood in which people are poor but employed is different from a neighborhood in which people are poor and jobless. Many of today's problems in the inner-city ghetto neighborhoods – crime, family dissolution, welfare, low levels of social organization, and so on – are fundamentally a consequence of the disappearance of work."). A substantial proportion of the building stock in East and West Baltimore is blighted and abandoned, but the City's goals for these neighborhoods go beyond the mere removal of blighted properties. Rather, the City measures its success in East and West Baltimore according to the well-being and productivity of the people who live there. In East and

West Baltimore, blight and abandonment have occurred *precisely because economic development has not occurred*, and so, in Baltimore at least, urban renewal and economic development go hand in hand. *Both* are public purposes.

East Baltimore alone was once home to thousands of workers in the shipping, steel, and automotive industries. The presence of those industries in the city's economy is now a fraction of what it once was. Baltimore, with a current population of 640,000, lost 75,000 jobs in manufacturing alone between 1953 and 1984. The disappearance of industrial employment is written on the face of neighborhoods, in the form of abandoned and blighted properties. It also appears unmistakably in economic indicators of neighborhood well-being. In 2000, unemployment rates in East Baltimore's poorest census tracts ranged from twenty to thirty percent (compared to a citywide rate of ten percent and a current statewide rate of 3.9 percent). Only about forty percent of working age adults in these census tracts were actually employed (compared to 58 percent citywide).[6] *Cf.* Wilson, *supra*, at xiii (recognizing that, "[f]or the first time in the twentieth century most adults in many inner-city ghetto neighborhoods are not working in a typical week"). In East Baltimore, the cycle of disinvestment has taken hold despite the presence of the Johns Hopkins University medical campus. Residents of East Baltimore live, often quite literally, in the shadow of the country's top-ranked research hospital, yet they have been

[6] See Baltimore Neighborhood Indicators Alliance, *Vital Signs: Measuring Baltimore's Progress Toward Strong Neighborhoods and a Thriving City* 40-41 (2004), available at www.bnia.org/PDF/0.%20VITALSIGNS3_ALL_FINAL.pdf.



isolated for decades from opportunities for meaningful employment and economic advancement.

The City of Baltimore is currently trying to address these problems through the development of a center for biotechnology on thirty acres in a seriously blighted section of the city, adjacent to Johns Hopkins. It is hoped that this biotechnology center, with approximately two million square feet of space for research and business activities, will both complement existing activities at Johns Hopkins and generate substantial new opportunities for neighborhood residents. The City estimates that the new development will create six thousand new jobs, about one-third for individuals whose highest level of education is a high school diploma or equivalent.

The City is currently acquiring land for the proposed biotechnology center through both purchase and eminent domain. Of the approximately 1,700 total properties that the City expects to acquire in East Baltimore, approximately 1,150, or about two-thirds, are abandoned, while approximately 550 are currently- or recently-occupied private homes or businesses. The acquisition phase of the project has been accompanied by an intensive program of outreach to neighborhood residents, focused both on facilitating the relocation process and on workforce development.

The City, through its elected officials, has decided to pursue the development of a biotechnology center, a project that simply could not take place in an area divided into 1,700 separate parcels of land if the City were unable to exercise its power of eminent domain. The courts can and must protect individual property owners by ensuring that they are given "just compensation" for their land. But

it is for the people of Baltimore and their elected representatives, not the courts, to determine whether the East Baltimore biotechnology center is a "public use" of the land where the center will be located.

For Baltimore to continue its redevelopment efforts, it needs the flexibility that this Court's Takings Clause jurisprudence affords. Petitioners invite the Court to depart radically from that jurisprudence. The City of Baltimore respectfully urges the Court to decline that invitation and to reaffirm the deference that is due to government decisions in this critical area.

## CONCLUSION

For the reasons stated, *amicus*, the City of Baltimore, respectfully urges that the judgment below be affirmed.

Respectfully submitted,

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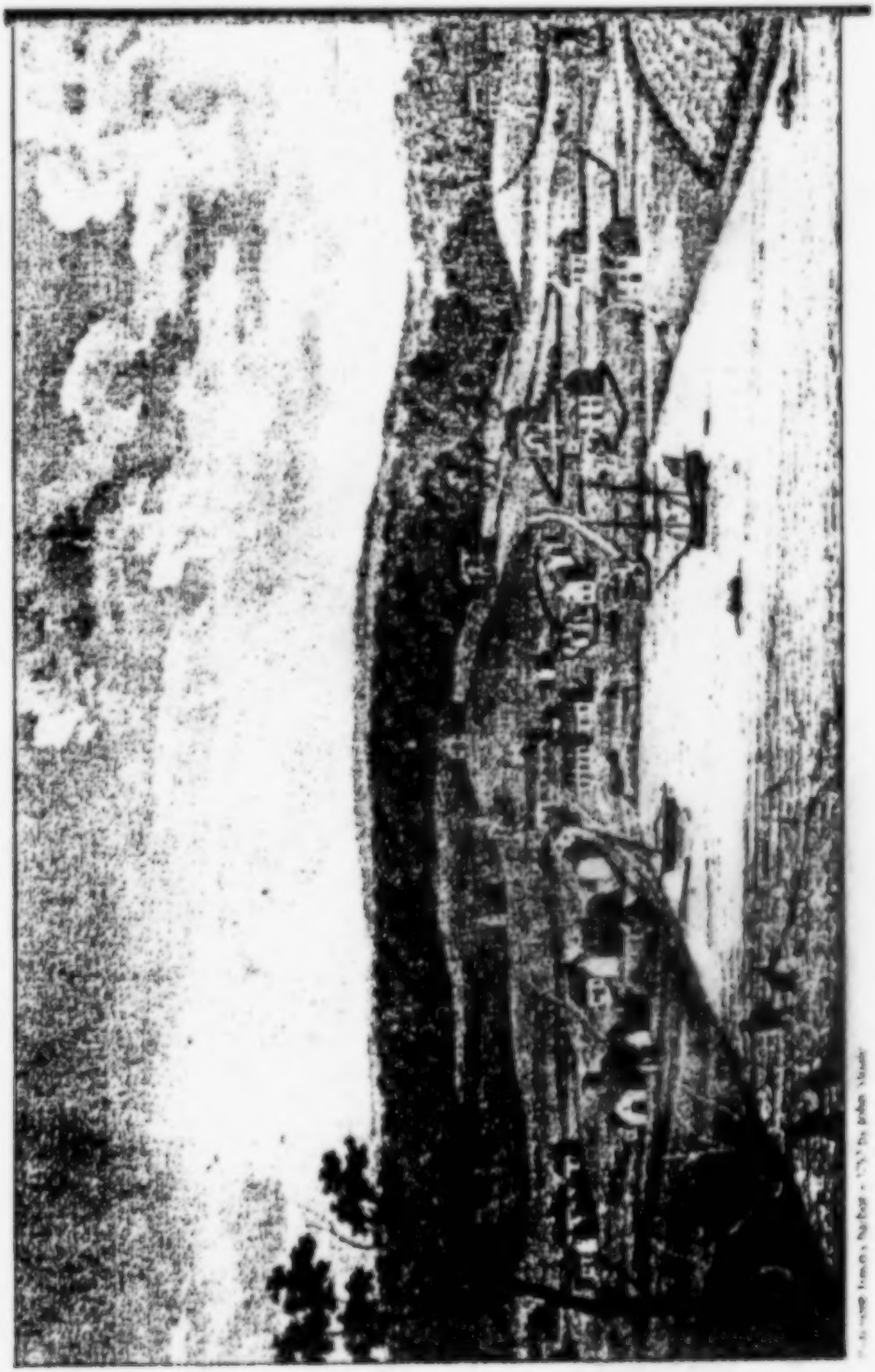
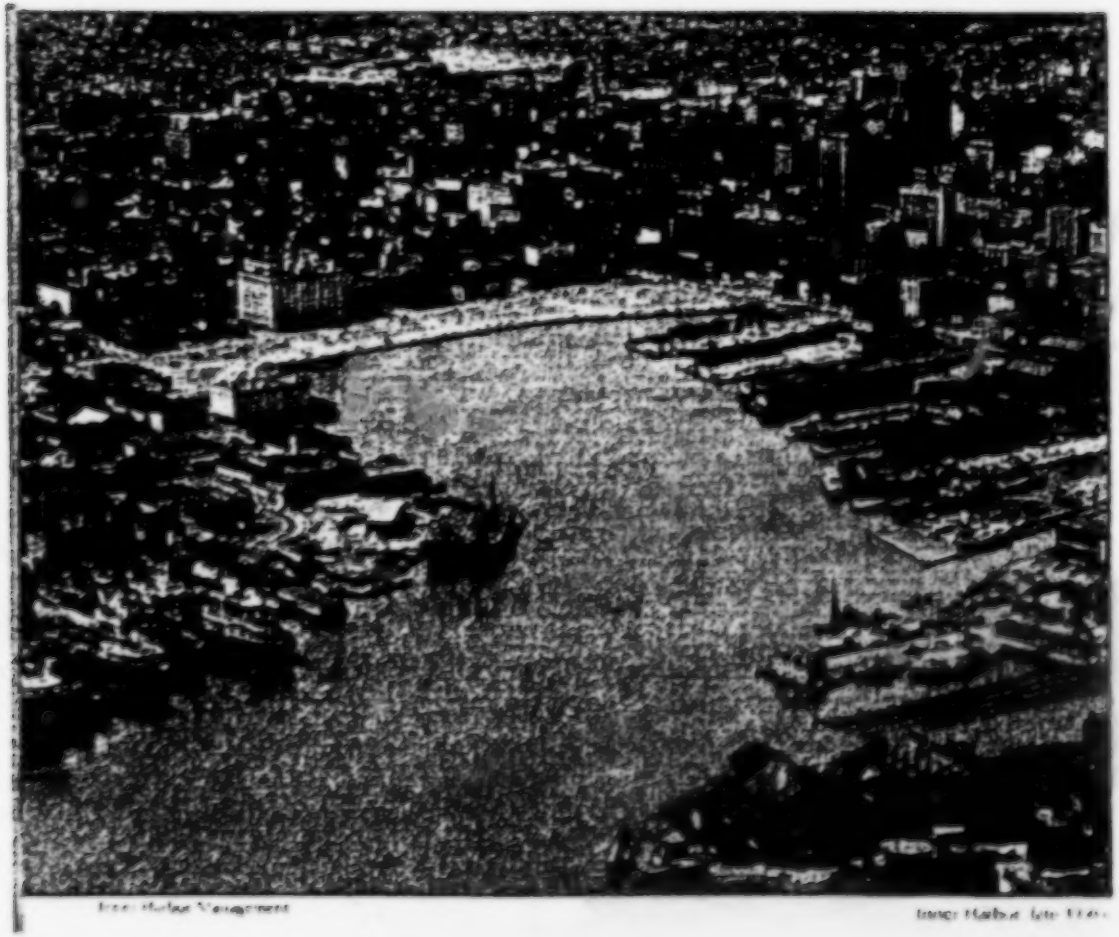
January 21, 2005





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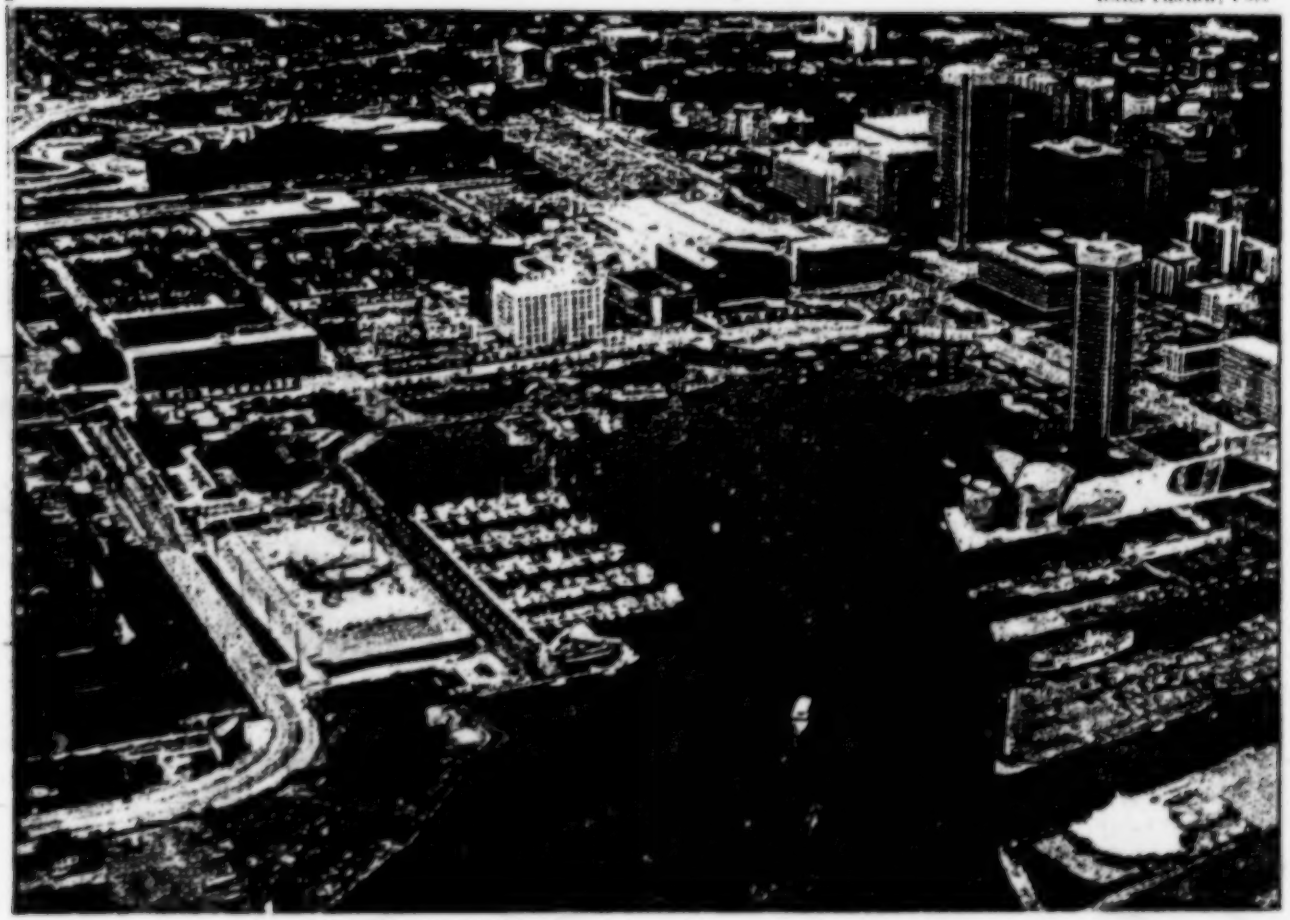

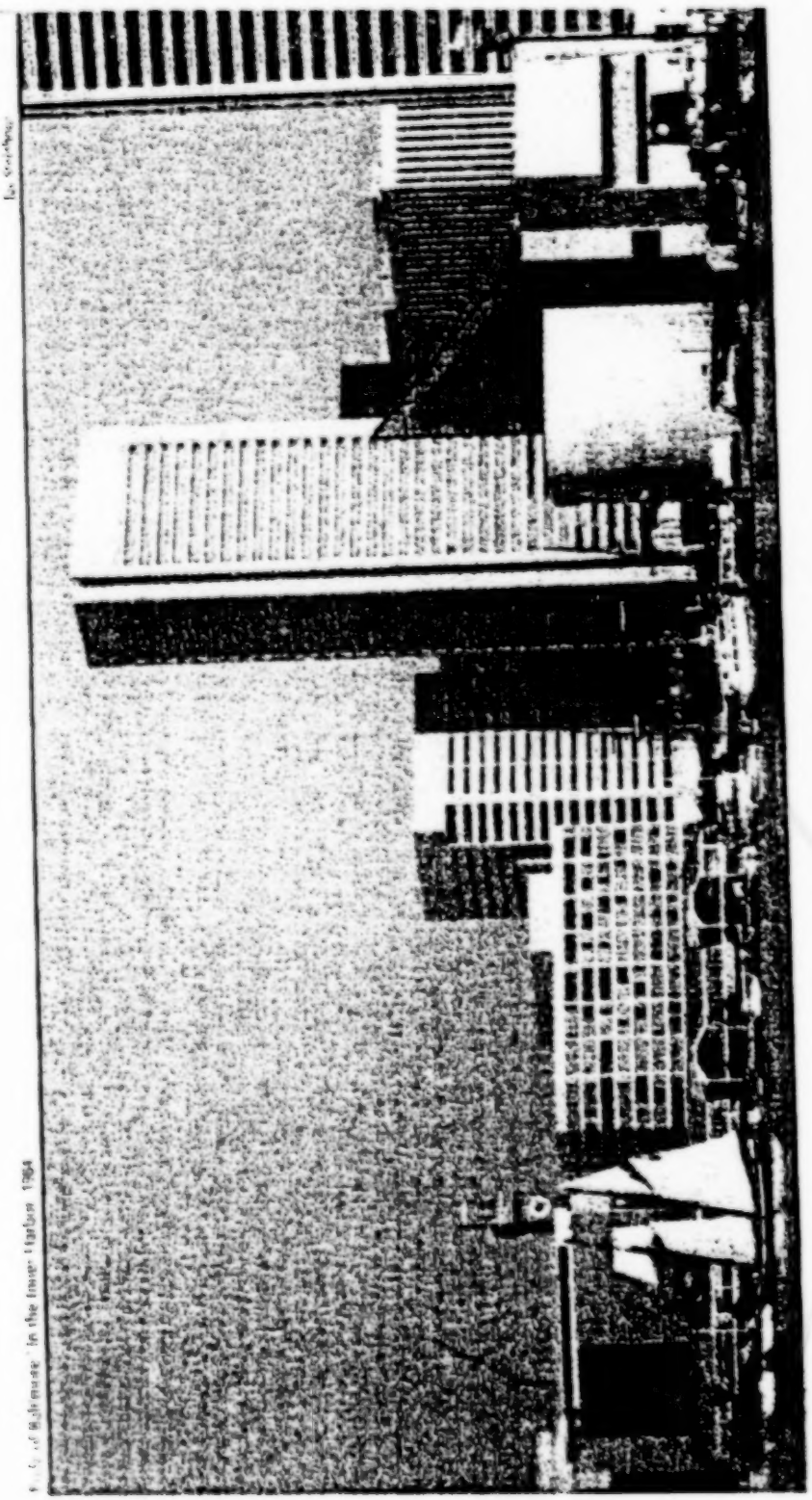

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# In The Supreme Court of the United States

SUSETTE KELO, *et al.*,

*Petitioners,*

v.

CITY OF NEW LONDON, CONNECTICUT,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## *AMICUS CURIAE* BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONERS

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## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONERS

Mountain States Legal Foundation and Defenders of Property Rights respectfully submit this *amicus curiae* brief on the merits in *Susette Kelo, et al. v. City of New London, Connecticut*, in support of Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the Fifth Amendment

[1] Counsel for Petitioners, Susette Kelo, *et al.*, and Respondents, the City of New London, Connecticut, have filed "blanket" consents for the filing of *amici* with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

constitutional protections afforded property. For example, MSLF represented the prevailing party in *Laguna Gatuna, Inc. v. United States*, 50 Fed.Cl. 336 (2001). MSLF also participated as *amicus* in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Moreover, MSLF currently represents several clients whose property is under threat of transfer to private developers at the hands of eminent domain authorities under the guise of the so-called "public use" doctrine. MSLF believes that its expertise in the area of Fifth Amendment constitutional guarantees will assist this Court.

Defenders of Property Rights ("Defenders") is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).



## BACKGROUND

Susette Kelo would like to continue living in her newly-restored, waterfront home of seven years. Her neighbor, Wilhelmina Dery, would like to continue living in the home in which she was born in 1918 and, for the past fifty years, has shared with her husband, Charles. Pfizer Corporation, on the other hand, with sales last year totaling in excess of $45 billion, would prefer that the City of New London, Connecticut, condemn these and neighboring properties only to have the ninety acres on which they are located leased to a "Pfizer-pfriendly developer" at the bargain basement price of $1 per annum.[2] Never mind that on this very same acreage, the developer is slated to construct some ninety "upscale residences."[3]

Of course, the ultimate question before the Court in this case is "whether the Fifth Amendment's 'public use' requirement prohibits the exercise of eminent domain solely for reasons of 'economic development'?" A threshold and more fundamental question must first be answered, however. That is, whether it is ever the proper role of government in a free society to confiscate property at below-market prices for divestiture to some private, politically-connected entity at

[2] *Kelo, et al. v. City of New London*, 843 A. 2d 500, 510 (Conn. 2004).

[3] *Kelo* at 539.

some even lower, below-market price.[4] This Court initially answered such questions with a principled and resounding "no."[5] However, this Court subsequently abandoned that fundamental principle in deciding the cases of *Berman*[6] and *Midkiff*.[7] Even if this Court continues to ignore the inherent injustice of forced redistribution of property from the politically estranged to the politically connected under the guise of "public use," it should not, as requested by the City of New London, equate "public use" with "public benefit" or further broaden the definition of public use to include what some small band of central planners determine is "economic development." Rather, this Court should restore the pre-*Berman* definition of public use – especially given the bureaucrat's inherent inability to engineer in

[4] *See generally* Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles*" 201-205 (Ludwig Von Mises Institute rev. ed. 1993). (Any legitimate market price is established by market participants engaging in voluntary, rather than forced, exchanges. It is axiomatic that the initiation of forceful condemnation is by definition not voluntary and thus, does not generate a market price. Also, insofar as the law generally recognizes real estate as unique, no price absent that generated between the buyer and seller of a specific property truly qualifies as a market price.)

[5] "[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." *Calder v. Bull*, 3 U.S. 386, 388-89 (1798).

[6] *Berman v. Parker*, 348 U.S. 26 (1954).

[7] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).



advance, in any scientifically viable or economically legitimate way, economic development or growth.

## ARGUMENT

### I. THE PROPER ROLE OF GOVERNMENT IS SECURING INDIVIDUAL RIGHTS; NOT MAXIMIZING TAX REVENUE. THE COURT MUST SERVE AS A CHECK TO PREVENT TYRANNY BY THE MAJORITY.

> [R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic . . . The great end for which men entered into society, was to secure their property.[8]

A dominant theme of the Declaration of Independence is that individual rights pre-exist governments and that governments are created for the purpose of securing these pre-existing rights.[9] It necessarily follows that, if government receives its power only from the individuals it governs, only rights held by those individuals could, in turn, be bestowed upon that government. That is, if the individual has no right to take by force his neighbor's justly-acquired property for his private use, neither could

[8] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

[9] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." *The Declaration of Independence* para. 2 (U.S. 1776).

it be said that government could legitimately acquire such a right to act collectively for those individuals over whom it governs. Yet, this is exactly the role the City of New London hopes this Court will again sanctify. Unfortunately for Ms. Kelo, the City of New London has reason to be optimistic because, as this founding principle and, hence, property rights have been neglected by this Court and others, government has become the very means by which individuals acting collectively do exactly that which government was established to prevent in the first place – the forcible taking of property.

Following the lead of this Court and citing to both *Berman* and *Midkiff*, the Connecticut Supreme Court has, in the instant case, likewise abandoned its proper check on a legislature that has ignored both "respect for the sanctity of the home" and the "great end for which men entered into society." The Connecticut Court, in fact, goes so far as to categorize the simple maximization of revenue as a "public use" and a governmental end in itself – an end, in fact, that, in that court's view, justifies ignoring the plain language of both the state and federal constitutions.[10]

Certainly, while governments need money to operate police forces and court systems to protect individual rights, maximizing revenue through forced private exchanges of justly-acquired property as we see in this case is hardly a means consistent with *bona fide* governmental ends. Here, of course, central planners at the New London

[10] "We, therefore, conclude that the plaintiffs have not proven beyond a reasonable doubt that the provisions of chapter 132 of the General Statutes authorizing the use of eminent domain are facially unconstitutional when used in furtherance of an economic development plan such as the development plan in the present case." *Kelo* at 536.



Office of Development and Planning attempt only to forcibly seize property rights rather than protect them because, they claim, with dollar signs in their eyes, they are somehow privy to how to best utilize any given property, irrespective of the owners' prior investment, knowledge, or desire.

As a result of this Court's prior decisions and the decisions of the States that have followed them, this Court will likely be reminded *ad nauseum* (and deservedly so) by individual rights advocates in this case that "[A] law that takes property from A. and gives it to B: It is against all reason and justice."[11] This reminder is most appropriate given the Court's abandonment of its proper role of protecting property rights against the tyranny of the majority.

The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the "tyranny of shifting majorities." *I.N.S. v. Chadha*, 462 U.S. 960, 961 (1993). The Framers properly perceived that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Theirs was not a baseless fear. "Under British rule, the colonies suffered the abuses of unchecked executive power that were attributed, at least popularly, to an hereditary monarchy." *See* Levi, *Some Aspects of Separation of Powers*, 76 Colum.L.Rev. 369, 374 (1976); The Federalist No. 48.

[11] *See supra* note 5.

During the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown. "The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts." Levi, 76 Colum.L.Rev., at 374-375.

Yet, here, the Supreme Court of Connecticut has (as has this Court, previously) neglected its proper constitutional role as a check on the legislature and allowed, as Henry Louis Mencken would say of pure democracy unchecked by courts, the "running of the circus from the monkey cage."[12] Mencken further emphasized, in an essay criticizing the Court and Justice Holmes for deferring (at the expense of individual rights) to the legislature and deciding cases consistent with Holmes' belief "that the law-making bodies should be free to experiment almost *ad libitum*, that the courts should not call a halt upon them until they clearly passed the uttermost bounds of reason, that everything should be sacrificed to their autonomy, including, apparently, even the Bill of Rights":[13]

> It is the aim of the Bill of Rights, if it has any remaining aim at all, to curb such prehensile gentry. Its function is to set a limitation upon their power to harry and oppress us to their own private profit. The Fathers, in framing it, did not

[12] http://www.watchfuleye.com/mencken.html

[13] Henry Louis Mencken, *A Mencken Chrestomathy* 259 (Alfred A. Knopf 1949).



> have powerful minorities in mind; what they sought to hobble was simply the majority. But that is a detail. The important thing is that the Bill of Rights sets forth, in the plainest of plain language, the limits beyond which even legislatures may not go.[14]

Addressing below the Connecticut Supreme Court's failure to acknowledge the "plainest of plain language" as it relates to the requirement of "public use" rather than "public benefit," the Connecticut Supreme Court errs as significantly by deferring inappropriately to the legislature and allowing the tyrannical majority to reign supreme. While paying lip service to "specific constitutional limitations,"[15] the court below nevertheless embraced the notion that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and "a public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government."[16]

"However, if the legislature may say that a transfer of property from one to another may be deemed for public use because of any amount of public benefit incidentally arising therefrom, then the whole control of the subject is with the legislature, and the constitutional restraint is gone." *Olmstead v. Camp*, 33 Conn. 532 (1866) (Petitioner's argument). Moreover, if generating addition tax revenue is sufficient for condemnation, there is then virtually no security left in residential private property;

[14] *See* Mencken, *supra* note 13 at 261.

[15] *Kelo* at 525

[16] *Kelo* at 524-25.

nearly any individual lot could be put to some commercial use that would generate more property tax income.

## II. "PUBLIC USE" IS NOT "PUBLIC BENEFIT."

The Connecticut Supreme Court failed to adhere to the Bill of Rights' "plainest of plain language" because "public use," as required by both the state and federal constitutions, and "public benefit" are entirely different things.

"It may be a public benefit that all the lands of the state should be under cultivation or that all the vacant building lots in our cities should be built upon and occupied by industrious families, but a transfer of title by legislative authority in these instances to such as should so cultivate and occupy in order to produce such public benefit, would be void, because though for public benefit it is not a taking for public use." *Olmstead v. Camp*, 33 Conn. 532 (1866). The "public may have an interest in the particular use which is made of property, as for instance in having it used for manufacturing instead of agricultural purposes, but that does not make the manufacturing use a public use. The legislature has no power to make that a public use which in its nature is a private use." *Id.* As was the decision in *Olmstead*, it is also "true that [some] courts have indulged the fiction that a private use is a public use, simply because it was for the general welfare or of public utility or benefit, but this conceit, however pardonable, does not change the use from private to public." *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 144 P. 277, 279 (Ariz. 1914).

Fortunately, at least for the citizens of several states, application of the plain language of the law to facts is not



lost on their respective judiciaries. Rather, in those states, "[T]he public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it." *County of Wayne v. Hathcock*,[17] 684 N.W.2d 765 (Mich. 2004) *citing Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 538, 49 N.W. 894 (1891).

The Washington Supreme Court has also "consistently held that 'a beneficial use is not necessarily a public use.'" *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 189 (Wash. 2000). Likewise in Virginia, "the *public use* implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies." *Ottofaro v. City of Hampton*, 574 S.E.2d 235, 237 (Va. 2003) citing *Phillips v. Foster*, 211 S.E.2d 93, 96 (1975). In fact, the states of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington (and now Michigan[18]) have ruled, using a narrow view of their public use clauses, that economic development is, by itself, not a "public use" for eminent domain purposes.[19]

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[17] Although *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), was relied upon heavily by the *Kelo* court, the Michigan Supreme Court, in deciding *County of Wayne*, expressly overturned *Poletown* subsequent to the Connecticut Supreme Court deciding *Kelo*.

[18] *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

[19] *Kelo* at 532.

## III. EVEN IF "PUBLIC BENEFIT" WERE THE TEST, FORCED REDISRIBUTION BETWEEN PRIVATE PARTIES AT THE HANDS OF CENTRAL PLANNERS DOES NOT CONSTITUTE ECONOMIC DEVELOPMENT.

The City of New London would have this Court believe that its condemnation of the properties in question for divestiture by way of a discount lease to Pfizer-pfriendly developers constitutes economic development. But "economic development" is not something engineered by central planners at the New London Office of Development and Planning or any other planning bureau, for that matter. In fact, because of the subjectivity of utility, no measure of economic development exists outside the market mechanism of pareto superior actions.[20]

Moreover, as is nearly always the case, elected officials justify their actions by relying on "what is seen" and ignoring "that which is not seen."[21] It's easy to point to a new hotel adjacent to a research facility built with subsidized (or confiscated) means and proclaim, "see what I, the benevolent politician, have done for the community." What is less apparent or not seen is the production or enjoyment that would have been generated by the money or property left in the taxpayers or landholders hands to spend or enjoy freely.[22] But by what means does or can the central

[20] *See* Rothbard, *supra* note 4, at 78-79. *See also* Joseph F. Becker, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States*, 15 N. Ill. U. L. Rev. 671, 695 (1995).

[21] *See* Henry H. Hazlitt, *Economics in One Lesson*, Chapter 4 (Laissez Faire Books 1996).

[22] *See* Hazlitt, *supra* note 21, Chapter 4.



planner balance the value or benefit of the Pfizer-pfriendly development with that value or benefit forcibly taken from the taxpayer or property owner?

The not-readily-seen economic damage, however, is considerably more widespread. Not only does the Development and Planning Department engage in malfeasance with respect to Petitioners, it does so only at additional injury to every other landowner who could otherwise compete in the commercial or residential real estate marketplace for the purchasing dollars of Pfizer-pfriendly developers – to include adjoining landowners and those in neighboring communities (or states) who would have been delighted to sell their properties to Pfizer in a non-coercive market and at a price that would allow Pfizer to operate its research facility without enlisting the aid of bureaucrats and taxpayers.

In fact, the citizens in Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington[23] (and most recently Michigan[24]), whose states have embraced the literal and property right-embracing view of their "public use" clauses, are no longer allowed to compete fairly for the research centers of the Pfizers of the world because those states are not willing to abandon principle as the Connecticuts and federal courts have done. Yet, when the seeds of interventionism sown by the likes of Connecticut result in the misallocation of resources and further blight (as they necessarily will)[25], it

[23] *Kelo* at 532.

[24] *See supra* note 18.

[25] Properties best suited for development by market standards, instead of being used as such, lie dormant, whereas property already properly utilized (in the property owners') view is misused.

will be the federal tax dollars paid by the more prosperous taxpayers in the property-respecting states that bailout the fiscal woes of the outlaw states through federal Urban Development Action Grants ("UDAG"s) and their ilk.[26]

Institutional deficiencies such as these, when allowed to exist by the Courts, can hardly be said to engender a public benefit. Internalizing costs to decisionmakers, to the extent it can be done, is the means by which economies can grow and benefit by minimizing efficiency losses.[27]

Rather, real economic development (and public benefit) exists only within the pareto superior actions of moving resources to uses more compatible with societal needs and wants – genuine economic development does not consist of forced governmental transfers of property from owners who value it more highly to those, like Pfizer Corporation, who value it less highly. Meanwhile, such illegitimate actions leave property available for sale and use that would have been sold voluntarily by owners at a price that also would have allowed Pfizer to be truly profitable (in a market sense).[28] Pareto superior actions

[26] *See* William L. Anderson, Ph.D., *The Upside of the Chavez Debacle*, http://www.mises.org/fullstory.aspx?Id=585

[27] James D. Gwartney, *Economics: Public and Private Choice* 127-128 (Dryden 9th ed. 2000) (When property rights are not fully enforced, the actions of a producer or consumer might harm the property (or the person) of another, because the law fails to force the party doing the harm to bear the cost or to stop the harm. This failure results in efficiency losses and spillover effects called externalities, actions of an individual or a group that influence the well-being of other without their consent.) Or, as said by economist Thomas Sowell, "It is hard to imagine a more stupid or more dangerous way of making decisions than by putting those decisions in the hands of people who pay no price for being wrong."

[28] *See* Anderson, *supra* note 26.



are defined as those actions by which "one or more people are better off (in terms of satisfying utility) . . . while no one is worse off."[29] These actions move society toward a pareto optimal state of efficient allocation where no further actions with property can be taken without making someone else worse off. Socializing costs while internalizing profits for the politically connected is an economic system incompatible with a free society. In fact, it will be these unseen, unsold Pfizer-viable properties that will soon be labeled "blighted" and become justification for the next round of corporate/government partnership land grabs thus setting the whole cycle in motion, yet again.[30]

A court of law that myopically views only that which is seen and ignores the overall economic efficiency loss to the state or country as a whole in the name of boosting a narrow economic region upholds a system of laws that, at a minimum, fails the rational basis test on which *Kelo* is, in part, decided. That is, it cannot even rationally be said that the actions of the City of New London result in economic development – especially economy-wide.

[29] *See supra* note 20.

[30] Although not argued as justification for using the power of eminent domain in this case, even to the extent that blight exists, it is either a consequence of nature-given scarcity or, more often, little more than the consequence of some prior market intervention ranging from rent control, prohibition, public housing projects, or excessive taxation. To the extent so-called blight is a consequence of nature-given scarcity, there is no serious science to suggest that intervention will do anything other than make matters worse – if not on location, then somewhere else (see above). The City of New London, of course, does not contend it is engaged in the ill-informed but well-meaning attempt at blight removal. Instead, revenue maximization for its own sake is its stated purpose.

These, however, are not the only economic losses. Further losses result from injecting further uncertainty into an economy. Should this Court continue in its decisions to abandon again the sanctity of the home and the great end for which men entered into society, it will do so at the cost of further destroying economic development countrywide. Uncertainty in property rights will generate economic stagnation – not development. Economic growth and long run prosperity can only increase, *ceteris paribus*, as savings or investment increase.[31] A society that must devote all of its present resources to producing the consumer goods necessary to sustain life from day to day is necessarily stagnant and will enjoy no increase in prosperity. Only by producing more than it consumes, can it sustain itself during periods of production of higher order capital goods, which, once produced, can be used to produce consumer goods more efficiently. Uncertainty, however, plays a major role in the utility increasing aspects of savings and investment.[32] To the extent that savings are not possible to safeguard or property rights become suspect, a shift from savings to consumption invariably results and, again, economic growth is curtailed.[33] For this reason, to maximize societal wealth and economic growth, a legal system must avoid allowing property rights to become subject to forceful abdication.

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[31] Ludwig Von Mises, *Human Action* 490 (Laissez Faire Books 3rd rev. ed. 1966). ("[P]ostponement of consumption makes it possible to direct action toward temporally remoter ends. It is now feasible to aim at goals which could not be thought of before on account of the length of the period of production required. . . . Saving is the first step on the way toward improvement of material well being and toward every further progress on this way")

[32] See Rothbard, *supra* note 4 at 52.

[33] See Von Mises, *supra* note 31.



## CONCLUSION

Thomas Jefferson said, "A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine." It is this Court's role to check the tyranny of the majority and secure individual rights from legislatures and planning commissions. It is also this Court's role to apply the plain language of the Connecticut and federal constitutions and restrict eminent domain condemnations to those legitimately for "public use." Lastly, no system of rules or laws that allows confiscation of property below genuine market price for delivery to the politically connected could rationally be said to foster economic development. Rather, these non-pareto superior actions and the resulting institutional uncertainty undermine the fundamental framework that would otherwise promote genuine economic growth. For all these reasons, *amicus curiae* urge this Court to reign in those who would remove Petitioners from their homes and restore the narrow and proper definition of "public use" to exclude forceful private entity to private entity transfers.

Submitted December 2, 2004.

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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court of Connecticut**

## BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AARP, HISPANIC ALLIANCE OF ATLANTIC COUNTY, INC., CITIZENS IN ACTION, CRAMER HILL RESIDENT ASSOCIATION, INC., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*

The National Association for the Advancement of Colored People ("NAACP"), AARP, Hispanic Alliance of Atlantic County, Inc. ("Hispanic Alliance"), Citizens in Action ("CIA"), Cramer Hill Resident Association, Inc. ("CHRA"), and the Southern Christian Leadership Conference ("SCLC") submit this brief as *amici curiae*.[1]

The NAACP, established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

AARP is a nonpartisan, nonprofit membership organization of more than 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity, and purpose. Livable communities and economic security are two of the key social impact goals for AARP. AARP is deeply concerned with the preservation of home equity, the availability of affordable, safe, decent and stable housing and the elimination of discrimination in housing. In addition, AARP supports the ability of older people to receive the services they need in their homes and to age with dignity in their community. AARP is deeply committed to ensuring that its members are not forced out of their homes and communities except as a means to remove blight or for a needed traditional public

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[1] Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* state that all parties have given written consent to the filing of this brief. Copies of the consent letters are on file with the Clerk. Further, pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* also state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members or counsel, made a monetary contribution to the preparation or submission of this brief.

use and to ensuring that when such displacement must occur that older homeowners receive compensation that recognizes the unique costs of their dislocation. AARP's advocacy on behalf of its members has included representing through AARP Foundation Litigation (AFL) low income and minority individuals and community groups challenging redevelopment plans that would result in the taking of their homes. AFL is currently engaged in litigation challenging as racially discriminatory a redevelopment plan that uproots hundreds of residents, many of whom are elderly.

The Hispanic Alliance is a New Jersey corporation with offices located in Atlantic City, New Jersey. The Hispanic Alliance engages in educational, charitable and advocacy activities on behalf of and to further the interests of the Hispanic community within Atlantic County. Representing the Hispanic community of Ventnor, New Jersey, the Hispanic Alliance is challenging that city's targeting of a 26-block neighborhood with a highly concentrated Hispanic population which, if allowed to proceed, will result in the displacement of 332 households. That suit is pending before the Law Division of the Superior Court of New Jersey.[2]

CIA is an unincorporated community organization composed of residents of the Mt. Holly Gardens neighborhood of Mt. Holly Township, New Jersey. CIA is challenging a redevelopment plan adopted by Mt. Holly Township which calls for the demolition of all homes in the cohesive, racially and ethnically diverse neighborhood.[3]

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[2] *Hispanic Alliance of Atlantic County v. City of Ventnor*, Superior Court Docket No. ATL-C-136-03. Ventnor's redevelopment plan is also pending judicial review in the matter of *Richard Gober v. City of Ventnor*, sustained by the Law Division and the Appellate Division of the Superior Court of New Jersey at Docket Nos. ATL-L-3367-01 and A-2837-0T2, respectively. A petition for certification is currently pending before the New Jersey Supreme Court at Docket No. 56,525.

[3] *Citizens in Action, et al. v. Township of Mt. Holly*, Superior Court Docket No. BUR-L-003027-03.



CHRA is a non-profit corporation founded for the purpose of improving the quality of life in the Cramer Hill neighborhood in Camden, New Jersey, uniting and involving residents in community activities and decision-making, engaging in neighborhood planning and revitalization, and defending the Cramer Hill community against unjust use of eminent domain, and forced displacement of Cramer Hill residents. The membership of the Association is comprised of residents of the Cramer Hill neighborhood. The CHRA is currently challenging a redevelopment plan adopted by city and state officials which, if implemented, would require displacement of more than 1,000 households living in Cramer Hill by eminent domain.[4]

The Southern Christian Leadership Conference ("SCLC") is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other civil rights ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country.

## SUMMARY OF ARGUMENT

The Connecticut Supreme Court has interpreted the Fifth Amendment's requirement that any taking be for a "public use" in a way that renders those very words meaningless. Its holding that government may take property from a private citizen for the purpose of giving it to another private party purely for "economic development" is both inconsistent with the language of the Constitution and dangerous. Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly.

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[4] *Cramer Hill Residents' Association v. Melvin R. "Randy" Primas*, Superior Court Docket No. ___ (not yet assigned).

Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development on those least able to bear it, exacting economic, psychic, political and social costs.

The Constitution requires that any taking pursuant to the state's eminent domain power be for a "public use." Although this Court has not had cause to delineate the limits of permissible "public uses," state court decisions addressing similar provisions of state constitutions have held that something more than the mere possibility of future economic benefits is necessary to justify the exercise of eminent domain power.

Expanding eminent domain such that a stated desire for "economic development" alone satisfies the public use requirement would grant government a power that is not merely different in scope but different in kind from traditional eminent domain authority. It would remove what few checks there are on that power, virtually eliminate judicial review and fail to protect the rights of already disadvantaged groups from majoritarian pressures.

## ARGUMENT

### I. The Fifth Amendment Specifically Requires That Any Taking Be for a Public Use.

The power of the state to compel the sale of individual property, while long recognized and necessary under certain circumstances, is among the greatest intrusions permitted by our Constitution. It often requires individuals or families to give up their most valuable and important possessions – their homes – and even to leave lifelong communities.

The Framers created a government of limited powers, with the essential purpose of protecting private property



as well as persons.[5] The right to own and use private property is both fundamental to liberty[6] and a tangible expression thereof.[7] This Court has recognized the central and fundamental role of such rights in our system of ordered liberty.[8]

Because the eminent domain power does such violence to this fundamental right, the Fifth Amendment to the United States Constitution allows such a taking only where it is demonstrated that taking is for a "public use."[9] The public use requirement is the only true limit on the eminent domain authority.[10] Thus, the breadth or narrowness of the definition of "public use" dictates the permissible scope of the eminent domain power.

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[5] "[G]overnment is instituted no less for the protection of property than of the persons of individuals." THE FEDERALIST NO. 54, at 370 (Jacob E. Cooke ed., 1961) (James Madison); *see also* James Madison, Property, National Gazette (Mar. 27, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland, et al. eds., 1983) ("Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

[6] "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA (4th Ed., New York 1775).

[7] "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993).

[8] "The right to enjoy property without unlawful deprivation . . . is, in truth a 'personal' right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

[9] "Nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

[10] The only other requirement, that the private party from whom property is taken be given "just compensation," may limit the attractiveness of certain takings, but does not determine whether a taking is permissible.

In this case, "public use" has been defined so broadly that eminent domain authority has no practical limits. The Connecticut Supreme Court held that the use of eminent domain to transfer property from one private party to another purely because the transfer is likely to lead to greater "economic development" satisfies the public use requirement. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). To hold that the public use requirement is satisfied wherever there are potential economic benefits to be realized is to render the public use requirement meaningless.[11] Allowing a taking simply because the party to whom the state wishes to transfer the property has a greater ability to maximize the value of that property fails to account for the rights of the individual property owners and would systematically sanction transfers from those with less resources at their disposal to those with more.

Moreover, expanding the scope of "public use" to include "potential for economic development that may ultimately benefit the public" would arguably include virtually any use and thus render meaningless the judicial review of takings cases. Such a rule would leave this important fundamental right subject to the unrestrained will of the majority.[12] Absence of judicial protection from

[11] Not only does such a reading fail to protect vital rights, it also is contrary to the venerated canon of construction that provisions are interpreted in a fashion that gives meaning to all terms. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77 (1946); *Wright v. United States*, 302 U.S. 583, 588 (1938).

[12] As Justice Story explained, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829); *see also Calder v. Bull*, 3 U.S. 386, 388 (1798) (There "are acts which the Federal, or State Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments which will determine and overrule an apparent and flagrant abuse of legislative power" such as "a law that takes property from A and gives it to B: it is against all

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majoritarian impulses is especially troubling to *amici*, who represent the interests of groups that are targets of the overuse and abuse of the power in question.

## II. The Burden of Eminent Domain Has and Will Continue to Fall Disproportionately upon Racial and Ethnic Minorities, the Elderly, and the Economically Disadvantaged.

Absent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly. These groups have been targeted for the use and abuse of the eminent domain power in the past and there is evidence that, if use of the eminent domain power for pure "economic development" is permitted, these groups will be both disproportionately and specially harmed by the exercise of that expanded power.

### A. Eminent Domain Power Has Historically Been Used to Target Racial and Ethnic Minorities.

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro removal." 12 THOMPSON ON REAL PROPERTY 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin); *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

reason and justice, for a people to entrust a Legislature with such powers.").

One commentator has described how "a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations." Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 53 (2002). Ninety percent of the 10,000 families displaced by such projects in Baltimore were African-American. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 29 (1989). Los Angeles eviscerated a Mexican neighborhood with freeway projects. *Id.* Another scholar has estimated that 1,600 African-American neighborhoods were destroyed by similar projects. MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 17 (2004).

This was no accident or oversight. The former Attorney General of Minnesota recounted his work on a Minneapolis highway project in the 1950s:

> We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose on society.

FRIEDEN & SAGALYN, DOWNTOWN, INC. at 28-29.

This phenomenon does not exist exclusively in the past. *See, e.g.*, Charles Toutant, *Alleging Race-Based Condemnation*, NEW JERSEY LAW JOURNAL, Aug. 2, 2004 (discussing litigation alleging that cities and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); Erik Schwartz, *Progress or Discrimination? Facing Displacement, Minorities Battle Towns' Eminent Domain*, COURIER-POST, July 30, 2004.



### B. Even Absent Abuse, Takings for "Economic Development" Will Disproportionately Affect Neighborhoods with Relatively High Concentrations of Racial and Ethnic Minorities and the Elderly.

Even absent illicit motives, eminent domain power has affected and will disproportionately affect racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels and office parks. *See* DANA BERLINER, *Condemnations for Private Parties Destroy Black Neighborhoods and Out with the Old: Elderly Residents are Prime Targets for Eminent Domain Abuses in* PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 102, 185 (April 2003).

For example, four siblings in their seventies and eighties were forced to leave their homes and Christmas tree farm to enable the city of Bristol, Connecticut to erect an industrial park. *Bugryn v. City of Bristol*, 774 A.2d 1042 (Conn. App. Ct. 2001), *appeal denied*, 776 A.2d 1143 (Conn. 2001), *cert. denied*, 534 U.S. 1019, 122 S. Ct. 544 (2001).[13] Several African-American families in Canton, Mississippi were similarly forced to leave the homes they had lived in for over sixty years to clear land for a Nissan automobile plant. *See* David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20.[14]

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[13] In permitting the taking, the court observed that "the state had recognized the city as an economically disadvantaged community and that the industrial park would serve the public good by creating or retaining manufacturing jobs, creating additional industrial land in the city and increasing the tax base." *Id.* at 1049. Neither the legislature nor the court made any finding of blight.

[14] Again, the taking was not justified on the basis of blight or necessity. As the executive director of the Mississippi Development Authority explained:

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Statistics confirm that takings for economic development disproportionately impact these groups. In San Jose, California, ninety-five percent of the properties targeted for economic redevelopment are Hispanic or Asian-owned, even though only thirty percent of businesses are owned by minorities. Derek Werner, *Note: The Public Use Clause, Common Sense and Takings,* 10 B.U. PUB. INT. L.J. 335, 350 (2001) ("Between 1949 and 1963, sixty-three percent of all the families displaced by urban renewal were non-white."); *Poletown Neighborhood Council v. City of Detroit,* 304 N.W. 2d 455, 464 (Mich. 1981) (City of Detroit condemned the homes of approximately 3,438 persons, most of whom were elderly, retired, Polish-American immigrants, to build a General Motors plant). *See also Who Feels Renewal Most?* SILICON VALLEY/SAN JOSE BUSINESS JOURNAL, Sept. 20, 2002, at 1. Similarly, near Atlantic City in Ventnor, New Jersey, forty percent of the city's Latino community lives in a zone targeted for economic redevelopment. *See* Schwartz, *supra*. In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African-American residents (44%) is twice that of the entire Township and nearly triple that of Burlington County, and in which the percentage of Hispanic residents (22%) is more than double that of all of Mt. Holly Township, and more than five times that of the county. *Id.*; U.S. Census of Population and Housing, 2000: Tables for Blocks 1000, 1001, 1003 and 1009: (a) Vacancy Status, (b) Tenure by

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> It's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through.

*Id.* The trial court nonetheless ruled in favor of the taking. *Mississippi Major Impact Authority v. Archie*, No. Co-2001-0082 (Madison Cty., Miss. Spec. Ct. July 26, 2001). Upon motion of the families, the Supreme Court of Mississippi stayed the condemnations until it could consider the families' appeal. Once the stay was granted the state gave up its fight and dismissed its eminent domain actions.



Race of Householder, and (3) Tenure by Household Size (Hispanic or Latino Householder): Mt. Holly, New Jersey.[15] These statistics confirm that if eminent domain can be exercised for the purported public use of "economic development," the displacement of the poor, minorities and the elderly will only become more commonplace.[16]

The reason these groups are disproportionately affected is that they are palatable political and economic targets. Condemnations in predominately minority or elderly neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action. *See* Laura Mansnerus, *Note: Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409, 435-436 (1983) (discussing the difficulty of opposing condemnation proceedings). Condemning authorities target areas with low property values because it costs the condemning authority less (as market value is the measure of the "just compensation") and the state and/or local governments gain financially when they replace areas with low property values with those with higher values. Even assuming non-discriminatory motives, cities like New London have and will continue to target these areas. *See, e.g., Kelo,* 843 A.2d at 509 (Conn. 2004)

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[15] In both the Ventnor and Mt. Holly cases there were pretextual findings of blight, but the condemning authorities did not adhere to the applicable standards. Were "economic development" a public use and a finding of blight unnecessary, it would be substantially more difficult – if not impossible – for plaintiffs to stop such condemnations.

[16] As discussed in subsection C below, renters are, in some senses, placed in an even more difficult position than homeowners when their residence is taken by eminent domain. In New London, a disproportionate percentage of renters come from minority groups. New London is a racially and ethnically diverse community: 56.1% of its residents are white, 19.7% are Hispanic and 18.6% are African-American. U.S. Census of Population and Housing, 2000: Summary Population and Housing Characteristics: New London, Connecticut. But whereas 49.6% of New London's white population rent their homes, 70.9% of the city's African-American population and 75.7% of its Hispanic population are renters. *Id.*, Total Population in Occupied Housing Units by Tenure, 2000: New London, Connecticut.

(citing adding jobs and tax revenue as motivation for the taking); *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (same).

### C. The Impact of Takings on the Elderly, Minorities and the Economically Disadvantaged is Different in Kind from Their Impact on Other Populations.

The very circumstances that put minorities and the elderly at increased risk of being subjected to eminent domain power also leave those groups less able to deal with the consequences when such takings occur. Thus, it is not simply that the exercise of eminent domain, particularly when the purpose is "economic development," affects the elderly, minorities, and the economically disadvantaged more often than it does those with more political and economic power, but that it affects those groups in different and more profound ways.

Eminent domain law does not truly offer "just compensation" in the economic development context. "Just compensation" is generally defined as the fair market value of the property at the time of the taking. *See, e.g., Tandet v. Urban Redev. Comm'n*, 426 A.2d 280, 298 (Conn. 1979). The fact that particular property is identified and designated for "economic development," however, almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not currently recognizing. In addition, determination of just compensation is limited by the "project influence doctrine," which prevents the court's consideration of the likely change in market value as a result of the actual project for which the property is being condemned. *See, e.g., City of San Diego v. Rancho Penasquitos P'shp*, 130 Cal. Rptr. 2d 108, 119 (Cal. App. 2003); *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 560-61 & n.6 (Mo. App. 1983) (collecting cases). Thus, those displaced by eminent domain exercised for the purpose of "economic development" are systematically undercompensated.



Moreover, when an area is taken for "economic development," the underprivileged, racial and ethnic minorities, and the elderly are driven out of their own neighborhoods, unable to afford to live in the "revitalized" community.[17] Because the neighborhoods chosen are (in large part) selected because of the low market value of the properties therein, these displaced individuals will typically have a difficult time finding adequate replacement housing.

This phenomenon is clearly present in the case at hand. As of the most recent census, the median residential property value for owner-occupied residences in the City of New London is $107,900, whereas the value for such properties in the county is $142,200 and $166,000 statewide.[18] Moreover, in such economically disadvantaged areas, a disproportionately large percentage of the residents are renters rather than owners. New London is no exception,[19] and those renters may have an even more difficult time finding adequate replacement housing than do those who own their home.[20]

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[17] *See generally* Pritchett, *supra* p. 7; John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two:" Gentrification and The K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433 (2003).

[18] U.S. Census of Population and Housing, 2000: Median Value of Specified Owner-Occupied Housing Units: Connecticut.

[19] Over 62% of New London residents rent their homes as compared to the state-wide average of 33.2%. U.S. Census of Population and Housing 2000: General Housing Characteristics: Connecticut.

[20] Many of New London's renters struggle to pay their rent. As of the most recent Census, New London's per capita yearly income was $18,437. U.S. Census of Population and Housing, 2000: Connecticut. According to the U.S. Department of Housing and Urban Development (HUD), a household in New London earning $19,620 per year in 2003 could afford a maximum monthly rent of $491, whereas the Fair Market Rent (FMR) in New London for a one-bedroom household is $654 per month, and a two-bedroom household is $797 per month. 68 Fed. Reg. 56713 (October 1, 2003). State-wide, the FMR for a one-bedroom household is $752 per month, and a two-bedroom household is $936. *Id.*

Not only are other areas less likely to be affordable than that from which victims of eminent domain power for "economic development" are displaced, but the remaining "affordable" housing in the area is almost certain to become less so. Such takings invariably take lower cost housing and replace it with either business(es) or higher cost housing in order to achieve the goal of increasing the tax base and/or number of jobs. This reduces the supply of affordable housing in the area and drives up prices. Indeed, one study indicates that 86 percent of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling. HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 380 (2d ed. 1982); *see also* SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (citing multiple studies and concluding that "[a]ll ten . . . indicate substantial increases in housing costs").

Displacement presents a particular burden for the elderly. Over one-third of New London's homeowners are aged 65 or older. Overwhelmingly, the elderly strongly prefer independent living in their own homes to other alternatives. Not only is remaining in one's own home the vast preference of older people, *see, e.g.*, HOUSING ASSISTANCE COUNCIL, FEDERAL PROGRAMS AND LOCAL ORGANIZATIONS: MEETING THE HOUSING NEEDS OF RURAL SENIORS (2001), home ownership is associated with a reduced risk of entering a nursing home, as well as a greater likelihood of exiting if admitted. Vernon L. Greene and Jan I. Ondrich, *Risk Factors for Nursing Home Admissions and Exits: A Discrete-Time Hazard Function Approach* 45 J. GERONTOL. SOC. SCI. S250-S257 (1990). The risk of not being able to afford adequate replacement housing is particularly acute as New London residents aged 65 or over earn significantly less income per year than working



adults and 11.4% of the city's elderly population live below the poverty line.[21]

In addition to the increased risk of institutionalization, there is the considerable psychic harm that affects those dislocated from their homes and communities, particularly among the elderly. For example, one of the plaintiffs in this action, Wilhelmina Dery would, under the New London development plan, be removed from a home she was born in over 85 years ago and a community which her family settled upon their arrival from Italy in the early 1880s. Trial Tr., Vol. 1, 40-53 (July 23, 2001). Her husband has lived in their house with her for the past 59 years and their son and his family have lived in the house next door since he married. *Id.* The deleterious psychological effects of such upheaval have been studied and recorded. *See, e.g.*, FULLILOVE, ROOT SHOCK at 11-20; FRIEDEN & SAGALYN, DOWNTOWN, INC. at 34; GANS, THE URBAN VILLAGERS at 379. Indeed, studies have found tangible effects from such dislocation including increased risk from stress related diseases, such as depression and heart attack. FULLILOVE, ROOT SHOCK at 14.

Like the elderly, racial and ethnic minorities will suffer special harm from takings for the purpose of "economic development." To the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates (or severely undermines) established community support mechanisms and has a deleterious effect on those groups' ability to exercise what little political power they may have established as a community.[22]

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[21] U.S. Census of Population and Housing, 2000: Connecticut.

[22] The very threat of such takings will also hinder the development and improvement of strong minority communities. Enforcement of the constitutional limits on eminent domain power embodied in the Fifth

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## III. While This Court Has Permitted Use of the Eminent Domain Power to Remedy Blight, It Has Never Endorsed Taking Purely for Economic Development.

Permitting exercise of eminent domain power to transfer property from one private party to another for its anticipated "economic development" both fails to protect a fundamental individual right from majoritarian impulses, and places the burden of economic development most heavily upon those who are least able to bear it. Such a result is unjust and is in no way compelled by this Court's jurisprudence.

The Connecticut Supreme Court's conclusion that pure economic development constitutes a valid public use under the federal constitution relies primarily on a misreading of this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In *Berman*, the District of Columbia Redevelopment Land Agency acquired a stretch of land by eminent domain "for the redevelopment of blighted territory in the District of Columbia and the prevention, reduction or elimination of blighting factors or causes of blight." 348 U.S. at 29 (citation omitted). A department store in the blighted area challenged the taking. The Supreme Court allowed it, finding that blight could reasonably be addressed "on an area rather than on a structure-by-structure basis." *Id.* at 34. *Berman* found the District of Columbia Redevelopment Act constitutional, *as*

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Amendment "protects private expectations to ensure private investment." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria many minority neighborhoods will be at increased risk of having their property taken. Individuals in those areas will thus have less incentive to engage in community-building for fear that such efforts will be wasted.



*applied*. It did not address the Act's facial constitutionality.[23]

As applied, the redevelopment in *Berman* was fundamentally different than the activity in New London. The redevelopment was the *means* to solve the urban problem of blight, not the *purpose* or *end* of the exercise of eminent domain. In *Berman*, the purpose of the exercise of eminent domain was to eliminate slums and urban blight:

> In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community. . . . It was important to redesign the whole area so as to eliminate the conditions that cause slums. . . . In this way ***it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented***.

*Id.* at 34-35 (emphasis supplied). The motivation for the takings in New London are entirely different:

> In its preface to the development plan, the development corporation stated that ***its goals were to*** create a development that would complement the facility that Pfizer was planning to build, ***create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront***, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

*Kelo*, 843 A.2d at 509 (Conn. 2004) (emphasis supplied). This difference is crucial because in *Berman*, the Court evaluated the propriety of the eminent domain *for the purpose of eliminating blight*. It *then* asked whether redevelopment was an acceptable use for the land. In the case at bar, the question is whether economic improvement *itself* is a valid reason for exercise of eminent domain power.

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[23] "The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property." *Berman*, 348 U.S. at 28.

Hence, *Berman* stands only for the proposition that, once the *purpose* behind the eminent domain has been deemed a "public use," the transfer of the land to private parties for economic development may be appropriate. "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman*, 348 U.S. at 33. It does not hold that economic development alone is a proper public use.

The assault on private property rights occurs at the taking, not upon the redeveloping of the property. The focus of eminent domain analysis thus must remain on the end accomplished by taking the property rather than how the property is to be used after the taking.

The Connecticut Supreme Court's reliance on *Hawaii v. Midkiff* is similarly misplaced. That case contained two peculiar circumstances. First, it dealt with rectifying historical inequities enforced by the state legislature in the 1960s, a concern not present in this case. Second, it contemplated the public value of land redistribution to the less wealthy. The public value of such purposeful land redistribution is a fundamentally different public question than the economic development in question here. The unique facts of *Midkiff* render its holding inapplicable to the present controversy.

As explained above, these *amici* oppose the extension of the eminent domain jurisprudence to cases of pure economic development because the eminent domain power has traditionally been used (and abused) to the detriment of those with less economic and political power, particularly minority racial and ethnic groups, the economically disadvantaged and the elderly. It would be cruelly ironic if permitting a single taking to rectify historical inequities under the unique circumstances present in *Midkiff* was used to justify expansion of eminent domain power in such a way that will have a disproportionate negative impact on other historically discriminated-against and disadvantaged groups.



## IV. Some States Have Recognized That Economic Development Alone Cannot Constitute a Public Use.

Unlike this Court, several state courts have been squarely faced with the issue of whether economic development alone constitutes a public use. One of the seminal cases relied upon by the Connecticut courts is the Michigan case *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (Mich. 1981). That case, however, was recently overruled, *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), and the experience of Michigan should counsel this Court against repeating the mistake of *Poletown*.[24]

In *Poletown*, the Michigan Supreme Court permitted the city of Detroit, at the time financially strapped and desperate for economic recovery, to condemn private property in a neighborhood of Polish immigrants (called Poletown) in order to transfer the property to General Motors for the building of an assembly plant. 304 N.W. 2d at 457-58. Poletown had not been found to be blighted, nor was it necessary for GM to locate in that particular neighborhood. Rather, GM approached the city about using its eminent domain power to acquire parcels to GM's specifications, to which the city readily agreed in hopes of creating jobs and increasing the tax base. *Id.* at 466-67. The Michigan Supreme Court equated "public use" with "public purpose," and found this sort of "economic development" to be a public use or purpose, even though there was no blight to be cleared. *Id.* at 457.

Justice Ryan wrote a vigorous and insightful dissent in which he explained how the majority's holding was

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[24] Although *Hathcock* concerned the interpretation of the public use requirement of the Michigan Constitution, the language of the relevant clause is almost identical to that in the Federal Constitution. *Compare* Mich. Const. Art. X, § 2 ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.") *with* U.S. Const. Amend. 5 (quoted *supra* note 9).

inconsistent with Michigan's prior caselaw. He further pointed out that eminent domain "can entail, as it did in this case, intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Id.* at 481.

Justice Ryan went on to describe precisely the scenario that troubles *amici* in this case when eminent domain is used for the purpose of "economic development" like in *Poletown* and in *Kelo*:

> What has been done in this case can be explained by the overwhelming sense of inevitability that has attended this litigation from the beginning. . . . The justification for it, like the inevitability of it, has been made to seem more acceptable by the "team spirit" chorus of approval of the project which has been supplied by the voices of labor, business, industry, government, finance, and even the news media. Virtually the only discordant sounds of dissent have come from the miniscule minority of citizens most profoundly affected by this case, the Poletown residents whose neighborhood has been destroyed.

*Id.* at 81-82.

The Michigan Supreme Court recently had cause to reconsider *Poletown*, and determined that the decision's expansive definition of "public use" was inconsistent with Michigan's caselaw and its constitution.[25] At issue in

[25] It is also worth noting that the *Poletown* development fell well short of expectations in terms of economic impact. After the city of Detroit spent over $200 million acquiring and preparing a site for General Motors (in the process displacing 600 businesses and demolishing 1400 residential structures), it took GM two years longer than scheduled to finally open its plant (seven years after the condemnations) and the plant only employed a little more than half of the workers originally promised. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, DOLLARS & SENSE, July 2001; *cf. Poletown*, 304 N.W. 2d at 471.



*Hathcock* was the condemnation of land for the creation of a business and technology park. The Michigan Supreme Court agreed that the business park would help the local economy and that, if *Poletown* were to remain good law, it would have to affirm the county's determination that this was a constitutional "public use." However, the court overruled *Poletown* and adopted Justice Ryan's dissent. The court found that only three more limited situations qualified as "public use" in the context of eminent domain, observing that:

> Every business, every productive unit in society, does . . . contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

*Hathcock*, 684 N.W. 2d at 786.

Several other states have also explicitly rejected the slippage of public use to the point where potential "economic development" alone will satisfy the requirement. *See, e.g., Georgia Dept. of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1 (Ill. 2002); *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); *cf. City of Midwest City v. House of Realty, Inc.*, ___ P.3d ___, Nos. 100,064, 100,065, 2004 WL 1446925 (Okla. June 29, 2004);

*Eighth & Walnut Corp. v. Public Library of Cincinnati*, 385 N.E.2d 1324 (Ohio 1977).

While some states other than Connecticut have accepted the use of eminent domain for purely economic development purposes,[26] many of these cases relied upon the now-overruled *Poletown* case. The fact that some states are effectively reading out the United States Constitution's public use requirement, coupled with the deleterious impact that this has on various socially and economically disadvantaged groups as described above, makes it vital that this Court hold that economic development alone does not constitute a public use for eminent domain purposes.

## V. "Economic Development" Is Not Amenable to Standards Enabling Judicial Review.

Allowing "public use" to include "economic development" renders the eminent domain power open to abuse – to the particular disadvantage of those, such as *amici*, who lack economic or political power. It is a fundamental principle of our government that the judiciary functions as a check on the potential for tyranny of the majority.[27] In

[26] *See, e.g., City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004); *City of Jamestown v. Leevers Supermkts.*, 552 N.W. 2d 365, 372-73 (N.D. 1996); *Duluth v. State*, 390 N.W. 2d 757, 763 n.2 (Minn. 1986).

[27]

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . Th[e] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals. . . . [T]he firmness of the judicial magistracy . . . serves to moderate the immediate mischiefs of those [laws] which may have been passed, [and] it operates as a check upon the legislative body in passing them.

THE FEDERALIST NO. 78, at 525, 527-28 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961); *see also* THE FEDERALIST NO. 47, at 326 (James Madison) (Jacob E. Cooke, ed., 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .") (quoting Montesquieu).



order for the judiciary to perform this function, the laws must be subject to judicial review.[28] And in order for that judicial review to be effective, there must be standards to govern the judiciary's decisions. Unlike the "public uses" that have previously been allowed by this Court, the limits on a public use of "economic development" are not susceptible of easy definition, and thus the judiciary is unable to rein in potential abuses of the eminent power by reference to those limits.

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ." THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). Courts have recognized that specific and objective standards can prove a useful check on what might otherwise be unlimited government power, or in areas where the court is particularly concerned about abuse (as the history of eminent domain demonstrates the Court should be here, *see* Section II.A *supra*) which infringes on fundamental individual rights. For instance, this Court has long recognized the usefulness of standards as guideposts to check government power and guard against abuse of that power in the area of First Amendment prior restraints:

> The absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far

[28] *See* THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) ("Laws are a dead letter without courts to expound and define their true meaning and operation.").

> too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

*City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). Likewise, standards in the area of eminent domain can allow courts to check whether the power is indeed being used for a permissible public purpose. Although the analysis of eminent domain cases is admittedly different from First Amendment cases, the underlying point – that specific, objective standards provide a means of checking against infringement on important constitutional rights – remains valid, and should inform the Court's approach to this case.

In *Hathcock*, the Michigan Supreme Court case overruling *Poletown*, the court retreated from the amorphous "economic development" justification for use of eminent domain and instead set out three situations in which "public use" would justify its application: (1) construction of roads and the like, which requires collective action; (2) where the property remains subject to public oversight; and (3) "where the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred." 684 N.W. 2d at 783. The first two situations – where its use is necessary to allow construction of roads and other instrumentalities of commerce, and where the public retains some measure of control over the use of the property – are not only reasonably limited, these traditional uses of eminent domain are also well-defined by years of precedent.

Even the third "public use," which is essentially the equivalent of what this Court in *Berman* termed "blight" and is admittedly less limited, is still reasonably susceptible of definition.[29] For instance, in *City of Midwest City v.*

[29] This is not to say that the "blight" rationale has not proven problematic in practice. *See* discussion of "Negro removal" *supra* pp. 7-8. Indeed, *Berman* itself had a distinct racial overtone that is largely

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*House of Realty, Inc.*, Oklahoma defined blight as requiring the presence of certain specific conditions, including "a substantial number of deteriorated or deteriorating structures," or "unsanitary or unsafe conditions," under two statutes where the state's eminent domain power had been delegated to the local government, whereas in a statute that did not delegate eminent domain power, blight was defined by somewhat broader standards. 2004 WL 1446925, at *8-11 (Okla. June 29, 2004). The Oklahoma Supreme Court found it unnecessary to address the plaintiff's argument that the latter broader standards failed to provide adequate guidelines to local governments, and thereby rendered the local government's use of the eminent domain power unconstitutional, because it held that the latter statute simply did not authorize local governments to exercise eminent domain power. Other states have been able to define "blight" in similar ways. *See Hardwicke v. City of Lubbock*, ___ S.W.3d ___, No. 07-04-0097-CV, 2004 WL 2051823, at *1, 3-4 (Tex. App. Sept. 3, 2004); *Concerned Citizens of Princeton, Inc. v. Mayor & Council of the Borough of Princeton*, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004), *certification denied*, No. 56,750, ___ A. ___, 2004 WL 2713995 (N.J. Oct. 6, 2004).

By contrast, when economic improvement is the public purpose, there is *no natural limit* to government takings. "Economic development" can be as broad as any "higher" or "better" use that the local government or redevelopment agency can imagine, and can be used to justify the taking

ignored in the opinion. The "renewal district" in *Berman* was 97.5% "Negroes." 348 U.S. at 36. Of the 5,900 units of housing that were ultimately constructed on that site, only 310 could be classified as "affordable" to former residents of the area. HOWARD GILETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163-64 (1995). This resulted in the area being transformed from almost entirely African-American to majority white in less than a decade. *Id.* at 164.

of virtually any property.[30] As the *Hathcock* court observed, the "'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." 684 N.W. 2d at 786 (emphasis in original).[31]

In this case, the Connecticut legislature determined that acquisition and redevelopment of private property was justified for the purpose of fostering "continued growth of industry and business within the state," because "such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost." Conn. Gen. Stat. § 8-186. In other words, the state legislature declared it "necessary" to use the extraordinary power of eminent domain to foster business simply because it believed that the market for private property was often inefficient.[32] Yet, the market may be inefficient for

[30] While the elimination of blight also impacts economically poor areas, blighted areas are (or, at least, should be) chosen because of genuine public safety and welfare problems, like structurally unsound homes or neighborhoods rife with crime. *See Berman*, 348 U.S. at 31. On the contrary, areas targeted for redevelopment are frequently well-maintained, untroubled neighborhoods – if they weren't, cities would assert the *permissible* public use of eliminating blight.

[31] *See also Chesapeake Stone Co. v. Moreland*, 104 S.W 762, 765 (Ky. 1907):

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

[32] The affected neighborhoods were not shown to be "blighted areas"; although New London was designated a "distressed municipality," the designation as a "distressed municipality" was not a requirement for allowing the use of eminent domain for the project, but only for obtaining special grants for the development.



good reason: Individuals develop personal connections to the places they live, and those personal connections inform their decisions whether to sell their property as much, or more than, the market value of the property. The Constitution allows the individual property owner to decide, in most cases, that his property is more valuable to him than the market dictates by placing limitations on the circumstances for which private property must be given up in exchange for "just compensation."

Even assuming that extending the meaning of "public use" to include "economic development" provides some limit on the government's eminent domain power,[33] the fact that "economic development" is not easily defined inexorably leads to one of two results, neither of which adequately protects the fundamental right of individuals to retain the property they own absent an overriding public interest. First, and at best, judicial decisions as to whether the promise of "economic development" justifies the use of eminent domain in particular cases will be inconsistent, leaving governments unsure of the extent of their power, and individuals likewise unsure of the extent of their

[33] The dissent in the Connecticut Supreme Court proposes a three-part test that purports to give objective standards by which to assess whether a particular taking for "economic development" constitutes a public use. 843 A.2d at 587-88. Because of the inherent breadth of the term "economic development," the standards proposed by the dissent will do little to inform or constrain exercise of eminent domain power. For example, one of the prongs of the test proposed by the dissent is whether the public benefit sought is likely to be achieved. *Id.* at 588. Determining *ex ante* whether a business venture is likely to be successful is a highly inexact determination and most instances either answer is nearly equally likely to be correct. Moreover, "public benefit" is not achieved merely if the project is successful from the perspective of the private developers, it requires further guesswork as to whether any such success is likely to trickle down and result in the creation of more jobs than previously existed and significant expansion of the tax base. While *amici* do not believe that "economic development" by private parties should or can constitute a public use, *see* Part I *infra*, the attempt to craft a workable standard for determining, case-by-case, if such a taking constitutes a public use is preferable to the majority position, which would result in no meaningful review at all.

property rights. Second, and more likely, the courts, unable to ascertain a clear limit on permissible "economic development," will be reluctant to interfere with a legislative decision that a given development is a "public use," eliminating the ability of the judiciary to function as a check on the legislature in precisely the setting where, as discussed in Part II, *supra*, certain historically discriminated-against groups are at a systematic disadvantage.[34]

Deference to that legislative determination in such a case is a complete license to the legislature to adjust private property rights in whatever way it sees fit, offering no protection for the rights of individual property owners from majoritarian overreaching. This potential for overuse should be checked by refusing to expand the definition of public use in the eminent domain context and limiting public uses to the three categories identified in the *Poletown* dissent and adopted in *Hathcock*. *See* 304 N.W. 2d at 476.

The lack of meaningful review and of clear standards for that review is particularly troubling in the eminent domain context, where the authority to take property is often delegated local governments. *See, e.g., Eighth & Walnut Corp.*, 385 N.E.2d at 1326. Local governments are

[34] Indeed, the courts below deferred to the legislative determination, finding that, in this case, the legislature could rationally have determined that economic development was a public use, 843 A.2d at 528, and that there was no evidence of bad faith, *id.* at 533. The Connecticut Supreme Court based its deference to the legislative determination that "economic development" was a public use on *Berman*. Specifically, the Connecticut Supreme Court quoted that portion of *Berman* that stated, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 260 Conn. 1, 36 (quoting *Berman*, at 32). But the deference to legislative purpose discussed there assumes that there are "specific constitutional limitations" on the legislature's determination of "public use." If the Constitution's "public use" clause does not admit of a limitation narrower than the whole field of "economic development," then there is effectively no "specific constitutional limitation" on the legislature's determination of the public interest.



particularly prone to capture by private, politically influential and economically powerful interests. Pritchett, *supra* p. 7, at 2 ("Several studies have shown how urban elites promoted redevelopment to . . . protect and enhance their real estate investments")[35]

The ability of the public to obtain meaningful review and to hold the government to specific standards for use of its eminent domain power is thus particularly important to *amici*, who represent groups that are typically less politically and economically powerful. As Justice Ryan observed in *Poletown*, these groups are often the ones who bear the brunt of the effect of the condemnation, but their dissent will be unpopular when the rest of the community believes they stand in the way of "economic development." Having specific, objective and verifiable standards against which the public can measure the use of eminent domain – in the political process, and if necessary, in the courts – is an important check on the potential for abuse.

[35] In fact, the delegation of the eminent domain power does not end at local governments, who are accountable to the public in at least some minimal way. The authority is commonly delegated to utilities, redevelopment agencies and the like. *See, e.g., Concerned Citizens, United v. Kansas Power & Light*, 523 P.2d 755 (Kan. 1974) (noting that the power of eminent domain is delegated by statute to electric utility, which is "vested with reasonable discretion to determine the necessity of taking land for its lawful corporate purposes," and that discretion is subject to review only for abuse of discretion); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 631 N.W. 2d 131, 137 (Neb. 2001) (noting that "[a]lthough railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain"); *Balsamo v. Providence Redevelopment Agency*, 124 A.2d 238 (R.I. 1956) (noting redevelopment agency was delegated authority to exercise eminent domain authority). Without standards governing the permissible uses of eminent domain authority, overuses and abuses of the authority by private or semi-private companies will be difficult to combat.

## CONCLUSION

The Fifth Amendment's public use requirement is a specific textual limitation on the government's power to take privately held property. Should this Court affirm the Connecticut Supreme Court's holding that pure "economic development" constitutes a public use for eminent domain purposes, legislative majorities will be able to infringe on the property rights of minorities and allocate the burdens of economic development to less politically and economically powerful groups – those least able to bear this burden. Shorn of the textual limitation embodied in the Fifth Amendment and absent meaningful judicial review of majoritarian legislative enactments to protect this important individual right against wrongful takings, the eminent domain power becomes little more than "a license for government to coerce individuals on behalf of society's strongest interests."[38]

Respectfully submitted,

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[38] George F. Will, *Despotism in New London*, WASHINGTON POST, Sept. 19, 2004, at B7.

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No. 04-108

In The

# Supreme Court of the United States

SUSETTE KELO, *ET AL.*,
*Petitioners,*

v.

CITY OF NEW LONDON, AND NEW LONDON DEVELOPMENT CORPORATION,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF THE PETITIONERS

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## INTERESTS OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the National Association of REALTORS® have received consent of the parties to file this brief as *amici curiae* in support of the Petitioners pursuant to a blanket consent issued by each party. Letters of such consent have been filed with the Clerk of the Court.[1]

NAHB is a trade association representing more than 215,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 1.77 million new housing units projected for 2004, making housing one of the largest engines of economic growth in the country.

While NAHB members include property owners and development interests, its primary goal is to preserve opportunities for housing. Affordable housing projects have proven to be helpful to support the widely-recognized public purpose of redevelopment of a blighted area or slum. Additionally, many NAHB members participate in non-blight redevelopment projects at the local level.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that their counsel authored this brief and *amici* paid for it. No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution to the preparation of the brief.

However, NAHB recognizes that housing will almost never afford a community with the economic development benefits that a commercial application will. If economic development as a sole justification for public use is decided using a rational basis test with deference to local legislative bodies, then the door is left open for local governments to abuse their eminent domain powers and take developable land from NAHB members as they could from any other property owner. Therefore, NAHB must adhere in this case to its long-standing objective to protect private property rights from abuses by local government.

The National Association of REALTORS® ("NAR") is a non-profit association representing over one million members engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such activities as safeguarding real property rights, promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, public service, and cultural diversity. Like NAHB, NAR and its members embrace a deep appreciation for the value of homeownership in American society, and the importance of safeguarding private property rights.

To the end of their respective concerns, NAHB and NAR provide this brief in support of the petitioners, homeowners, with the understanding that there must be a balance between redevelopment opportunities and protection of private property rights.



NAHB has been before this Court as *amici curiae* or "of counsel" to the land owner in a number of cases involving rights of property owners and the remedies available to them when their rights are obstructed. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

Similarly, NAR has participated as *amicus* before this Court in cases including *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995);

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[2] This Court's opinion cited the NAHB's brief. 483 U.S. at 840.

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Allegheny Pittsburgh Coal Co. v. Webster County*, 485 U.S. 976 (1989); and *Preseault v. ICC*, 494 U.S. 1 (1990).

## SUMMARY OF THE ARGUMENT

By deferring to a legislature for the determination of whether economic development is a valid justification for condemnation under the Fifth Amendment of the U.S. Constitution, the Connecticut Supreme Court has effectively sanctioned condemnations for *any* purpose, as long as the government can relate the proposed use to some increased tax revenue or potential job opportunities. This standard requires minimal, if any, justification by the government to the courts for its actions. As a result, local governments are at liberty to abuse the public use requirement, to the detriment of property owners, with little check on their activities.

This Court must not only reverse the lower court's decision as to the redevelopment plan of the City of New London, but also it should provide a framework for an intermediate level of scrutiny such that other courts can determine whether a condemnation involving significant private interests is appropriate, especially in cases where economic development is the sole justification for condemnation.

## ARGUMENT

### THERE NEED NOT BE A BRIGHT-LINE TEST FOR PUBLIC-PRIVATE TAKINGS, BUT CAREFUL JUDICIAL REVIEW OF GOVERNMENT ACTION IS CRITICAL.



It is widely recognized that state supreme courts are split on the issue of whether property may be taken for solely for economic development and there is no consistent legal standard for evaluating whether these condemnations are for a public use. *See* Pet. for Cert. at 10; and *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). In order to resolve the conflict, it is not necessary for this Court to determine that all public-private takings using an economic development justification are unconstitutional. Instead, the Court need only clarify that careful judicial review of condemnations involving significant private interests, including pure economic development situations, is appropriate such that courts will not rely merely on the stated purpose of a condemnation but rather examine all available evidence to determine whether the proposed use would in fact be for public or private purpose.

#### A. *Berman* and *Midkiff* represent extraordinary circumstances which are not applicable to modern economic development situations.

Two U.S. Supreme Court cases have been put forth as the most applicable to the question presented by the petitioners about whether the Fifth Amendment's public use requirement allows for condemnation solely for economic development. While the two cases may provide a historical perspective on the public use doctrine, neither of these cases is particularly instructive for the City of New London factual situation.

*Berman v. Parker*, 348 U.S. 26 (1954), addressed the complaint of a department store owner whose property was being condemned as part of a broad plan to rid the District of Columbia of slums. The action was pursuant to a declaration by Congress that redevelopment plans to

eliminate "substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation" are a public use because they protect the public health, safety, morals and welfare. *Id.* at 28. However, the heart of the issue was whether a viable *commercial* property rightfully could be condemned as part of the housing redevelopment plan since it did not contribute to the blight or substandard housing situation targeted by Congress.

*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), dealt with a land oligopoly traceable to the early high chiefs of the Hawaiian Islands. The Hawaii legislature created a plan to transfer title of real property from the few land owners to their leasing tenants in order to reduce the concentration of land ownership, which was determined to be "responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232. Landowners argued that this condemnation to effectuate the transfer from one private property owner to another private property owner was in violation of the public use clause.

**i. In *Berman* and *Midkiff*, the focus of this Court shifted from the public nature of the proposed future project to the eradication of a current undesirable use.**

The inclusion of the redevelopment statutes seeking to cure slums and blight conditions not only expanded the definition of public use to include "public benefit," but also shifted the thinking of the courts in how to assess that use.[3]

[3] The shift is clearly captured by the dissenting justices below. "At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as a public building. As the population grew and collective needs of our society changed, however, the takings power was construed more broadly. Government authorities condemned private properties not just for a 'public use,' but also to achieve a 'public benefit' such as the elimination of urban blight." *Kelo*, 843 A.2d at 574.



Intentionally or not, the courts in the middle of the twentieth century began to defer review of the benefit of the proposed use in favor of the eradication of the present use. In essence, courts deferred to the legislature with the understanding that any rational plan would be better than a slum.[4] Legally, it was determined that the use of eminent domain was appropriate to effectuate police powers to protect public safety, public health, morality, peace and quiet, and law and order. As a result, this Court in *Berman* held that "the legislature, not the judiciary, is the main guardian of public needs to be served by social legislation." *Berman*, 348 U.S. at 32.

*Midkiff* followed the *Berman* rationale and the Court deferred to the legislature when it determined that "there is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff*, 467 U.S. at 240. Again, it seems that any *rational* plan would be better than an oligopoly—"to attack certain perceived evils of concentrated property ownership" is a "classic exercise of a State's police powers." *Id.* at 241-42.

[4] Related to the case before this Court, the dissenting justices cite Connecticut General Statutes 8-124 and point out that "in redevelopment projects, it is the elimination of blight and not the development that follows that constitutes the public benefit." *Kelo*, 843 A.2d at 576.

The *Kelo* situation, as with all non-blight economic redevelopment cases, is distinctly different. The city sought to develop approximately 90 acres adjacent to both a state park and a Pfizer global research facility with commercial and residential interests with the hopes of revitalizing its downtown area. The issue at hand is not about finding a means to stamp out an existing evil or to protect the community from a current danger. Clearly, the circumvention of a market-based system of land acquisition, without a clear evil to eliminate, makes this type of condemnation particularly troublesome. The goal of the government merely is to "trade up" on a property that is already a viable part of the community.

Consequently, the *Berman* and *Midkiff* standards are inapplicable outside the scope of eradicating slums, dismantling an oligopoly or some other egregious fact pattern. Generally, the focus of the courts in public-private takings, including non-blight economic development cases, needs to be on the proposed use and whether its scope is truly public or private in nature.

**ii. The two cases do not anticipate public uses being justified by local legislative bodies.**

The legislative deference afforded by the Court in *Berman* and *Midkiff* does not account for the broad authority of local governments in non-blight economic development situations.

*Midkiff* affirmed the concept first put forth in *Berman* that some judicial deference was appropriate because the power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its



affairs – including the police power. *Berman*, 348 U.S. at 31. *Midkiff* clarified the fact that a state legislature, instead of Congress, made the public use determination does not mean that judicial deference to that legislative body is less appropriate. *Midkiff*, 467 U.S. at 244. This Court determined that state legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *Id.*

It is not clear that the decisions of local governments should be afforded the same deferential treatment as the determinations of a state legislature. In the case at hand, whether the same level of judicial deference is appropriate for the findings of the New London City Council and its development corporation is certainly a debatable question. The findings that the project "intended" to benefit the public interest rather than a private entity[5] must not be given the same deference as that accorded to the determinations of a state legislative body.

In *Fasano v. Bd. of County Comm'rs. of Washington County*, 507 P.2d 23 (Or. 1973),[6] a much heralded landmark case on the role of the court in reviewing a rezoning decision of a local legislative body, the Supreme Court of Oregon answered this question with a resounding "no." Rather, the court found that such an exercise of the police power is "an exercise of *judicial authority*," and therefore is not entitled to deferential review." *Id.* at 26, 29 (emphasis added). The court explained:

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[5] 843 A.2d at 540.

[6] *Disapproved on other grounds, Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980).

> At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local government bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. *Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life....*

*Fasano*, 507 P.2d at 26 (emphasis added).

A growing minority of state courts follow *Fasano*. The most recent of these is North Carolina.[7] The *Fasano* rationale merits consideration by this Court in determining

[7] *See, e.g., Devaney v. City of Burlington*, 545 S.E.2d 763 (N.C. Ct. App.), *review denied*, 550 S.E.2d 772 (N.C. 2001) (City Council proceeding on zone change application was quasi-judicial). Other state court decisions following *Fasano* include: *People ex rel. Klaeren v. Village of Lisle*, 737 N.E.2d 1099 (Ill. App. Ct. 2000), *appeal allowed*, 744 N.E.2d 289 (Ill. 2001); *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271 (Del. 1989); *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978); *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971); *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988); *Woodland Hills Conservation Ass'n, Inc. v. City of Jackson*, 443 So. 2d 1173 (Miss. 1983); *West Old Town Neighborhood Ass'n v. City of Albuquerque*, 927 P.2d 529 (N.M. Ct. App. 1996), *superseded by statute on other grounds by C.F.T. Dev., LLC v. Bd. of County Comm'rs of Torrance County*, 32 P.3d 784 (N.M. Ct. App. 2001); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972), *overruled on other grounds by Raynes v. City of Leavenworth*, 821 P.2d 1204 (Wash. 1992).



the appropriate level of review to be applied to the actions of the New London City Council and its development corporation in this case.

In economic development situations, the problems with the local nature of the decision-making process are compounded by the fact that, in many instances, public housing or blight statutes fundamentally are different from economic redevelopment statutes. The latter are usually broad and may not provide local governments with guidance as to how to accomplish the goals of the statute—leaving an inexperienced local body to interpret its power of condemnation more broadly than is appropriate. *See e.g., Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002).

**iii. If the legislative deference afforded by this Court in *Berman* and *Midkiff* is extrapolated to all non-blight economic development situations like *Kelo*, then the public use clause becomes irrelevant.**

In its decision below, the Connecticut Supreme Court used a subjective "intent" test in determining whether, in light of the transfer of the condemned property to as yet unknown private parties for economic development, the exercise of the eminent domain power in this case was an "unreasonable violation of the public use clause." *Kelo*, 843 A.2d at 541-42. Indeed, the majority's opinion cites approvingly the conclusion of the trial court that "the *primary motivation* for the city and its development corporation was to take advantage of Pfizer's presence, and that *the primary motivation* and effect of the development plan and its conditions was to benefit the distressed city, not Pfizer." *Id.* at 540. Accordingly, the lower court con-

cluded that the "trial court's *finding* that the takings were not *primarily intended* to benefit a private party" was not "clearly erroneous." *Id.* at 542 (emphasis added). *See also id.* at 543-44.

Coupling this subjective analysis with the most deferential standard of review (*i.e.*, the clearly erroneous standard) meant that to prevail, the condemnees had to show that there was *no evidence* in the record to support the condemnor's decision. *Kelo*, 843 A.2d at 544 (emphasis added). This virtually preordained the result. Under the extremely deferential standard of review adopted by the lower court, a condemnation would fail to promote a public purpose only if it was "primarily intended" to benefit a private party rather than "primarily intended" to benefit the public. *Id.* at 541-44. Thus, as noted by the condemnees, condemnation of private property for a private business in Connecticut is a public use "so long as the government *claims* that the purpose of the condemnation is to improve the City's tax base and to increase employment." Pet. for Cert. at 25.

The Connecticut Supreme Court characterized the "principal issue" in the condemnees' appeal as being "whether the *public use clauses of the federal* and state constitutions authorize the exercise of the eminent domain power" in the manner in which it was carried out herein. *Kelo*, 843 A.2d at 507 (emphasis in original). In so doing, it ruled that the trial court's determination that the city's legislative authority *primarily intended* a taking to benefit the public interest, rather than a private entity – *is "a question of fact* that we review pursuant to the clearly erroneous standard of review." 843 A.2d at 540 (emphasis



added).[8] However, the dissent casts serious doubt as to whether this ruling is legally correct. Relying upon respected authority, the dissent asserts that "the question of what is a public use is always one of law,"[9] or at least is a mixed question of fact and law "because the trial court's determination as to public use rests on numerous factual findings regarding the goals, motives and interests of the public officials and the private parties associated with the project." *Id.* at 595. Accordingly, as noted by the dissent, "the conclusion that the development plan was intended primarily to benefit the public, *per se*, is insufficient to justify the takings." *Id.* at 596.

Support for the dissent's position that virtually unquestioned judicial deference should *not* be given to the city government's conclusory findings and declarations of intent may be found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[10] In *Lucas*, the landowner filed suit in state court alleging that application of the state's Beachfront Management Act ("BMA") to his property constituted a taking without compensation. Significantly, as in the case at bar, one of the "findings" of

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[8] A finding of fact is clearly erroneous "when there is no evidence in the record to support it" or when it is obvious that a mistake has been made. *Id.*

[9] *Id.* at 595 (citing 2 T. Cooley, *Constitutional Limitations* 1141 (8th ed. 1927)) (Zarella, J. dissenting).

[10] In this regard, it is noteworthy that in *Midkiff*, cited extensively by the lower court, this Court stated that the "public use requirement is ... co-terminus with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Amici understand this to mean that it is subject to the same boundaries as the exercise of the police power.

the state legislature in enacting the BMA was that the local economy would benefit from "tourism industry revenue." *Lucas*, 505 U.S. at 1024, n. 11.[11] In reversing the trial court, which had found a taking and awarded compensation, the Supreme Court of South Carolina held that it was required to accept the "uncontested findings" of the South Carolina legislature that new construction in the coastal zone threatened that public resource. *Id.* at 1010. Accordingly, said the court, when a regulation respecting the use of property is designed "to prevent serious public harm," no compensation is due under the takings clause, regardless of the regulation's effect on the property's value. *Id.* This Court rejected that proposition,[12] and in so doing, took note of the fact that some of the state legislature's "findings" seemed to be "phrased in 'benefit-conferring' language instead." *Id.* at 1024, n. 11.

Of particular relevance to the case at bar, the Court further noted that if the test for required compensation was whether the legislature had recited a harm-preventing justification for its action, such a justification could be formulated in practically every case, thus amounting to "a test of whether the legislature has a stupid staff." *Id.* at n. 12. Similarly, in the instant case when non-blighted private property is condemned and then is to be transferred to as yet unknown private entities for economic development, the test for constitutionally required "public use" would not be satisfied merely by relying on the condemnor's recitations that a

[11] The South Carolina legislature also made a finding that the BMA would benefit the state's citizens by providing "a natural healthy environment" in which to spend their "leisure time." *Id.*

[12] *Id.* at 1022-23.



development plan "primarily was intended to benefit the public interest rather than private entities."[13]

To that end, the *Lucas* Court "emphasized" that to win its case on remand:

> South Carolina must do more than *proffer* the legislature's *declaration* that the uses Lucas desires are inconsistent with the public interest, or the *conclusory assertion* that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ispe dixit*, may not transform private property into public property without compensation ...."

505 U.S. at 1031 (emphasis added).

Applying the *Lucas* instruction to the case at bar suggests that even deferential review should not result in acceptance of mere proffers of declarations by the condemnor that the taking of the condemnees' properties and transferring them to private ownership will benefit the public interest rather than a private entity. *See, e.g., Kelo*, 843 A.2d at 542-43. If the abuse of discretion standard allows such a result in circumstances like these, then there is no refuge for property owners from legislatures run amuck.

**B. This Court needs to review most public-private condemnations with a higher level of scrutiny.**

When the range of activities proposed by the government entity is unquestionably private, a heightened scrutiny by

[13] 843 A.2d at 542-543.

this Court is imperative. To be clear, it is not NAHB's position that all condemnation actions need to be reviewed with heightened scrutiny. It is well established that those projects that will be of actual use by the community (*i.e.*, parks, roads, and schools) or are infrastructure necessities to be shared by the public at large (*i.e.*, water & sewer treatment facilities) are of public use.

However, a higher level of scrutiny should be triggered by a factual situation wherein a government is not only condemning property but also there will be a transfer of property interest such tnat a private party will maintain primary ownership, control, or jurisdiction over the property. This is not to contend that public ownership is the sole method of promoting the public purposes of community redevelopment projects. *See Berman*, 348 U.S. at 34. Simply, it would allow for a more careful review of the use to which the property will be put to determine whether the public use or purpose is primary or incidental.

The Connecticut Supreme Court contends that "a public use defies absolute definition, for it changes with varying conditions of society, new application in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation." *Kelo*, 843 A.2d at 524 (citing *Katz v. Brandon*, 245 A.2d 579 (Conn. 1968)). Additionally, this Court has offered that when dealing with what is traditionally known as the police power, "an attempt to define its reach or trace its outer limits is fruitless," for "each case must turn on its own facts." *Berman*, 348 U.S. at 32. While it is a pointless exercise to make a list of all types of potential condemnation actions and determine whether each is a public use, it is imperative



for this Court to give guidance to the lower courts for reviewing public-private condemnations so that as the meaning of public use is shaped, the courts do not render the federal Public Use Clause irrelevant. U.S. Const. amend. V.

**i. The clear and convincing evidence standard of review for cases with significant private interest makes the most sense at this time in view of all of the facts and circumstances of this case.**

To resolve the tension between public and private uses, this Court must consider requiring a heightened or intermediate level[14] of review to be used by the lower courts in determining whether the public use requirement has been satisfied in these circumstances.

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[14] Amici propose intermediate standards with the understanding that there are more extreme levels of scrutiny which may be applied by this Court. Of course, the most deferential would be the rational basis test or the abuse of discretion standard (also called the "clearly erroneous" standard adopted by the Connecticut Supreme Court in *Kelo*, 843 A.2d at 543.) At the other end of the spectrum, the highest standard would be strict scrutiny. Strict scrutiny requires that the government show a "compelling" government objective for transferring property from one private property owner to another. It would be most appropriate in the event this Court were to find that ownership of private property is a fundamental right. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 314 (2000). While NAHB has argued previously that the right to own property is fundamental, this Court has declined to address the matter recently. Brief for the National Association of Home Builders, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (No. 01-1269). With that acknowledgement, amici consider this argument beyond the scope of the case before the Court at this time.

The most persuasive is the "clear and convincing evidence" standard espoused by the dissent below. *Kelo*, 843 A.2d at 588. The argument is that this standard of review applies in civil cases in Connecticut to protect particularly important individual interests. *Id.* It forces the government to prove that "the evidence induces in the mind of the trier a reasonable belief that the facts asserted are *highly probably true*, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Id.* (emphasis added). The dissent cites adverse possession claims in Connecticut as a similar land use dispute to condemnation requiring clear and convincing evidence to justify the taking.

The clear and convincing evidence standard is supported by other land use cases throughout the states. For instance, the Kentucky Supreme Court in *Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), overturned a section of an economic development statute finding that "public use" and "public benefit" are not synonymous. The court in Kentucky distinguished this case from others where eminent domain was appropriate by noting that those cases contained condemnors showing blighted property or public uses by clear and convincing evidence. As another example, the Supreme Court of North Dakota in *Tibert v. City of Minto*, 679 N.W.2d 440 (N.D. 2004) recently affirmed that the dedication of an easement for a public street, precluding the former owner "from resuming his right of private property, or indeed any use inconsistent with the public use" must be proven by clear and convincing evidence. *Id.* at 445.

Property rights, whether or not fundamental, certainly should be considered important enough for the public use



clause of the Constitution to require a "highly probably true" justification for the loss of an owner's title to land.

As an alternative if the clear and convincing evidence standard is unpersuasive to this Court, then a somewhat less demanding but still intermediate standard is that of heightened reasonableness discussed and adopted by the Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Dolan*, this Court applied a heightened level of review in determining the constitutionality of certain regulatory exactions. It expressly rejected "very generalized statements as to the necessary connection" between the required exaction and a proposed development's impact as being "too lax" to protect the property owner's right to just compensation when her property is taken for "public purposes." *Id.* at 391. The Court noted that the "reasonable relationship" test approximated the federal constitutional standard, but it did not adopt this standard because it could be confused with the most deferential "rational basis" level of review. *Id.* To avoid confusion, this Court applied a new "rough proportionality" standard, and in so doing, explained:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best

> encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but *the city must make some sort of individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development.
>
> * * *
>
> *[T]he city must make some effort to quantify its findings* in support of the dedication for the pedestrian/bicycle pathway *beyond the conclusory statement* that it could offset some of the traffic demand generated.

*Dolan*, 512 U.S. at 391 (footnotes omitted) (emphasis added).

The key to any intermediate level of scrutiny, whether it is by clear and convincing evidence or heightened reasonableness, is the shifting of the burden of proof to the condemnor to show that the proposed use is a public one. After the condemnee has shown that there will be a transfer of property interest such that a private party will maintain primary ownership, control, or jurisdiction over the property to trigger a heightened scrutiny, a burden shift is necessary.[15] In this instance, the city and development corporation should be required to present probative evidence, including a plan explaining or "quantifying" in

[15] The dissent below points out that a shifting burden of proof is appropriate "because the taking party has greater access than the opposing party to information regarding developer interest in the properties and the progress of negotiations relating to the disposition of the properties." *Kelo*, 843 A.2d at 588.



reasonable detail how the goals of the development plan will in fact be achieved (*e.g.*, identification of redevelopers and execution of formal agreements, providing a time frame and staging plan for redevelopment, and meaningful public oversight of the private entity's financial capability and accountability to the public in its use of the condemned properties).

Providing evidence is the *least* the condemnor should do in view of all the circumstances related to public-private condemnations. For the owners of the condemned properties in the City of New London, the social costs are enormous and the stakes are far too high to risk relying upon conjecture or conclusory "declarations" regarding the condemnor's intentions that might well be *wrong*.[16] The rational basis review provided by the Connecticut Supreme Court simply does not take into account the private nature of economic development condemnations.

**ii. In reviewing the evidence presented by the government, this Court should balance several factors to determine whether a taking is for a public or private use.**

*Amici* have identified three key areas which on balance would show whether a public or private taking is occurring: government intent, project feasibility, and government

[16] At the end of the day, it is the condemnees herein who are the most at risk and who have the most to lose if the condemnor is in fact wrong. What recourse will they have after 30 years? One need only look at the Michigan Supreme Court's decisions in *Poletown* and *Hathcock* to find the likely answer. *See Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

accountability to the public. Again, following a presentation of significant private interests by the condemnee, the government should bear the burden of showing that the proposal will amount to a public use.

### a. Intent of Condemnor

The first issue is the intent of the government for the condemnation to determine whether the proposed use will primarily benefit the public or a private party. As discussed *supra*, mere declarations of public purpose are inadequate and the use must be examined carefully. While this Court need not grapple with every detail of a redevelopment plan, for example, it is imperative for the Court to consider the existence of planning documents and confirm that the condemnor adequately studied the situation. Additionally, this Court may consider the timeline of development for the project, whether there is one and to note whether the condemnation itself is suspect based on the timing set out in the plan. Another instance for consideration in terms of intent may be the origination of compensation for the project. It is understood that private parties are required for many redevelopment projects and the local government capital for condemnation may be acquired through private parties, but if a private party is driving the condemnation proceedings primarily for its own use or benefit, the compensation mechanism will be worthy of a court's notice. Finally, the condemnor's intent may show through the transfer itself to the third party if significantly less than fair market value or fair rental value is included in the terms.

In the case at hand, the government may well show that the plan presented for condemnation of this property truly was intended to benefit the public through economic



development and not for the benefit of Pfizer or any other particular private entity. While intent is a crucial element in many cases, mere expressions of declarations of intent must not be the only basis of a court's examination.

For example, in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002), the development authority (after advertising its ability to condemn to entice business interests to the area) sought to condemn 148 acres adjacent to a racetrack in order to allow the racetrack owners to develop additional parking. *Id.* at 4. The condemnor argued that the taking was necessary to reduce the danger of increased traffic congestion. *Id.* at 6. The Illinois Supreme Court provided more than broad judicial review and determined that the chief reason for the condemnation was for the convenience and profit of the racetrack owners. In fact, the court considered that racetrack owners had other, though more expensive, options including building a parking deck on existing raceway property. *Id.* at 10-11. Had the court merely accepted the expressed intentions of the condemnor and relied on the findings of the local development authority, the court might not have saved the adjacent property owner from condemnation.

### b. Feasibility of Proposed Development

The second area for consideration is whether the government can show that the development plan is feasible. Much backlash has occurred regarding the *Poletown* decision because the project did not produce the revenue predicted by the city.[17] While *amici* recognize that this

[17] Notwithstanding the *Hathcock* court's utter rejection of its *Poletown* decision 23 years earlier, it remains to be seen whether *Poletown's* 1,200 families, or its 100 business owners, 16 churches

Court would be wary about trying to predict the future and second-guessing monetary projections, there are basic questions to be asked of the local government to provide confidence that a project will go forward. After all, the effects of condemnation are irreversible for the property owner and the government must provide proof that it takes this responsibility seriously. To that end, it is important to determine whether the development is imminent.

For example, if after comprehensive planning and condemnation proceedings commence, developers have not been identified to develop the property according to the plan, then there should be some question as to the feasibility of the project. At the bottom line, if the real estate market does not suggest that the use will be profitable for a developer, then the required private parties will not become involved.

To satisfy these concerns, the City of New London needs to show that it has carefully studied the real estate market to make the determination that the economic development projected will occur. The city and its development corporation should have the burden of going forward with some sort of individualized determinations, based on empirical evidence rather than generalized declarations of intent, explaining *how* the professed *goals* of the development plan *will actually be achieved* and the public benefited. This is crucial in light of the acknowledged "lack of any formal commitments" from developers,[18] no

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and 278-bed hospital, destroyed by the original decision, will ever recover their properties or have any meaningful recourse. *Poletown*, 304 N.W.2d 455.

[18] 843 A.2d at 545.



signed development agreements despite "extensive negotiations,"[19] the inability of the development corporation to attract investors for several years,[20] the lack of marketing studies, evidence of favorable economic trends, or other "documentation [of the] '*present development environment*' [that would indicate] a near-term demand" for the proposed uses.[21]

### c. Government Accountability to the Public

Finally, a third issue for consideration is the government's accountability to the public for a condemnation with significant private interests. To what degree does the condemnor ensure that the property will be developed according to the proposed use? In short, the condemnor should provide a guarantee that the use for which the property is condemned is the use to which it is put.

In New Jersey the highest court specifically has declined to extend a heightened scrutiny to economic development cases, however, the accountability factor proved to be of great weight in *Casino Reinvestment Authority v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law. Div. 1998). The condemnation action was to support redevelopment of a residential lot for parking for the adjacent casino. The court ultimately found that the primary interest to be served was private, but the case hinged upon the fact that there would be no control over the property by the condemning

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[19] *Id.* at 596 (Zarella, J. dissenting).

[20] *Id.* at 596-597.

[21] 843 A.2d at 590, n. 19 (emphasis in original).

authority and no assurance that the property would be developed or used as planned. *Id.* at 109.

Arguably, in the case before this Court, New London has provided little, if any, assurance that the development will occur. Although the lower court essentially parroted the generalized recitals of the condemnor's intent regarding "substantial state oversight," and concluded that "ample judicial machinery was available for enforcement of the development plan,"[22] it acknowledged that the record revealed, "no primary or secondary authorities" regarding the use of the term "reasonable assurances of future public uses."[23] Additionally, the dissent in *Kelo* points out that the statutory scheme applicable to this condemnation contains no clear description of how the economic redevelopment goals are to be accomplished and that a development plan may be abandoned within three years of it approval, such that any properties acquired thereunder may be conveyed free of the plan's restrictions if they cannot be conveyed to a private party at fair market value pursuant to the plan. *Kelo,* 843 A.2d at 580. The development corporation condemned property for this project more than six years ago but no committed redevelopers have come forward and no "formal mechanisms,"[24] or "formal commitments"[25] for achieving the goals of the development plan (such as executed development agreements), yet exist. It remains to be seen at what point the City of New London will abandon this

[22] *Id.* at 544, n. 63, 545, n. 65.

[23] *Id.* at 543.

[24] *Hathcock,* 684 N.W.2d at 784.

[25] 843 A.2d at 545.



project and attempt to sell the condemned property outright for any other private use.

A few months after the lower court's decision was issued, a searching review of this very issue was conducted by the Supreme Court of Michigan in *County of Wayne v. Hathcock,* 684 N.W.2d 765 (Mich. 2004). On a strikingly similar fact pattern to the case at hand, the Michigan Supreme Court found that the condemnor:

> intends for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy. Finally, there is nothing about the *act* of condemning defendants' properties that serves the public good in this case. The only public benefits cited by plaintiff arise after the lands are acquired by the government and put to private use. Thus, the present case is quite unlike *Slum Clearance* because there are no facts of independent public significance (such as the need to promote health and safety) that might justify the condemnation of defendants' lands.

*Hathcock,* 684 N.W.2d at 784 (emphasis in original).

**iii. While most public-private condemnation situations require heightened scrutiny, blight and collective action cases practically may be held to a lesser standard.**

While the *amici* advocate an intermediate level of judicial review for those condemnations wherein a transfer of property interest such that a private party will maintain primary ownership, control, or jurisdiction over the property, it also recognizes the impracticality of application of a heightened scrutiny by the courts in two situations. While the most common standard of review for blight cases has been abuse of discretion, a higher standard has been used by a few courts in blight situations.[26]

*Amici* concede that there is little need to apply a higher level of scrutiny to plans for slums or blighted areas. *Amici* do not question the case law supporting blight redevelopment from *Berman* forward and the well established deference to the state legislatures as to blight statutes. While clearly the case before this Court does not address a blighted property, it is necessary to distinguish this particular type of redevelopment statute from any other

[26] "The trend in states where many cases have reached the appellate level is that the standard of review tends to change from the more deferential standard of arbitrary and capricious behavior to the less deferential standard of clear error. In the clear error standard, 'substantial evidence,' as prescribed by statute, must be presented as evidence for the findings of the redevelopment agencies or local governments." Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Prop. & Tr. J. 389, 412 (2000).



for the judicial review of public-private takings outlined herein to be most effective.

The Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), attempted to capture this concept with its term "facts of independent significance"[27] to support selection of a particular property for condemnation. While the attempt is reasonable, relying on a legislature, especially a local one, to determine "facts of independent significance" is tantamount to endorsing creative writing to justify condemnations. This Court should narrowly limit the exception to the intermediate scrutiny level of review to cases wherein eradication of slums or blight, as defined by federal or state law, is the object.

Second, it is obvious that there are condemnations with significant private benefit, but without a particular condemnation scheme, the project would be infeasible. For example, railroad tracks inherently must run in a straight line and require easements from many adjacent property owners as part of a large plan for condemnation. The court in *Hathcock* described these cases as "public necessity of the extreme sort requir[ing] collective action."[28] *Amici* agree that it would be efficient for courts to allow legislative deference for collective actions of this sort.

[27] *Hathcock*, 684 N.W.2d at 783 (the court defined the phrase as meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement).

[28] 684 N.W.2d at 783.

*Amici* concede that it is conceivable that either of these situations could be stretched or abused by a local government. However, it is presupposed that the courts would maintain an abuse of discretion or clear error standard for these two exceptions such that blatant abuses would not go unchecked.

## CONCLUSION

The National Association of Home Builders and the National Association of REALTORS® respectfully request that this Court reverse the ruling of the Connecticut Supreme Court and determine that legislative deference generally is not a proper standard of review for condemnations involving significant private interests, especially those with economic development as the sole justification.

DATED: December 3, 2004

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IN THE
# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, AND WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON AND NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Connecticut**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

Whether using eminent domain, with payment of just compensation, to promote economic development in a depressed local economy—thereby creating jobs, alleviating human suffering, and otherwise promoting the public welfare—constitutes a public use under the Fifth Amendment.

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## INTEREST OF THE *AMICI CURIAE*

This case is of vital importance to *amici*, whose members include state and local governments and officials throughout the United States.[1] These officials use eminent domain for many purposes, including as a fundamental tool for economic development in distressed cities like New London. Eminent domain is often indispensable for revitalizing local economies, creating much-needed jobs, and generating revenue that enables cities to provide essential services. At the same time, the condemnation power should be used prudently, as is being done by New London here. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

## SUMMARY OF ARGUMENT

1. During the last 50 years, this Court has handed down no less than seven rulings reaffirming that public use under the Fifth Amendment is coterminous with the police power, and that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear." *Berman v. Parker*, 348 U.S. 26, 33 (1954). These rulings are not fact-based, as Petitioners suggest, but instead rooted in a broad rationale recognizing that courts should defer to a legislative finding of public use unless that finding lacks a rational basis, even where a private actor stands to benefit. Early decisions of this Court likewise recognize the propriety of using eminent domain for economic ends. These long-standing rulings faithfully capture the original understanding and plain meaning of the Fifth Amendment as reflected in its text, structure, and history.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk of the Court.

Petitioners contend that this Court should jettison its traditional rational basis test and impose heightened scrutiny that would prohibit condemnation for economic development unless there is a high degree of certainty that the condemnation will yield the expected public benefits. But the Court repeatedly has held that it "need not make a specific factual determination whether the condemnation will accomplish its objectives." *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422-23 (1992). The proposed heightened scrutiny would be unworkable and transform courts into super-legislatures.

2. The variation in eminent domain law among the States properly reflects the appropriate diversity of our federal system. A narrow federal constitutional constraint on the scope of public use would inappropriately impose a uniform standard on States facing highly diverse challenges. This Court repeatedly has recognized that maintaining a tolerant federal standard permits adaptation of eminent domain to varying local conditions. The just compensation requirement ensures that condemnees are treated justly, as do other state constitutional and statutory protections.

3. Local communities across the country face daunting economic challenges that must be addressed through redevelopment programs that require the use of eminent domain. The private sector often cannot accomplish the job alone due to a range of market failures, including holdouts; obstacles to assembling an appropriate development site in urban and suburban areas; the risks associated with cleaning up "brownfield" sites; clouded property title on key parcels; and the need to improve street patterns. The Kansas City Speedway and associated retail development, as well as the Nissan auto plant in Canton, Mississippi, illustrate how eminent domain is essential to the rebirth of many economically distressed municipalities and regions.



## ARGUMENT

### I. ECONOMIC DEVELOPMENT IS A PUBLIC USE UNDER THE FIFTH AMENDMENT.

Of all the public purposes advanced by eminent domain, Petitioners argue that economic development alone is not a "public use" under the Fifth Amendment. On this reading, local officials could condemn Petitioners' property to create a park, enhance a scenic river vista, or pursue any other public purpose. But they cannot condemn the same property to promote economic revitalization that will create jobs and alleviate the human suffering and social devastation caused by unemployment and reduced public services. On Petitioners' view, economic development is always off-limits as a justification for eminent domain, no matter how fair the compensation, no matter how compelling the public interest in new jobs and renewed prosperity. *See* Pet. Br. 11-27.

Alternatively, Petitioners argue that the Court should jettison the traditional rational basis test and replace it with a heightened "reasonable certainty" standard of judicial review. *See id.* at 27-48. This position is both contrary to established precedent and wholly unworkable.

#### A. Longstanding Precedents Show that Economic Development is a Public Use.

For 50 years, without dissent, the Court repeatedly has held that the scope of public use is coterminous with the police power and that courts must defer to legislative determinations of public use. Those decisions rejected arguments, similar to those advanced by Petitioners, that private benefits generated by a condemnation render it suspect. It is not surprising, then, that every Justice on the Connecticut Supreme Court concluded that economic revitalization is a public use. *See* Pet. App. 171 (dissent) (agreeing with the majority that

"private economic development projects . . . satisfy the takings clauses of the federal and state constitutions").

Petitioners cite no federal constitutional authority remotely suggesting that economic development does not constitute a legitimate public use, and there is none. In fact, established precedent compels the contrary conclusion. In *Berman v. Parker*, 348 U.S. 26 (1954), two owners of non-blighted land challenged an urban redevelopment program in Washington, D.C. The Court unanimously held that Congress may use eminent domain to improve the quality of the urban fabric: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 33 (citation omitted). *Berman* stressed that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear." *Id.*

Several factors make this case easier than *Berman*. Here, private developers will have only leasehold interests, subjecting them to ongoing oversight by the city's agent, the redevelopment agency. *See* Pet. App. 6. Moreover, the specific plan to use eminent domain here was approved by the city council and subject to extensive public input (Resp. Br. 3-5), affording greater democratic participation than in *Berman*. *See Berman*, 348 U.S. at 29-30.

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), another case involving transfer of condemned land to private individuals, the Court unanimously confirmed that public use is "coterminous" with the police power. *Id.* at 240. Eight years later, the Court again unanimously reaffirmed that public use "is coterminous with the regulatory power," even where a condemnation "result[s] in the transfer of ownership from one private party to another." *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422 (1992).



Repeated decisions of this Court reaffirm these bedrock principles.[2]

Petitioners argue that these cases can be explained away because they have "facts of independent public significance." Pet. Br. 24. But the rationale of *Berman*, *Midkiff*, *National Railroad*, and similar rulings is not fact-based. These rulings stand on an expansive and common rationale recognizing that the concept of public use is as inclusive as the police power. Even the *amici* professors supporting Petitioners acknowledge that the ruling below is "in keeping with" *Midkiff*. Br. *Am. Cur.* David Callies *et al.* 3.

Older cases, too, approve the use of eminent domain to foster economic development. In *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885), the Court upheld a state "Mill Act," which authorized downstream mill builders to flood land of upstream riparian owners, to secure "the advantages inuring to the public from the improvement of water power and the promotion of manufactures." *Id.* at 19; *see also Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (approving condemnation of a right of way for an aerial bucket line for a private mining company); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896) (approving condemnation for the irrigation of private land and comparing public use justifications for eminent domain with those for taxation). New London's use of eminent domain for economic development falls squarely within this longstanding tradition.

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[2] *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003) (government may condemn property for any reason justifying a tax or user fee); *First English Evan. Luth. Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function 'for Congress and Congress alone to determine.'") (citations omitted); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984).

### B. The Text, Structure, and History of the Fifth Amendment Show that Economic Development is a Public Use.

*Berman*, *Midkiff*, *National Railroad*, and similar precedents faithfully capture the original meaning of the Takings Clause. The term "public use" never was intended to limit eminent domain only to condemnations where the public would own or have access to the expropriated property. As has been long noted, the language of the Takings Clause does not impose any limitation other than the payment of just compensation. *See* John Lewis, *A Treatise on the Law of Eminent Domain* ii (1888). There is no evidence the Framers were concerned about the purposes for which eminent domain is employed where it is subject to legislative control. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L. J. 1245, 1299-1301 (2002).

The plain meaning of the term "public use," both now and at the Founding, encompasses not only public ownership and access, but also the public enjoyment of benefits.[3] In keeping with this plain meaning, as early as 1837 the Court recognized that eminent domain could be used to promote "the public interest and convenience." *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 542 (1837) (observing that state legislators had taken and extinguished a ferry franchise through eminent domain because "the public interest and convenience would be better promoted by a bridge in the same place"). The public interest plainly includes economic prosperity since "[t]he object and end of all government is to

[3] *E.g.*, *Webster's Encyclopedic Unabridged Dictionary* 2097 (1996) (meaning of "use" includes "service or advantage in" and "help; profit; resulting good"); 1 N. Webster, *American Dictionary of the English Language* (1st ed. 1828) (meaning of "use" includes "advantage" and "production of benefit").



promote the happiness and prosperity of the community." *Id.* at 547.

Because the language of the Takings Clause does not impose any limitation other than the payment of just compensation, the constitutional text suggests that the means-end validity of eminent domain generally should be determined under the Due Process Clause, as it would be for any legislative action. Indeed, to our knowledge, only once in its entire history has this Court invalidated government action under the U.S. Constitution for taking property for a purely private use, and it did so under the Due Process Clause. In *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403 (1896), the Court set aside as a violation of due process an order of a Nebraska agency requiring a railroad to allow farmers to build a grain elevator on the station grounds. In *Midkiff*, the Court noted the extremely limited reach of *Missouri Pacific*, emphasizing that the "order in question was not, *and was not claimed to be*, . . . a taking of private property for a public use under the right of eminent domain." *Midkiff*, 467 U.S. at 241 (quoting *Missouri Pacific*, 164 U.S. at 416; emphasis added in *Midkiff*).[4]

In the end, it makes no practical difference whether the Court embraces the Due Process Clause as the means-end limitation on eminent domain, or treats "public use" as "coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Where "the eminent domain power is rationally related to a conceivable public purpose, the Court

[4] *See also Fallbrook Irrigation Dist.*, 164 U.S. at 160 (public use issues raised by condemnation "where there is no color of necessity therefor . . . and simply for the purpose of gratifying the taste of the owner"); *Southwestern Ill. Dev. Auth. v. National City Envtl., L.L.C.*, 710 N.E.2d 896, 902 (Ill. App. Ct. 1999) (invalidating a taking where the condemning agency characterized it as one "for *private use*"), *aff'd*, 768 N.E.2d 1 (Ill. 2002).

has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.

### C. Petitioners' Proposed Heightened Scrutiny is Unprecedented and Unworkable.

Petitioners alternatively argue that this Court should impose heightened scrutiny for economic development projects. They contend that courts should allow eminent domain for economic development only where "the government can show that there is reasonable certainty that the project will . . . yield the public benefits that are used to justify the condemnation." Pet. Br. 36.

This proposal is wholly untethered from this Court's eminent domain jurisprudence. Longstanding precedents under the public use provision explicitly reject such heightened scrutiny. "The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Ruckelshaus*, 467 U.S. at 1015 n.18; *accord National Railroad*, 503 U.S. at 422-23 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives.").

Petitioners' proposed heightened scrutiny also is unworkable. They leave their "reasonable certainty" standard largely undefined, but even a "reasonable likelihood" test would be highly problematic. It often is impossible to predict the future success of a new economic enterprise of the size and complexity of the Fort Trumbull project, or of the individual businesses that make up that project.[5] Potential delays caused

[5] *See* Brian Headd, *Redefining Business Success: Distinguishing Between Closure and Failure*, 21 Small Bus. Econ. 51, 58 (2003), http://www.sba.gov/advo/stats/bh_sbe03.pdf (about one-third of new businesses fail).



by years of litigation over probability of success would likely preclude the use of eminent domain for economic development in many cases. Heightened scrutiny would alter market signals by injecting additional risk, and markets would protect against this risk by increasing costs through higher interest rates for municipal bonds or terminating the development opportunity.

If government officials pursue ill-considered ventures, the appropriate remedy should be left to the voters. Democratic oversight works well for redevelopment projects using eminent domain because the entire community bears the cost of acquiring the land and thus has a strong interest in ensuring that condemnations are prudent. Public proceedings, like the extensive public meetings and hearings held in New London (*see* Resp. Br. 3-5), allow condemnees to bring these issues to the fore, and media scrutiny promotes public consideration and participation. Market signals, such as investor interest in municipal bonds, also help affirm the viability of redevelopment projects.

In contrast, the judiciary is ill-equipped to predict the outcome of complex economic undertakings. While legislatures have the resources and time to engage in complex fact-finding and economic analysis, such decisions "are not wisely required of courts." *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000); *accord Midkiff*, 467 U.S. at 243 ("[E]mpirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."). Petitioners would have courts review contracts and land use laws to ensure there are binding "contractual, statutory, or other minimum standards" that will make economic success a reasonable certainty. Pet. Br. 37. Heightened scrutiny would transform the courts

into super-legislatures or boards of land use appeal, inundating them with requests by holdouts to review the details of economic development projects across the board.

Petitioners' "reasonable certainty" standard also would harm many landowners. When a municipality announces a development project, many affected landowners want to sell their land as soon as possible. The marketplace often is unavailing because ordinarily few people want to buy land that will be acquired by the government. But the municipality often is unable to proceed with land acquisition until it can acquire *all* land needed for the project; developers reasonably insist on assemblage of the entire project site before proceeding with a multi-million dollar project. Under current law, land acquisition can begin when local officials have a rational basis for believing the project will advance a public purpose. But under heightened scrutiny, acquisitions might be delayed for years because local officials could not condemn land held by holdouts until the officials could show to a reasonable certainty that the project would be successful. And these holdouts would have every incentive to challenge a "reasonable certainty" showing in court to gain leverage in extorting large compensation awards.

These concerns are by no means hypothetical. In Norwood, Ohio, about 70 properties were needed to expand a complex of shops and offices to promote economic growth in that financially strapped city.[6] More than 60 owners agreed to sell voluntarily, but they could not sell because a handful of owners held out, even though they were offered 125% of market value.[7] So outraged were the 60+ landowners that many joined with the city in opposing the holdouts' lawsuit,

[6] *See* Cindi Andrews, *Some in Norwood Fight to Sell Homes*, Cincinnati Enquirer, Oct. 11, 2003, *available at* 2003 WL 62434526.

[7] Steve Kemme, *Norwood Battle Puts Life on Hold*, Cincinnati Enquirer, July 18, 2004, *available at* 2004 WL 79970802.



planting yellow signs in their yards protesting that they were being "Held Hostage" by the holdouts' counsel.[8] Among the landowners held in limbo were the Vogelsongs, who were forced to pay two mortgages and exhausted one of their pension funds and tapped into another until the holdout issue was resolved. Michelle Vogelsong directed her anger not at the city, but at the holdouts' counsel: "It's aggravating. People who aren't even residents here are holding up the best thing that's happened to Norwood in a long while."[9] For Jeanne Dawson, an 83-year-old blind retiree, the delay "meant the loss of three opportunities to move into a retirement home."[10] Heightened scrutiny would allow many more holdouts to exploit their monopoly position at the expense of other landowners.

Some *amici* supporting Petitioners make the peculiar argument that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), support heightened scrutiny of eminent domain. Br. *Am. Cur.* David Callies *et al.* 24. But *Nollan* and *Dolan* address situations where the government sought to acquire property interests without paying any compensation by imposing permit conditions requiring dedications of property. The opinions carefully explain that heightened scrutiny was justified by the concern that government could extort property for free in the guise of granting permits. *See Nollan*, 483 U.S. at 841 (noting "heightened risk that the purpose is avoidance of the compensation requirement"); *Dolan*, 512 U.S. at 385 (relating heightened scrutiny to doctrine of "unconstitutional conditions"). One obvious remedy for the Nollans and Mrs.

[8] *See* Andrews, *supra* note 6.

[9] Kemme, *supra* note 7. Donna Laake, who also is paying two mortgages, lamented: We haven't had our side of the story told too much." Andrews, *supra* note 6.

[10] Steve Kemme, *Residents Remain in Limbo*, Cincinnati Enquirer, Mar. 28, 2004, *available at* 2004 WL 72712753.

Dolan was payment of compensation. It defies logic, as well as precedent, to extend these exaction decisions to fully compensated takings where such risks do not exist.

## II. EXISTING STATE AND LOCAL PROTECTIONS FOR PROPERTY OWNERS IN EMINENT DOMAIN CASES REFLECT THE APPROPRIATE DIVERSITY OF OUR FEDERAL SYSTEM.

The Court has long recognized that different States have different approaches to eminent domain and public use due to the diversity of local circumstances. Indeed, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). As early as 1923, the Court stressed that the determination of an appropriate public use "is influenced by local conditions," and courts "should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state." *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 705-06 (1923).

To our knowledge this Court has never reversed a state court decision finding that a taking constitutes a public use, regardless of whether similar takings might violate constitutional or statutory constraints in another State. For example, the Court upheld New Hampshire's "Mill Act" against a federal constitutional challenge even though other States had concluded similar statutes violated "their respective Constitutions." *Head*, 113 U.S. at 18.

In *Clark v. Nash*, 198 U.S. 361 (1905), the Court explained this deference to state court judgments on public use, upholding a Utah statute that permitted condemnation of rights



of way for irrigation ditches necessary for private farming and mining:

> Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. . . .
>
> . . . This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts.

*Id.* at 367-68; *accord Fallbrook Irrigation Dist.*, 164 U.S. at 159-60 ("[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter . . . .").

In other words, the irrigation measure like that upheld in *Clark* might not be a public use in Connecticut. But while Connecticut is not arid, it does have several older urban areas with seriously declining economic bases, the economic redevelopment of which requires the use of eminent domain. A narrow federal requirement for public use would improperly impose a uniform standard on States facing highly diverse challenges. Maintaining a flexible federal standard permits adaptation of eminent domain to the diverse needs of States, as has been the practice throughout our history.

Petitioners and their *amici* discuss various state court decisions that limit eminent domain. But nothing in the Federal Constitution prevents States from placing greater restrictions on the use of eminent domain as a matter of state constitutional or statutory law, and several have done so. In

rejecting the federal public use claim of one property owner who relied extensively on state precedents, Justice Holmes wrote for a unanimous Court: "If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it." *Strickley*, 200 U.S. at 531.

Washington's constitution, for example, provides an "absolute prohibition against taking private property for private use" (subject to specific exceptions) and also expressly makes "the question of public versus private a judicial question." *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 188 (Wash. 2000). Washington's courts thus do not follow *Berman* or *Midkiff* due to the different language of its constitution. *Id.* at 189.

Michigan provides another pertinent example because Petitioners offer *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), as a model for how this Court should construe the federal Constitution. But the history of Michigan's interpretation of its own Takings Clause shows why *Hathcock* should have no influence on interpreting the federal Constitution. Michigan had long viewed economic development not to be a public use; it had even held its own Mill Act to be unconstitutional, in contrast to this Court's construction of the federal Takings Clause. *Compare Ryerson v. Brown*, 35 Mich. 333 (1877) (necessity for general mill act less than in other States) *with Head v. Amoskeag Mfg. Co.*, 113 U.S. at 26 (upholding New Hampshire's Mill Act). The *Hathcock* court's decision turns entirely on its reading of where Michigan law stood when the state constitution was adopted in 1963; it pointedly ignores *Berman* and *Midkiff*, as well as general questions of the balance between individual and community interests. *Hathcock*, 684 N.W.2d at 780-85. It would be bizarre for this Court to accord weight to a



Michigan decision that affords no weight to this Court's precedents.[11]

Most States have anticipated or adopted the general approach to public use charted by this Court, although with variations. *See* 2A P. Nichols, *Eminent Domain* § 7.02[5] (3d ed. 2003, J. Sackman ed.). For example, the court below took a "flexible approach" (Pet. App. 30) but still ruled as a matter of Connecticut constitutional law that a taking would violate the public use clause if "the taking was primarily intended to benefit a private party, rather than primarily to benefit the public." *Id.* at 68. It carefully reviewed the lower court findings and the record before concluding that the project constituted a public use.

This Court's longstanding deference to state and local approaches to public use will not result in any systematic unfairness to property owners. All condemnees receive what the Takings Clause guarantees them: just compensation. Petitioners suggest that homeowners suffer intangible losses that are not compensated, but even if true it would not support a restrictive reading of public use. Rather, the argument bears on the Court's interpretation of "just compensation." *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979). That issue is not before the Court here.[12]

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[11] In any event, the rule embraced in *Hathcock* provides far too rigid an interpretation of public use for the U.S. Constitution. It is insensitive to the locally determined need for economic development or the care with which it is carried out. The rule applies only when a private entity will own the property, but not to cases where a public entity retains ownership, which would perversely encourage governments to maintain ownership and control of developments that might be better managed by private enterprise. *Hathcock* also protects to the same extent long-term homeowners and short-term speculators in undeveloped land, even though the former might suffer subjective losses but not the latter.

[12] Many States and the Federal Government provide additional funding to condemnees beyond just compensation. For example, Connecticut has

States also place many statutory and constitutional prerequisites on recourse to eminent domain, particularly for economic redevelopment. For example, under Connecticut's urban renewal laws that address blight, local officials may condemn structures that are not substandard, but only if "essential to complete an adequate unit of development." Conn. Gen. Stat. § 8-125(b). The Connecticut Supreme Court reads this provision to require local officials to consider whether existing owners can be integrated into redevelopment projects. *See Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1185 (Conn. 2002). Under Connecticut's economic development laws, the provisions invoked by New London here, local officials must show that condemnations are primarily intended to benefit the public (Pet. App. 68), and provide other reasonable assurances that condemnations will advance the public interest. *Id.* at 71-110, 122-33. Commentators agree that redevelopment projects today are carried out with greater sensitivity to the value of existing communities.[13]

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enacted the Uniform Relocation Assistance Act, Conn. Gen. Stat. § 8-266 *et seq.*, under which more than $10 million in relocation assistance is available to Petitioners and other landowners within the Fort Trumbull site (on average more than $100,000 per affected landowner, in addition to fair market value). J.A. 206-07.

[13] *See* Alan Altshuler & David Luberoff, *Mega-Projects: The Changing Politics of Urban Public Investment* 43 (2003) ("solidly entrenched" consensus among local officials that redevelopments "should proceed only if their negative side effects were negligible, or at least fully mitigated"). The excesses of urban renewal during the 1950s and 1960s that Petitioners' *amici* discuss were curbed by federal legislation that fostered more careful consideration of the consequences of demolition, such as the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 3303(c), and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* These statutes typically also restrict States when they use federal money or require federal approvals for their redevelopment plans.



## III. EMINENT DOMAIN IS A VITAL ECONOMIC DEVELOPMENT TOOL FOR MANY COMMUNITIES.

After acknowledging Petitioners' personal dreams and desires, the trial court recognized that the city officials in New London "have a dream also. The accomplishment of their dream presents no opportunity of personal gain or favor. . . . Their dream is for their city buffeted for decades by hard times and until recently declining prospects." Pet. App. 196. State and local governments across the country face similarly daunting economic challenges, particularly for the poorest members of those communities. Some local economies have been especially hard hit:

> ► Milwaukee, once known as the "toolbox to the world," has been devastated by relentless global competition. African-American males in the city have suffered almost twice the drop in employment that the nation endured during the Great Depression. In one generation, Milwaukee "has turned from a place of unrivaled opportunity for blacks into a locus of downward mobility without equal among other big U.S. cities."[14]

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Congress amended the federal urban renewal program several times and finally terminated it in 1974.

Petitioners and their *amici* try to create the impression of an epidemic of abuse by citing to an Institute for Justice document that purports to identify instances of abuse. *E.g.*, Pet. 8 (citing Dana Berliner, *Public Power, Private Gain* (Institute for Justice 2004)); Br. *Am. Cur.* Better Gov't Ass'n 5-6 (same). But the term "abuse" as used in this document includes *any* project in which the land was to be turned over to a private entity (Berliner, *supra*, at 2), a criterion rejected by *Berman*, *Midkiff*, *National Railroad*, and countless other federal and state cases.

[14] Associated Press, *Loss of Manufacturing Jobs Hits Milwaukee's Black Community Hard*, St. Paul Pioneer Press, Dec. 9, 2004, at 3B, *available at* 2004 WL 95865925.

► North Carolina residents know firsthand the local devastation caused by the loss of textile jobs to overseas production. During the last ten years, our nation has lost more than half of its textile jobs. This year brings a further lifting of federal protections for U.S. textile mills from foreign competition, thereby "exposing an already troubled industry to the full force of globalization."[15]

► Last year, General Motors announced it will close its Baltimore plant, the most recent blow in a steady decline of the city's manufacturing base. Baltimore's steel industry has been cut by about 90 percent, and during the 1990s the city lost a shipyard and other large employers, forcing city officials "into extreme make-overs they would just as soon have lived without."[16]

► Missouri lost 94,500 jobs during the 20-month period ending December 2003, the worst rate of decline among the 50 States. A major clothing manufacturer closed its plant due to lower labor costs in Latin America, and other large employers also have left the State for other countries.[17]

Petitioners' *amici* belittle economic development projects as a mere sop to politically connected private interests. *E.g.*, Br. *Am. Cur.* Better Gov't Ass'n 5. This disparaging view reflects a fundamental misunderstanding of local officials. Local governments do not exist to enrich a select few, but to solve problems and provide services that all citizens need and demand. The millions of dollars provided by revitalization

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[15] Paul Blustein, *On Pins and Needles: As Quotas Expire, U.S. Textile Industry Braces for Change*, Wash. Post, Dec. 31, 2004, at E1, *available at* 2004 WL 101233910.

[16] Associated Press, *Loss of Manufacturing Jobs Means a Makeover for Baltimore*, AP Newswires, Nov. 17, 2004.

[17] Shashank Bengali, *Loss of Manufacturing Jobs Cuts Especially Deep in Southwest Missouri Town*, Kan. City Star, Feb. 17, 2003, *available at* 2003 WL 4025326.



projects can mean more jobs and more money for vital government services across the board, including more police officers and firefighters, support for senior citizens, better pre-natal care, adolescent pregnancy prevention, more teachers and better-equipped schools, and more effective child-abuse prevention.

Urban waterfront redevelopment like New London's is especially attractive for several reasons. It draws people back from the suburbs and into the city to live and play. It capitalizes on the dramatic improvement in the water quality of our rivers and lakes in recent decades.[18] It creates jobs and tax revenue. It breathes new life into abandoned waterfront factories, warehouses, and shipyards rendered obsolete by economic change. It often includes river walks and other areas of public recreation that provide synergistic benefits and unite the community.[19]

The use of eminent domain often is essential to assemble a critical mass of property needed for development in metropolitan areas because market failures make it impossible for the private sector to do the job alone. These market failures include the difficulty of assembling an appropriately-sized development site due to holdouts; the legal risks associated with cleaning up lightly contaminated "brownfield" sites; clouded property title on key parcels; the need to improve street patterns; and decisions by existing businesses to leave nearby land vacant to prevent competitors from entering the market.[20] Local officials use eminent domain to address these and other market failures by acquiring parcels, providing for

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[18] Douglas M. Wrenn, *Urban Waterfront Development*, 15 St. Mary's L. J. 555, 556 (1984) (improvements in water quality have stimulated waterfront development).

[19] *See id.* at 556-58.

[20] Colorado Municipal League, et al., *Urban Renewal in Colorado* 41-46 (C. White ed., Sept. 2004).

cleanup, clearing title, and removing other obstacles to development.[21] *Amicus* Norquist argues that economic development should be left to the private sector. *See* Br. *Am. Cur.* John Norquist 3. But in many instances market failures require a public-private partnership, including the use of eminent domain, to remove barriers to investment.[22]

Grassroots organizations often support these efforts. In Boston, city officials have worked closely with a non-profit community organization to provide affordable housing and breathe life back into decaying neighborhoods.[23] Eminent domain was the "only way to acquire a coherent area of land on which to implement its plan" because "[d]eveloping only the city-owned land would defeat the goals of critical mass and community-controlled neighborhood redevelopment."[24]

Professor Epstein acknowledges that "holdout risks" can be a serious impediment to economic development that requires the use of eminent domain. *See* Br. *Am. Cur.* Cato Inst. 22. He argues, however, that the market failure caused by holdouts is "a complete nonproblem" in New London because the

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[21] *Id.*

[22] *Id.*

[23] *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. Rev. 1061, 1077-81 & n.190 (1996) (describing how a non-profit group formed by La Alianza Hispana, Cape Verdean Community House, Casa Esperanza, St. Patrick's Church, and other neighborhood organizations is helping to revitalize a "wasteland" area of "trash-filled vacant lots" less than two blocks from downtown Boston).

[24] 36 B.C. L. Rev. at 1080. *Amicus* Jane Jacobs argues that the private sector can address holdouts because private developers can "use specialized agents" and "negotiate with individual owners in secret" to trick holdouts into selling. Br. 14. Takings jurisprudence, however, should not turn on the availability of deceptive negotiating practices. In contrast, New London's redevelopment occurred in the sunshine of public hearings and media scrutiny.



city could simply build around them. *Id.* at 23. But Petitioners' land is located in the middle of Fort Trumbull peninsula, falls within a floodplain, and needs to be raised by adding fill to allow for new development. J.A. 3-4; Pet. App. 95 n.85. Building around them would leave them literally underground. More fundamentally, this myopic theory would encourage countless holdouts in future projects to exploit their monopoly position over land needed for economic development to secure more compensation than is constitutionally required. Because this compensation would come from the municipal fisc, it would unfairly benefit a few at the expense of the many.

Petitioners argue that the Fort Trumbull project is distinguishable from condemnations for economic development previously approved by this Court, such as those under the Mill Acts, because those early condemnations were location-specific. Pet. Br. 21-23. They blithely assert that hotels and offices are "ubiquitous" and can be built anywhere. *Id.* at 22. But the Fort Trumbull project and other waterfront projects are as location-specific as any mill. The Fort Trumbull project is integrated with the historic state park and economically tied to other facilities in the area that will supply customers to the retail shops. The very purpose of waterfront development is to revitalize areas abandoned by water-dependent industries such as shipbuilding and warehouses that fell into disuse with the rise of jet aircraft, the interstate highway system, and the decline of water-dependent industries.[25]

Petitioners might argue that because they do no: challenge the holding in *Berman*, their argument does not jeopardize projects where any portion of the project consists of blighted property. But this position would be unacceptably arbitrary. Federal constitutional authority to assemble land through

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[25] *See* Wrenn, *supra*, 15 St. Mary's L. J. at 556-57.

eminent domain for redevelopment should not turn on whether any portion of the land, however small, is blighted. The concept of blight is itself an economic concept, "a pattern of deterioration and decay of economic vitality in cities or neighborhoods." Willem van Vliet, ed., *The Encyclopedia of Housing* 32 (1998). Thus, the line between blight and under-use is sometimes exceedingly blurry, and attempts to distinguish blight elimination from economic development often elevate form over substance. For example, the highly successful Riverside Plaza redevelopment in Estes Park, Colorado, was driven by the need to revitalize the local economy after a devastating flood in 1982. Although certain condemned parcels might have been blighted, the primary purpose was not to remove eyesores, but to re-energize the local economy.[26]

Moreover, limiting eminent domain for redevelopment to blight removal would have the unjust effect of confining condemnation to the dwellings and businesses of the very poor, while immunizing the more affluent. *See* Bruce Fein, *Eminent Domain, Eminent Nonsense*, Wash. Times, Oct. 12, 2004, at A16 (describing the Fort Trumbull project as a "middle class reenactment of *Berman*" and criticizing Petitioners' effort "to make the Constitution pivot on Marxist-like class distinctions" by limiting condemnation for redevelopment to blighted land). It would be capricious in the extreme to read the U.S. Constitution as prohibiting the Fort Trumbull project, but to allow an identical project to go forward in another community simply because a small portion of the development site happens to be blighted.[27]

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[26] *Urban Renewal in Colorado*, *supra* note 20, at 47-48.

[27] To the extent Petitioners' brief might be read to suggest that local officials may condemn *only* blighted parcels, this position was categorically rejected in *Berman*, where the Court upheld the condemnations at issue even though the complainants owned a non-blighted department store. *See* 348 U.S. at 31.



Below, *amici* describe in greater detail two economic redevelopment projects which, like Fort Trumbull, involved condemnation of non-blighted land: the Kansas Speedway and the Canton, Mississippi, auto plant. As is sometimes the case when economic development projects are undertaken pursuant to the democratic process, there were some landowners who opposed these projects and did not sell voluntarily. But their objections do not detract from the enormous public benefits resulting from these projects or the undeniable "public use" to which the land is now being put. Nor was there any certainty that these projects, particularly the speedway, were going to succeed, but succeed they did. Petitioners would preclude every community from enjoying the benefits of similar projects in the future.

### A. The Kansas Speedway and Retail Success Story

In 1997, Kansas City, Kansas, and Wyandotte County had been struggling economically for almost fifty years.[28] Government revenues were dropping, and tax rates were climbing, creating "the kind of downward cycle that is hard to reverse."[29] The county had been burdened for generations by poverty, crime, and a stagnant economy.[30]

What changed the fortunes of Kansas City and Wyandotte County are the Kansas Speedway and the retail development that it sparked. In order to save its residents from the consequences of further economic decline like fewer job opportunities, higher taxes, and weakened public services, local officials made the difficult decision to use eminent

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[28] Rick Alm, *Learning From Past Mistakes Paved Way for Kansas Speedway's Success*, Kan. City Star, Oct. 1, 2002, *available at* 2002 WL 26158033.

[29] Dale Garrison, *Biggest Deals of the Past 30 Years*, Ingram's, Jan. 2004, http://www.ingramsonline.com/jan_2004/bigdeals4.html.

[30] *See* Alm, *supra* note 28.

domain to acquire property for the speedway.[31] The public benefits of the speedway and related development are "a glorious success for a once-struggling county."[32]

The speedway's wealth also has been spread throughout the region. One study found that $89.3 million flowed into the local economy on race days at the track during the first season, and the larger metropolitan area reaped "$150 million in economic activity, including $70 million in local workers' wages and $10 million in increased business tax collections."[33] But the most important economic impact of the speedway has come from the retail development that the speedway sparked, a 400-acre retail project called Village West that is "headed toward 10 million visitors a year."[34]

Village West probably would not have been possible without the speedway. As noted by Mayor Carol Marinovich, retailers were reluctant to go to Wyandotte County because of its small population, and local officials needed to create "a destination, a draw, that would bring retail," even without a large population.[35]

The decision to use the speedway as a catalyst for economic development was initially controversial, with critics harping that the project was doomed to failure.[36] But the benefits for the people of Wyandotte County and Kansas City

[31] Lisa Scheller, *Where Did They Go? Wyandotte Residents Displaced by Kansas Speedway Now Settled In*, Tonganoxie Mirror, July 28, 2004, http://www.tonganoxiemirror.com/section/archive/story/6613.

[32] Lance Dickie, *NASCAR's Lucrative Lure; Is It Right for the Northwest?*, Seattle Times, Sept. 19, 2004 at D1, *available at* 2004 WL 58951653.

[33] Alm, *supra* note 28.

[34] Dickie, *supra* note 32.

[35] Garrison, *supra* note 29. *See also* Dickie, *supra* note 32.

[36] Alm, *supra* note 28.



are now clear. The Village West tourism district will create approximately 4,000 new jobs.[37] Within the next several years, the state and local governments will receive $53 million in annual tax revenue from the development.[38] The once moribund housing market has revived, with single-family housing starts increasing by 146% between 2000 and 2003.[39] In the last seven years, tax rolls have swelled with $700 million worth of new real estate development.[40]

None of these benefits would have occurred without the use of eminent domain. Before the speedway existed, there were no market forces swirling around the 400-acre Village West site, which had previously been "in the middle of a demographically barren nowhere."[41] The government had to create the conditions for economic development, and it had to use eminent domain to do so. Without the efforts of local officials, including the use of eminent domain, the jobs for local residents, the revenue for local businesses, and the funds for local services simply would not exist.

Although some of the former landowners did not want to leave their homes, many support the project seven years later. For example, Joyce Vaught, one of the homeowners whose land was condemned for the speedway, is one of these converts: "At first I was pretty bitter about having to [move] . . . , we'd lived there for so long. But now I love it." She

[37] Mark Wiebe, *Village West to Get New Tenants*, Kan. City Star, Jan. 29, 2003, *available at* 2003 WL 4023705.

[38] Randy Covitz, *Track is a Green Light for County; Speedway Brings a Lot to Wyandotte*, Kan. City Star, Oct. 9, 2004, *available at* 2004 WL 94408340.

[39] Rox Laird, *Kansas City-Wyandotte County Have Merged—and Become a Top Tourist Destination*, Des Moines Register, Oct. 17, 2004, at O1, *available at* 2004 WL 90799574.

[40] Laird, *supra* note 39.

[41] Alm, *supra* note 28.

also is pleased with how the speedway and Village West area has grown. "It's beautiful and . . . it just amazes me when you go down there to eat how there are all those places and they're busy. It's just a beautiful thing."[42]

### B. The Canton Success Story

In the 2000 census, Mississippi ranked 49th in median household income ($31,000), 50th in personal per capita income ($20,000), first in overall poverty (20 percent), and first in child poverty (27 percent).[43] The State recently lost more than 50,000 manufacturing jobs, suffering through "several years of devastating factory closures."[44]

When the Nissan Motor Company chose Madison County, Mississippi, as the site for a major manufacturing plant in 2000, state officials recognized that this could have a transformative effect on the State.[45] Mississippi used eminent domain to acquire the more than 1,400 acres needed for the Nissan plant. Landowners on the site received an average of $18,000 an acre[46] for property that had been selling for about $2,300 an acre a few years earlier.[47] A handful of owners

[42] Scheller, *supra* note 31.

[43] *See* U.S. Census Bureau, *State Rankings—Statistical Abstract of the United States* (2004), *available at* http://www.census.gov/statab/www/ranks.html.

[44] Barbara Powell, *Economy Will be Barbour's Big Challenge as Governor*, Commercial Appeal, Nov. 16, 2003, at B4, *available at* 2003 WL 66406270.

[45] *See, e.g.*, Reed Branson, *Mississippi OKs $295 Million in Incentives for Nissan*, Commercial Appeal, Nov. 7, 2000, at A1, *available at* 2000 WL 27940695.

[46] David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sept. 10, 2001, at A10.

[47] John Porretto, *Last Owners Settle in Nissan Land Fight*, Commercial Appeal, Apr. 10, 2002, at DS5, *available at* 2002 WL 3469169.



objected to the use of eminent domain for the Nissan project, but they eventually settled with the State.[48]

The State's use of eminent domain authority has greatly benefited its residents: "[T]he arrival of Nissan in Madison County breathed new life into Mississippi."[49] The Nissan plant employs 5,300 workers at full capacity.[50] These workers earn hourly wages of between $13.25 and $25 (between $27,500 and $52,000 a year, well above the state-wide per capita income), plus competitive fringe benefits.[51] Tens of thousands of more jobs are expected just in Madison County, with 16,200 predicted by sometime this year, and 29,000 by 2010.[52]

Not surprisingly, Madison County has felt the most direct impact from the plant. "Madison County, especially its southern areas, has become a synonym for growth."[53] The "assessed value of land, property, vehicles, and utilities in the county exceeded $1 billion for 2004, up 36 percent from the year before."[54] This higher tax base means more money for public services that benefit county residents.

The Nissan plant's benefits have also spread beyond Madison County's borders. The plant's workforce comes from

[48] *Id.*

[49] Lynne Jeter, *Driving Change: Nissan Adds Punch to Region's Economy*, Miss. Bus. J., Nov. 29, 2004, at S12, *available at* 2004 WL 87315606.

[50] *Id.*

[51] Josee Valcourt, *Southern Auto Plants: Fringe Benefits Keep Packages Competitive*, Clarion-Ledger, Feb. 22, 2004, at 1C.

[52] Jeter, *supra* note 49.

[53] Eric Stringfellow, *Utility Chief Needs New Economic Agenda*, Clarion-Ledger, July 6, 2004, at 1B.

[54] *Glimpse of the Future 2: Residents Describe Plant's Massive Impact on Area*, Montgomery Advertiser, Aug. 22, 2004, *available at* 2004 WL 84752391.

eighty of the State's eighty-two counties, including many places that were hard hit by other plant closures.[55] The higher-than-average wages paid by Nissan and its suppliers could eventually boost manufacturing wages throughout the entire State, as other employers compete for skilled workers.[56] "It's a reality that Nissan's being here is changing things," a representative for the Mississippi Manufacturers Association told a reporter. "It's offering choices and opportunities for people."[57]

For individual Mississippians, the plant has been life-transforming: "Before I came to Nissan, it was like being covered over with dirt. I was in debt. I was buried," said one Nissan worker.[58] Another worker, who used to make $9 an hour handling raw chicken parts on an assembly line, will soon earn $21 an hour at Nissan. "My job has really changed my life," she said, "It keeps me going."[59]

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[55] Josee Valcourt, *Spending $365 million: Is State's Investment in Nissan Paying Off?*, Clarion-Ledger, Dec. 21, 2003, at 1C.

[56] Lynne Jeter, *The Nissan Effect, A Better Mississippi All Around*, Miss. Bus. J., June 23, 2003, at 19, *available at* 2003 WL 12776857.

[57] *Id.*

[58] Gary Pettus, *Nissan + 1, Thanks to Better Pay, Bills Lighter, Dreams Brighter, Workers Say*, Clarion-Ledger, May 30, 2004, at 9I.

[59] Valcourt, *supra* note 55.



## CONCLUSION

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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In the
**Supreme Court of the United States**
October Term, 2004

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SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA and CHARLES DERY, JAMES and LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,
*Petitioners,*
v.
CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,
*Respondents.*

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**On Petition for Writ of *Certiorari* to the Supreme Court of Connecticut**

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# BRIEF OF *AMICI CURIÆ* NEW LONDON LANDMARKS, INC., THE COALITION TO SAVE THE FORT TRUMBULL NEIGHBORHOOD, and NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

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*On the Brief*
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December 3, 2004

## QUESTIONS PRESENTED

*Amici Curiæ* New London Landmarks, Inc., the Coalition to Save the Fort Trumbull Neighborhood, and New England Legal Foundation adopt the question presented by Petitioners Susette Kelo *et al.*:

> What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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# BRIEF OF *AMICI CURIÆ* NEW LONDON LANDMARKS, INC., THE COALITION TO SAVE THE FORT TRUMBULL NEIGHBORHOOD, and NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

## INTEREST OF *AMICI CURIÆ*

*Amici* seek to bring to the Court's attention their views, and the views of their supporters, concerning the importance of the public use requirement of the Fifth Amendment's Takings Clause, as applied to the states pursuant to the Fourteenth Amendments to the United States Constitution.[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that

*Amicus Curiæ* New London Landmarks, Inc. ("NLL, Inc.") is a non-profit, membership-based Connecticut corporation that promotes the preservation and development of the entire urban environment of New London, Connecticut, including significant individual structures, streetscapes, neighborhoods, and open spaces. NLL, Inc. was formed in 1976, as a merger of two separate groups: the Union Railroad Station Trust, Inc., organized in 1973 to protest the impending demolition of New London's 1885 Henry Hobson Richardson-designed Union Station, and New London Landmarks, formed in 1975 to protest the New London Redevelopment Agency's plan to demolish eight buildings on Bank Street. NLL, Inc. is run by a volunteer Board of Directors along with a small professional staff. It actively promotes preservation through educational progams, publications, tours, and a historic plaque program. NLL, Inc. was the responsible agent in nominating eleven New London Neighborhoods to the National Register of Historic Places.

*Amicus Curiæ* the Coalition to Save the Fort Trumbull Neighborhood (the "Coalition") is a voluntary association made up of members of NLL, Inc., the New London Historical Society, the Fort Trumbull Neighborhood Association, college professors, and independent residents of the Fort Trumbull Neighborhood and greater New London generally. The Coalition was formed to oppose the taking by eminent domain and proposed demolition of the residences in the Fort Trumbull

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no counsel for any party authored this brief in whole or in part and that no person, other than *amici*, their members, and their counsel made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk pursuant to Supreme Court Rule 37.3 (a).



neighborhood of New London that are at issue in this case. The primarily residential Fort Trumbull neighborhood may not consist of pre-Revolutionary buildings, buildings designed by famous architects, or homes of wealthy merchants, which are typically the subjects of historic designations. Dan Pearson, *Board asks Fort Trumbull homes be saved,* The [New London] Day, Feb. 28, 2000.[2] Nevertheless, the vernacular architecture of the area is esthetically pleasing and preserves important aspects of New London's cultural and social history, from the Italian immigrants who originally built the bulk of the neighborhood's homes, to the close-knit group of current residents. *Id.*

The Coalition sponsored an alternative development plan that would have achieved all of the benefits of Defendant-Respondent New London Development Corporation's ("NLDC") Municipal Development Plan for the Fort Trumbull area, while preserving the homes. *See* Dan Pearson, *Alternative plan would save Fort Neck homes,* The [New London] Day, Dec. 23, 1999, at B1;[3] Dan Pearson, *Group opposing Fort Trumbull demolition approves new plan,* The [New London] Day, Dec. 27, 1999.[4] The Coalition's plan, designed by John Ames Steffian, architect, urban designer, and former dean at the Rhode Island School of Design, would have replaced the NLDC's planned high-end townhouse development with mixed-income housing that would have allowed for preservation and renovation of the existing Fort Trumbull housing stock. *Id.* NLDC cursorily rejected the Coalition's alternative plan. Dan Pearson, *Alternative Fort Trumbull plan is rejected,* The [New London] Day,

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2 Included in the Appendix to this Brief at *Amici* Appendix 2.
3 Included in the Appendix to this Brief at *Amici* Appendix 3.
4 Included in the Appendix to this Brief at *Amici* Appendix 5.

Dec. 28, 1999.[5]

NLDC's immediate rejection of the Coaltion's alternative plan (several days after its submission), NLDC's rejection of several alternative plans by its own consultants that would have allowed for preservation of existing homes, and NLDC's commencement of voluntary purchases in the Fort Trumbull area before approval of its own plan demonstrate that NLDC did not intend to consider seriously any alternatives that would allow for the preservation of existing Fort Trumbull homes. *Kelo v. City of New London*, 268 Conn. 1, 9 n.6, 843 A.2d 500, 510, *cert. granted*, 125 S. Ct. 27 (2004); John Ames Steffian, *NLDC could save homes; it just doesn't want to*, The [New London] Day, Jan. 16, 2000;[6] Pearson, *Group opposing Fort Trumbull demolition approves new plan*, *Amici* Appendix 5; Pearson, *Alternative Fort Trumbull plan is rejected*, *Amici* Appendix 6. The Coalition's well thought-out alternative design plan relates to whether the specific condemnation was, in fact, reasonably necessary, which *Amici* and Petitioners contest. *See Kelo*, 268 Conn. at 168 n.26, 843 A.2d at 600 (Zarella, J. dissenting). *But see Kelo*, 268 Conn. at 82–92, 111–21, 843 A.2d at 552–58, 568–74 (majority decision) (condemnations reasonably necessary under highly deferential standard).

*Amicus Curiæ* New England Legal Foundation ("NELF") is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and

5 Included in the Appendix to this Brief at *Amici* Appendix 6.

6 Included in the Appendix to this Brief at *Amici* Appendix 7.



defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF's members are affected by the security of their real estate investments, which depend, in part, upon the extent to which public agencies and private entities endowed by state law with the power of eminent domain exercise that power with restraint, respecting property owners' long-term expectations. Furthermore, some of NELF's members are directly interested in the constitutional protections for owners of real estate because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999); *Smedley v. Department of Mental Retardation*, 270 Conn. 32, 850 A.2d 1007 (2004); *Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048 (2002). NELF has submitted briefs, as party or counsel, in state and federal courts, in several cases involving the Fifth Amendment's Takings Clause. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Preseault v. United States*, 66 F.3d 1190 (Fed. Cir. 1995).

*Amici* believe that the Connecticut Supreme Court's divided decision unduly expands the circumstances in which a governmental or private entity with eminent domain powers may dispossess an owner of his or her property. In this

case, the eminent domain taking by NLDC of property in the Fort Trumbull neighborhood threatens to disrupt a vibrant community with a long history and architectural value for dubious and potentially ephemeral gains. *Amici Curiæ* therefore believe that this brief will provide an additional perspective to aid the Court in determining the extent to which the public use requirement of the Fifth Amendment's Takings Clause protects private property from ill-conceived schemes.

## SUMMARY OF ARGUMENT

The decision below in this case violates basic constitutional principles protecting property rights through the Fifth Amendment's public use requirement for eminent domain takings. While the attempted taking in this case should fail under any level of scrutiny at all, *Amici* argue that, in this case, heightened judicial scrutiny is consistent with this Court's precedents and is warranted. Here the evidence demonstrates that a taking is for a private benefit, for general, undefined economic benefits, and for an uncertain or unduly vague intended use. *Amici* further contend that the decision below is unduly deferential to agency determinations of the reasonable necessity of the condemnation to achieve that public benefit and that the takings were not reasonably necessary because plausible alternative development scenarios obviated the need for any taking.



## ARGUMENT

### I. Courts should apply heightened scrutiny to takings for a private benefit, for general, undefined economic benefits, or for an uncertain or unduly vague intended use.

As of the time of the trial in this case, NLDC had not determined how it would develop the property that it desired to take. *Kelo*, 268 Conn. at 9, 843 A.2d at 510. Nevertheless, NLDC intended to give at least a substantial portion of its interest in the property to a private developer. At the time of the trial, NLDC was negotiating to grant for-profit real estate developer Corcoran Jennison a 99-year lease on three major parcels in the project area (including the homes of several of the Petitioners) for nominal consideration of $1 per year. *Id.* This case clearly raises significant concerns about private benefits from the taking.

Moreover, while NLDC projected an increase in jobs and local tax revenue for its entire development plan area, it did not attribute a specific portion of those alleged benefits to the destruction of the existing residential neighborhood. *Id.* The dissent below concluded convincingly that there was no evidence of the need for the takings:

> The record . . . fails to establish that there was any momentum in the project from a development standpoint or any reasonable development prospects for parcels [that included the Petitioners' properties] at the time of the takings. Evidence to the contrary consists of vague predictions of future demand.

*Kelo*, 268 Conn. at 167, 843 A.2d 599 (Zarella, J. dissenting).

*Amici* support the Petitioners' contention that takings for private economic development plans, especially those based on vague and uncertain projections such as these, contravene the Fifth Amendment's public use requirement. *See* Petition for *Certiorari* at 7–8. *See Kelo*, 268 Conn. at 121–22, 843 A.2d 574–75 (Zarella, J. dissenting).

Commentators suggest that discouragement and cynicism are often bred by takings that benefit private parties, even when full compensation is paid and when there is no evidence of favoritism. "In governmental condemnations for private use, the disruption of the sanctity of private property and the reductions in investment and productivity as a result of 'unsafe' [*i.e.*, insecure] title may outweigh the benefits obtained from the property's alternative use prompted by the transfer."[7] Cynicism about government motives in takings for private beneficiaries encourages cynicism about government generally and therefore decreases cooperation with legitimate government programs.[8]

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7 Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 87–88 (1998). *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1307 (1985); Richard A. Epstein, *Takings, in* 3 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 561, 564 (Peter Newman ed., 1998); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559 (1972) ("[T]ransfers [by eminent domain to private parties] tend more than transfers to the government to be for non-public purposes and so more or less tend to be suspect."); Dale F. Rubin, *The Public Pays, the Corporation Profits: The Emasculation of the Public Purpose Doctrine and a Not-for-Profit Solution*, 28 U. RICH. L. REV. 1311, 1318 (1994) (public perception of rife corruption and fraud associated with government involvement in railroad development led to anti-aid amendments to state constitutions).

8 *See* Susan Rose-Ackerman, *Corruption, in* 1 *THE NEW PALGRAVE*



Some concrete examples of adverse effects from takings for private beneficiaries include those resulting from the demolition of Boston's West End neighborhood (clearance of residents completed by 1960) and the creation of the Cross-Bronx Expressway in New York City (clearance of residents completed by 1954). *See* Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 953–55 (2003) (detailing urban redevelopment failures); Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 355–56 (2001) (citing examples of use of eminent domain to take property from the politically disadvantaged to give to the politically connected). Even proponents of urban renewal subsequently widely derided Boston's West End project, "because it bulldozed the homes of poor people and replaced them with an enclave for the wealthy." LAWRENCE W. KENNEDY, *PLANNING THE CITY UPON A HILL* 162–63 (1992). The luxury housing that largely replaced the vibrant mixed-ethnic neighborhood is now considered dated and unattractive. *Id.* at 165. A well respected sociological study of the West End concluded that the large-scale clearance occurred because the redevelopment agency valued the interests of the redeveloper and his luxury rental tenants over those of the community as a whole; in other words, the development was primarily for private use. HERBERT J. GANS, *THE URBAN VILLAGERS* 328 (1962). The cynicism about government motives fomented by the West End clearance continues to this day. KENNEDY at 164; THOMAS H. O'CONNOR, *BUILDING A NEW BOSTON* 134, 284 (1993).

The Cross-Bronx Expressway provides another illustration of the public costs of judicially unchecked

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*DICTIONARY OF ECONOMICS AND THE LAW*. 517, 519 (Peter Newman ed., 1998).

government power. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1298–1300 (1985). The Expressway dislocated 1,530 East Tremont neighborhood families when an alternate route was available that was shorter and would have dislocated only 19 families and a private bus terminal facility, with a saving of $10 million in land acquisition costs. *Id.* Speculation as to the reasons for this choice by politically powerful New York City Planning Commissioner Robert Moses, the principal planner of the route, include "political corruption and whim exacerbated by stubbornness." *Id.* at 1299. In this case, NLDC gave short shrift to the Coalition's alternative development plan to save existing housing. Pearson, *Alternative Fort Trumbull plan is rejected, Amici* Appendix at 6. Similarly, Moses and leading New York politicians summarily dismissed the efforts of East Tremont residents to advocate for the cheaper, less disruptive alternative. Durham, 69 MINN. L. REV. at 1299. Another similarity is that the taking agencies in both cases were in a rush to move residents out despite the lack of any immediate need for the property. *Kelo*, 268 Conn. at 167, 843 A.2d 599 (Zarella, J. dissenting) (takings based on predictions of future demand); Durham, 69 MINN. L. REV. at 1299 n. 149 (East Tremont residents removed in 1954, highway construction not completed until 1960).

Adverse public policy effects inevitably flow from property takings that disrupt lives without providing a clear public advantage and that benefit powerful individuals or corporations. In this case, the eminent domain takings are for a private benefit, for an uncertain and vague intended use, and promise to provide, at best, a general, undefined economic benefit. Each of these circumstances, standing alone, would warrant heightened judicial scrutiny of the taking. *See, e.g.,*



Garnett, 71 GEO. WASH. L. REV. at 964 (courts should review public use challenges under the standards applicable to regulatory exactions to determine whether government can demonstrate that the taking is reasonably necessary for the taking agency's stated public purpose); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 87–88, 90 (1986) (heightened scrutiny warranted in takings with potential for secondary rent seeking, which includes those that benefit one or a few private parties); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000) (urging strict scrutiny of takings for private parties); Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75. N.D. L. REV. 783, 799–802 (1999) (heightened scrutiny to determine whether condemnation will be used for the proffered public purpose); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything? The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 570 (2002) (calling for heightened scrutiny of public use when private parties receive the primary benefit of a taking); Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking"—A Proposal to Redefine "Public Use"*, 2000 L. REV. MICH. ST. U. DET. C.L. 639, 680 (strict scrutiny warranted for economic development takings);[9] Laura

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9 *Amici* encourage courts to consider all relevant factors, including the following, when evaluating a taking agency's stated public purpose:

> (1) the amount of deference courts are to give to the municipality's proposed legislative action; (2) the economic costs of the takings; (3) the economic benefits of the proposed development; and, finally (4) the private market alternatives that are available to acquire the necessary realty.

Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 444–45 (1983) (suggesting *de novo* review and "actual rationality" standard); Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1083–85 (1995) (urging courts to review closely takings benefiting private parties).[10]

These suggestions for heightened scrutiny in cases that benefit a small group of private beneficiaries are consistent with this Court's decision involving a significant and direct positive impact on a broad public class in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (upholding "the exercise of the eminent domain power [when it] is rationally related to a conceivable public purpose"). *Midkiff* concerned the unusual circumstance, brought about by Hawaii's unique history, of a high degree of concentration in land ownership and a huge statewide population of long-term tenants. *Id.* at 232–33. This Court explicitly distinguished that situation from this case and others where the potential private benefits are clear and the public benefits obscure. *Id.* at 245. Because takings for a private benefit, for general, undefined economic benefits, and for an uncertain or unduly vague intended use, often cause public cynicism, long-term resentment, undue expense, and deterioration of secure property rights, courts should apply heightened scrutiny in such takings.

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Kulick, 2000 L. REV. MICH. ST. U. DET. C.L. at 679.

10 The majority decision below indeed acknowledged "that many commentators within the academic community . . . have addressed the issue of whether economic development satisfies the constitutional public use requirement. . . . [*M*]*ost* [*commentators*] . . . *tend to express alarm at what they consider to be a situation rife for abuse of the eminent domain power.*" *Kelo*, 268 Conn. at 53, 843 A.2d at 535 (emphasis added).



## II. Appropriate review of the condemnation of the Fort Trumbull residential neighborhood demonstrates that it was not reasonably necessary to effectuate NLDC's overall redevelopment plan and fails to comply with the public use requirement.

With its long-term rent of a significant portion of the development area to a for-profit entity for nominal consideration and its vague plans for much of the remainder, NLDC's proffered purpose fails to meet the public use requirement under any reasonable standard of scrutiny, even if the standard is lower than the heightened scrutiny that *Amici* argue should apply. The NLDC plan fails the public use requirement test under ordinary rational-relation scrutiny. It is only because the Connecticut Supreme Court applied a test of extreme deference that NLDC's proposed condemnation met with that court's approval.[11]

The Petitioners challenged below the reasonable necessity of the condemnation of their properties, in part because of the availability of reasonable alternative plans that would not have required the taking and demolition of their

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11 In a case of first impression in Connecticut, the court below allowed the property owners only extremely limited options to contest the public use of an economic development plan that includes property takings: "'[T]he plaintiff [has] the burden of establishing that the taking . . . was unreasonable, in bad faith or an abuse of power.'" *Kelo*, 268 Conn. at 88, 843 A.2d at 556 (quoting *Hall v. Weston*, 167 Conn. 49, 66, 355 A.2d 79, 87 (1974)). The court, further, effectively confined unreasonableness to a determination that the reason given by the taking agency was pretext. *Kelo*, 268 Conn. at 119, 843 A.2d at 573. The court utilized the same unduly deferential standard in its review of the components of the taking agency's determination, including the reasonable necessity for condemning the specific properties and reasonable foreseeability of an eventual public use for condemned property. *Kelo*, 268 Conn. at 90, 95, 98, 119, 843 A.2d at 557, 560–61, 573.

homes. *Kelo,* 268 Conn. at 82–92, 111–21, 843 A.2d at 552–58, 568–74 (majority decision), at 168 n.26, 843 A.2d at 600 (Zarella, J. dissenting) (agreeing with Petitioners that taking of residences on Parcel 4A was not reasonably necessary). The Connecticut Supreme Court's analyzed the reasonableness of and necessity for the condemnations solely on the basis of state statutory interpretation, however, disregarding similar federal constitutional norms under the Fifth Amendment's public use requirement.

*Amici* contend that courts must independently determine that eminent domain takings are reasonably necessary in order to satisfy the public use requirement. A proposed taking would violate the public use requirement if, for example, reasonable alternative development scenarios would permit the public project to go forward without the protested condemnations. At least one author has suggested that the seventeenth and eighteenth century civil law jurists (Grotius (Huigh de Groot), Samuel Pufendorf, Emerich de Vattel, and Cornelius van Bynkershoek), whose work was familiar to the Founding Fathers, intended "that the exercise of eminent domain power should be restricted to somewhat more necessitous situations than should other governmental powers." Stoebuck, at 595. *See* Kulick, 2000 L. REV. MICH. ST. U. DET. C.L. at 645. *See also* Garnett, 71 GEO. WASH. L. REV. at 964 (suggesting judicial review of reasonable necessity of taking). In less "necessitous" situations, the government should be able to purchase land for public purposes like private parties.

In this case, the Coalition and NLDC's own consultants proposed a number of plausible alternative development scenarios that would have allowed the entire NLDC project to go forward successfully without condemning the Petitioners' properties. *Kelo,* 268 Conn. at 9 n.6, 843 A.2d at 510; Steffian,



*NLDC could save homes; it just doesn't want to, Amici* Appendix 7. Therefore, the takings in this case were not reasonably necessary and violated the Fifth Amendment's public use requirement.

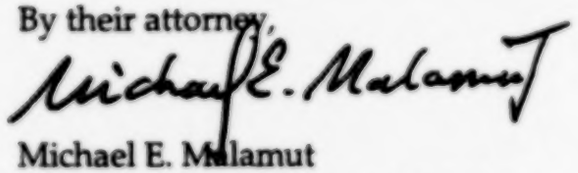
## CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Connecticut Supreme Court below and grant such additional relief as requested by Petitioners Susette Kelo *et al.*

Respectfully submitted,

NEW LONDON LANDMARKS, INC.,
THE COALITION TO SAVE THE FORT TRUMBULL NEIGHBORHOOD,
and
NEW ENGLAND LEGAL FOUNDATION

By their attorney,



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Dated: December 3, 2004

## *AMICI* APPENDIX

THE DAY, MONDAY, FEBRUARY 28, 2000

# Board asks Fort Trumbull homes be saved

By DAN PEARSON
Day Staff Writer

**New London** — One month before the City Council approved the plan to allow demolition in Fort Trumbull, the city's Historic District Commission and Design Review Board asked it not to.

In a letter written in December to both the City Council and the New London Development Corp., the commission said it had voted unanimously to recommend the NLDC's Fort Trumbull Municipal Development Plan be modified to retain a majority of existing houses, to require that new development be aesthetically integrated into the existing neighborhood, and to encourage residential property owners to remain in the Fort Neck area.

In January all city agencies, including the City Council, approved the NLDC's plan which would clear existing housing and property to make way for a hotel, conference and fitness center, townhouse community and research and development offices.

Edith Lidestri, commission's chairwoman, said the commission originally recommended the city and the NLDC preserve any building in the Fort Trumbull area that might be eligible for the National Register. But the city's preservation organization, acting on behalf of the Connecticut Historical Commission, determined that the area was not eligible because the buildings were not "pre-Revolutionary, built by famous architects or the homes of wealthy [illegible]."

The commission, however, [illegible] to write the letter after doing their own research and after hearing that demolition was opposed by the Landmarks group. Landmarks, which has been instrumental in preserving city landmarks such as Union Station, said in December that it supported the NLDC's overall goals but opposed the "wholesale demolition" of Fort Trumbull.

Landmarks determined that "although the buildings did not meet the high standards" required of the Register, "the Italians who had lived in the Fort Trumbull area had left behind a legacy of architecturally and historically significant buildings" and that the area had archaeological potential, especially at the former [illegible] Wharf. In late January, [illegible] Historical Commission [illegible] demolition on [illegible] and asked the city [illegible] NLDC to postpone demolition until it had further time to review the area.

"We wanted to support Landmarks' recommendation. That's our job, preserving our history," said Lidestri. "As far as demolition was concerned, we had to take a stand and look after the buildings. We don't like demolition."

While members of Landmarks have joined with other city groups and residents to oppose the demolition as part of the Coalition to Save Fort Trumbull Neighborhood, Lidestri said it is not her commission's responsibility to take a continued and active stand against the demolition. [illegible]

"We [illegible] we have already [illegible]," she said. "We can't get involved otherwise."



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THE DAY, THURSDAY, DECEMBER 23, 1999

# Alternate plan would save Fort Neck homes

## Plan includes hotel, offices with Fort Trumbull houses

By SAM PEARSON
Day Staff Writer

New London — A member of the Coalition to Save Fort Trumbull Neighborhood has designed an alternative development plan that would preserve homes in the Fort Neck area, which the New London Development Corp. plans to demolish.

John Steffian, an architect, urban designer and coalition member, said Wednesday that he has produced a plan that would preserve historic structures and the existing housing stock in Fort Trumbull while leaving room for the hotel, conference and fitness center, and biotech and bioscience offices and labs planned by the NLDC.

In a development plan for the area, the NLDC and its consultants have said that all the homes in the area must be demolished to make the development economically viable.

Members of the New London County Historical Society, New London Landmarks, residents and neighborhood groups formed the coalition in November to protest the demolition and to provide an alternative plan. The coalition has argued that the NLDC never considered an alternative because it began purchasing homes in the area before a consultant offered them options.

David Goebel, the NLDC's chief operating officer, said the NLDC plans to pursue eminent domain to obtain houses that owners refuse to sell.

"Until their plan is approved (by the City Council) they don't have eminent domain, so they shouldn't be threatening. But if (Goebel) said they were going to do it, they probably want to do it," Steffian said. "I just wanted to show that there is another approach and another plan that integrates the existing community."

Steffian, a Waterford resident and architecture professor with extensive urban planning experience, said the main difference between his plan and the NLDC's is that he proposes "blocks and lots" instead of clustered "pod" housing. In addition, instead of proposing the high-end townhouse community planned by the NLDC, Steffian proposes a mix of homes and apartments that would suit a range of incomes.

See PROPOSAL, page B4



# Proposal saves houses in Fort Trumbull area

From B3.

Steffian proposes constructing three- and four-bedroom homes with apartments over the garages. The apartments would open up the neighborhood to rentals for those unable to buy homes.

"What is wrong with all people of all incomes living together? There's room in this plan for everyone," he said. "There is a way to do this that won't destroy the social fabric of the neighborhood."

Steffian also proposes high-end three-bedroom homes, as well as two-bedroom duplexes and apartments with first-floor garages. Where there are vacant lots, he plans to construct homes similar to those traditionally found in the neighborhood.

"Just take clues from the historical method of making lots and blocks and developing, so that you have a tight and compact community," said Steffian. "It's very viable. Everybody has yards, parking, and a short distance to the waterfront."

Following the NLDC plan for Fort Trumbull, Steffian includes a hotel, a town green, health club, and the bioscience and biotech offices. Steffian, like the NLDC, anticipates using fill to elevate the hotel in the flood plain. But unlike the NLDC, which plans to change roadways and flatten the area's terrain, he would utilize the landscape and the existing road structure.

Landmarks president Sally Ryan and Historical Society president Nield Oldham said Wednesday that they were satisfied with Steffian's design. They said the coalition will continue to protest the demolition by petitioning against it and speaking against it at public hearings. The coalition will hold its own public hearing to present its alternative plan.

"(Steffian's) plan shows that you can have everything NLDC is seeking and still save the neighborhood," Oldham said.

THE DAY, MONDAY, DECEMBER 27, 1999

# Group opposing Fort Trumbull demolition approves new plan

By DAN PEARSON
Day Staff Writer

**New London** — The Coalition to Save Fort Trumbull Neighborhood has voted to endorse a new development plan that would preserve housing in Fort Trumbull that is slated for demolition by the New London Development Corp.

Last week's vote to endorse the plan comes only days after John Steffian presented the coalition with a plan that would preserve historic structures and houses in Fort Trumbull while leaving room for the hotel, conference and fitness center, and biotech and bioscience offices and labs planned by the NLDC.

Steffian works for the Waterford architecture firm Steffian and Steffian LLC and is an architect, urban designer and former dean at the Rhode Island School of Design.

Instead of the high-end townhouse community proposed by the NLDC, Steffian proposes a mix of housing that would draw diverse peoples and incomes. Steffian would save existing housing and, where there are vacant lots in between housing, fill in with aesthetically compatible homes.

In their Municipal Development Plan for the area, the NLDC and its consultants have said that the homes and some historic structures would have to be demolished to make the development economically viable. David Goebel, the NLDC's chief operating officer, told the coalition that the NLDC would use eminent domain to obtain any housing that residents refused to sell.

"It is not at all necessary to (demolish) to make this a nice community," said Steffian. "There is room here for everyone."

## Historical society

The coalition is comprised of members of the New London County Historical Society, New London Landmarks, the Fort Trumbull Neighborhood Association, the Neighborhood Network and residents. Steffian is a member of the coalition, New London Landmarks and the historical society.

The coalition also opposes the demolition because it believes the NLDC never considered a plan that would not involve it. The NLDC began purchasing homes in the area before a consultant offered them other options.

"In addition to preserving the present neighborhood (which has historical significance), Steffian's plan includes a realistic blend of housing, retail and recreational space," said Kathleen Mitchell, president of the network and a member of the coalition. "The major point that Mr. Steffian's site plan makes is that all significant features of the (Municipal Development Plan), as presented by the NLDC, can be accomplished without sacrificing the neighborhood."

# Alternative Fort Trumbull plan is rejected

THE DAY, TUESDAY, DECEMBER 26, 1989

## NLDC says no to the proposal for saving homes

By DAN PEARSON
Day Staff Writer

New London — The New London Development Corp. will not consider a plan that would save houses slated for demolition of homes in the Fort Trumbull neighborhood because it does not satisfy environmental and aesthetic requirements.

But the designer of the alternative plan said Thursday that the basic premise of the plan, of retaining housing and creating a mixed-income community, is still a viable option.

On Thursday, David Goebel, chief operating officer of the NLDC, said that architect and urban designer John Stefflan's plan for the Fort Neck neighborhood would not work because it violates a restriction placed on the NLDC by the state Department of Environmental Protection.

The NLDC, in its Municipal Development Plan, has proposed developing an upscale townhouse community, hotel, fitness and conference center, and biotech offices in the Fort Trumbull neighborhood. The DEP, said Goebel, has limited the townhouse community to 80 units for environmental impact reasons.

Goebel also said that Stefflan's plan would not create the "vistas" needed to make the redeveloped fort area and hotel economically viable or attractive to a developer.

The development of the community, said Goebel, will require the demolition of the existing houses in Fort Trumbull.

Stefflan is a member of the Coalition to Save Fort Trumbull that has been working for the last month to prevent the demolition and to present the state and city with an alternative plan.

Last week, Stefflan, an architect and urban designer who served as chief project designer for the Government Center project in Boston and is a former dean of the Rhode Island School of Design, completed a plan that would retain homes and the hotel and other developments.

Instead of using the "pod" style housing envisioned by the NLDC, Stefflan has proposed working with the original design of Fort Trumbull to create a mixed income "village" with upscale homes, moderate-income homes and apartments. Stefflan made a compact design by putting apartments and duplexes above garages.

But in proposing a mixed income "lots and blocks" style of residential development, based on the existing housing pattern, Stefflan's plan exceeded the 80-unit cap.

Goebel said that the "jam packed" concentration of housing would not be in compliance with the overall design of the fort area. If the NLDC were to use Stefflan's plan, Goebel said people traveling through Fort Trumbull would feel like they were approaching a Motel 6 instead of a luxury conference center.

Stefflan said he was not aware of the DEP housing cap, but said he could redesign the plan to comply. His plan, he said, still shows that alternative methods that do not involve demolition could be used while the development of the hotel and other developments could be carried through.

Stefflan disagreed with Goebel that the coalition plan was not aesthetically appropriate as an entranceway to the hotel and conference center. He envisions a village community with village green and shops that, he said, would serve as an attractive and welcoming entranceway to the hotel.

"(With my plan) you would have views of the whole place. It would bring you through the village right to the fort. That is the setting, that is the context of the whole thing," said Stefflan. "...There are a lot of ways to do this."

Stefflan said he will refine his plan before it goes to a public hearing later in January.

THE DAY, SUNDAY, FEBRUARY 18, 2000

PLAN FOR FORT TRUMBULL

# NLDC could save homes; it just doesn't want to

By JOHN AMOS STOFFLAN

The Coalition to Save the Fort Trumbull Neighborhood has asked only one question of the New London Development Corp.: "Why can the Fort Trumbull neighborhood *not* be saved?"

NLDC consultants and staff, including CEO David Goebel, failed again to answer this question at a meeting last December. Instead, the audience received the same patronizing formulaic "lectures." This had been the case as far back as the summer of 1998.

However, December's meeting saw one vital difference. Instead of being lulled into believing that Fort Trumbull residents might not be forced to face the specter of relocation – "Don't worry," residents had been told – the Coalition received Goebel's unequivocal nonanswer: All residents would be relocated and all houses demolished.

"Why can the Fort Trumbull neighborhood not be saved?" In all of this time citizens have had the benefit of only one single truly inclusionary public hearing at which then NLDC consultants Wallace, Roberts & Todd presented its now-familiar six alternative plans for the development of the Fort Trumbull Peninsula. Residents and many others from New London and surrounding towns spoke strongly in favor of alternative plan three, the only one of which envisioned retaining and incorporating the extant residential blocks.

The NLDC made no prior public announcement of its preference, so it was not until last fall that the public first had the opportunity to review the MDP draft. Imagine the dismay, then, when we discovered that deep within its nearly 3-inch built by the NLDC's "preferred development alternative," containing "positive elements of alternatives two, four, five and six," but unabling three entirely from consideration!

> Pressure on homeowners has continued unabated for two years, a carbon copy of discredited urban renewal policies of the 1950s and 1960s.

Citizens still seek an answer: "Why can the Fort Trumbull neighborhood *not* be saved?"

Shortly after Pfizer unveiled its welcome news to build a Global Research facility in early 1998, Fort Trumbull residents began to receive intimidating letters in which lurked the specter of eminent domain – and, possibly, lower selling prices – if they postponed relocation plans until the MDP draft became reality. Such pressures have continued unabated for almost two years, causing many to leave against their will. Recently the neighborhood Hispanic church has been enlisted to relocate; it is apparently particularly inimical to economic development to have religious institutions appear the sole holdouts to land clearance endeavors.

Such behavior is unconscionable. It's an anachronistic "carbon copy" of long-discredited urban renewal clearance policies of the 1950's and 1960's. By employing techniques of obfuscation and intimidation the NLDC has done much to degrade the uniquely vernacular appearance of this once close-knit neighborhood.

From the very start NLDC's intention has been to demolish the Fort Trumbull neighborhood, long before any MDP draft had been presented. Such intentions show an arrogant contempt for the community as well as for those citizens of New London and elsewhere who regard the phrase "social justice" as something more than mere empty rhetoric.

The NLDC is to be applauded for its zealous and unstinting efforts to create permanent job opportunities and increased revenues for the city, but it has from the beginning a marked aversion to inclusive public participation in the planning process.

Since we have yet to receive an answer from the NLDC, let alone a visual plan which the public could debate, my son and I developed an illustrative site plan for Fort Trumbull to show that all residents who wish to remain may do so and can comfortably co-exist with all of the economically desirable components that the MDP Draft envisions.

The plan includes bioscience research and development facilities, water dependent and related businesses, two marinas, a 200-room hotel and conference center, shopping and market facilities, and a health/fitness center. Provision has also been made for retaining two historic buildings in the Naval Undersea Warfare Center facility and a generous site for the Coast Guard Museum. New residential housing, of varying types is designed to permit flexibility; their number as well as their arrangement allows some to be easily used as "infill units" in existing blocks.

"Why can the neighborhood not be saved?" It certainly can be! The Coalition to Save the Fort Trumbull Neighborhood asks only for the City Council to amend the plan to retain a majority of the existing housing stock.

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*John Amos Stoffan is a retired architect and a Waterford resident.*

Supreme Court, U.S.
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

No. 04-108

IN THE

# Supreme Court of the United States

SUSETTE KELO, THELMA BRELSKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents,*

*On Writ of Certiorari to the Supreme Court of the State of Connecticut*

## BRIEF OF AMICUS CURIAE NEW LONDON R.R. CO., INC. IN SUPPORT OF PETITIONERS

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Dated: December 3, 2004

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## INTEREST OF THE *AMICUS CURIAE*[1]

New London RR Co., LLC (hereinafter "NLRR") is a privately owned entity that is the owner of a parcel of real property in the City of New London, Connecticut, upon which there are two historic and architecturally unique buildings known as Union Station. Union Station is leased in part to Amtrak and Greyhound Bus Lines and provides access to municipal bus service and taxi service. Only 15% of the building is leased to Amtrak and Greyhound; the balance is being renovated for use by private tenants including, potentially, a museum. Productive use is currently being made of Union Station. Besides acting as a transportation center, Union Station also includes office space and public spaces. Thus, it is a productive, privately owned parcel.

The City of New London issued a Notice and Statement of Compensation in May 2003, indicating its intent to take by eminent domain an easement across the land of NLRR for the purpose of constructing an enclosed, elevated walkway that would connect a parking garage to the land owned by Cross Sound Ferry, Inc. (hereinafter "Cross Sound"). The walkway would cross the land owned by NLRR as well as the railroad lines owned by Amtrak and other railroad entities. *Amicus* NLRR has filed suit against the City of New London seeking a permanent injunction enjoining the City from acquiring an interest in NLRR's property and from proceeding with the construction of the pedestrian walkway. The case is currently pending in the

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

Superior Court for the Judicial District of New London. No findings have yet been made by the Superior Court.

The design and location of this sky-bridge were first proposed by Amtrak in the late 1990s under substantially different circumstances, when Amtrak intended to build a Sky Station atop the structure over the railroad tracks. Thus the bridge would have served both the railroad patrons as well as the ferry patrons. In addition, the New London Development Corporation planned a new Neptune Building adjacent to the parking garage. Both construction projects have been abandoned. The City alleges that the proposed walkway will also connect to a public park, but it actually will only connect to the land owned by Cross Sound, where Cross Sound intends to build a ferry terminal. The pedestrian walkway would not provide easier access to the train station or the public park since both can more easily be accessed on the street level. The only true beneficiary of the pedestrian walkway would be Cross Sound.[2]

The owners and agents of Cross Sound have applied political pressure to the City of New London in order to secure the easement and construct the walkway. The City's proposal is driven not by public interest, but by political influence applied by private interests. In fact, Cross Sound is subsidizing the funding for the pedestrian walkway and the City of New London will spend little to none of its own funds to build the walkway.

The walkway is actually intended to benefit primarily Cross Sound. Any public benefit of the walkway will be incidental and illusory, as it will discourage members of the public from patronizing public and private amenities and

[2] These facts are as alleged in *amicus* NLRR's complaint against the City of New London, pending in a Connecticut Superior Court. The court has not made any findings of fact.



establishments in the City of New London. The structure, as designed, will be as close as five feet to Union Station and will obstruct its appearance and diminish its historic and aesthetic value. It will render unusable the current parking area for Greyhound buses, requiring that they be loaded and unloaded on the public street, creating safety hazards and obstructing vehicular traffic. It will also render unusable a portion of NLRR's land which is used for public parking for those who use the public transportation facilities at Union Station.

The stated purpose of the walkway, according to Cross Sound, is to permit ferry passengers to "seamlessly transfer (from trains and cars) without ever having to step outside." Such a seamless transfer would only increase the frustration of local merchants who already see more than a million passengers a year get off the ferries and exit directly out of town. The plan is not being driven by the City's needs, but by the economic needs of Cross Sound, a private entity which has a purely seasonal interest in transporting its passengers to its high speed ferries.

This Court's decision in *Kelo* will have an impact on the interpretation of takings law in all contexts, not just that of economic development. NLRR is in a unique position to comment on this matter in that it is also having land condemned by the City of New London, where the public purpose is questionable. As in the case before this Court, the City of New London is attempting to take land by eminent domain based on political motivations, in order to please a more powerful private entity. In the present case, that entity is Pfizer; in NLRR's case, that entity is Cross Sound. This Court's decision will have an impact on NLRR's pending case against the City of New London as it will define the limits of public use and determine the standard of review to be applied when reviewing a taking of land by a

municipality. A stringent standard for public use needs to be articulated by this court, not just for application to cases of condemnation for purposes of economic development, but for all condemnation cases, particularly where the taking disproportionately benefits a private party. As a party to a condemnation action not premised on economic development, NLRR has an interest in how this Court's decision will affect the level of scrutiny used by the court in determining whether the taking of its land is truly for the public use.

## SUMMARY OF ARGUMENT

The Supreme Court's interpretation of the term "public use" and the scrutiny that is applied to takings cases will have a profound effect not just on takings for economic development, but on all takings law. The broader issue to be decided by this Court is how much deference should be given to a municipality's determination that a use is for the public good. One of the fundamental issues in the case to which NLRR is a party is the procedure by which the court balances public and private interests when property is acquired by eminent domain. *Amicus* NLRR urges this Court to set forth a clear statement that when a taking benefits private interests, a heightened scrutiny standard of review will be applied. The potential for abuses in the exercise of eminent domain is high when a private party will benefit from the taking; thus, a heightened scrutiny standard of review is necessary to guard against such abuses. Without heightened scrutiny, a municipality has unbridled discretion to define public use in any manner that fits its decision to condemn, leaving it open to political pressure from private entities. The effect of such political pressure has been amply demonstrated by the conduct of the City of New London in its attempted condemnation of land in the Fort Trumbull area



as well as in its attempted condemnation of NLRR's land. In both instances, the City has based its decision to condemn land on the wants and needs of politically powerful, private entities.

## ARGUMENT

### I. The Appropriate Level of Scrutiny to Apply to Takings Cases in Which a Private Party Will Benefit, Whether or Not Based on Economic Development, is Heightened Scrutiny.

The issue in this appeal goes beyond just whether economic development meets the public use requirement. The broader issue is how much deference should be given to a municipality's determination that a use is in the public good. If *Kelo v. New London* is upheld, the door is open for a municipality to define public use as expansively as it wishes without meaningful judicial review to check its power. The *Kelo* majority held that as long as the appropriate authority had *rationally* determined that the taking would promote economic development, it is a valid public use. *Kelo v. City of New London*, 843 A.2d 500, 528 (2004). The dissent in the Connecticut Supreme Court suggested the application of heightened scrutiny in the form of a four-prong test. *Id.* at 587-91. Some form of heightened scrutiny is the correct standard to apply. However, this heightened scrutiny standard of review should not be limited to just economic development takings, but should apply to all takings cases where a private party stands to benefit from the exercise of eminent domain against another private entity.

A. Background on the Connecticut Supreme Court Majority and Dissent Views on the Level of Scrutiny to Apply to Economic Development Takings Cases.

The majority of the Supreme Court for the State of Connecticut in *Kelo* concluded "that an economic development plan that the appropriate legislative authority *rationally has determined* will promote municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions." *Kelo*, 843 A.2d at 528 (emphasis added). The majority applied a level of scrutiny akin to rational basis. The implication of applying a rational basis standard of review to takings cases is that a municipality is given unbridled authority to determine what it considers a public use, without meaningful judicial review. The result is that a municipality can make its decisions on whether to take land by eminent domain, an action which deeply affects the property interest of another, based on political pressure from a private party.

Furthermore, prior to *Kelo*, Connecticut precedent supported a court's authority to determine whether the implementation of a claimed public use would actually be for the public use in the specific case. *See Connecticut College v. Calvert*, 88 A. 633, 636 (Conn. 1913). Thus, under existing precedent, it would have been appropriate for the court in *Kelo* to examine whether or not the use "is or will be administered as a public or as a private use." *Connecticut College*, 88 A. at 636. As the dissent in *Kelo* pointed out, the majority opinion overruled the precedent which provides that "a trial court charged with determining whether the *actual* use being made of the property taken will in fact be for a public or private purpose need not defer to the views of the local legislative body." *Kelo*, 843 A.2d at 583.



The dissent of the Connecticut Supreme Court in *Kelo*, written by Justice Zarella, proposed heightened scrutiny in the form of a four-prong test to apply to takings by economic development to determine whether or not the taking is truly for the public use. *Kelo*, 843 A.2d at 587-91. The first prong would encompass a consideration of whether the statutory scheme which authorized the taking is facially constitutional. The burden of proof would be on the party opposing the taking to prove that it is unconstitutional. *Id.* at 587-88.

If the statutory scheme passes the facial test, the court moves to the second prong of the test. Under the second prong, the party opposing the taking has the burden of proving that the primary intent of the plan is to benefit private, rather than public, interests. *Id.* at 588.

Under the third prong, the burden shifts to the *taking party* to prove that the specific economic development will in fact result in a public benefit. *Kelo*, 843 A.2d at 588. In evaluating the third prong, the dissent recommended that the taking party "assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. Consideration under this proof involves an independent evaluation of the evidence by the court, with no deference to the local legislative authority." *Id.* at 596.

If after evaluating the third prong, it is determined that the taking *will* be for a public purpose, then the court moves to the fourth prong of the test. Under the fourth prong, the party opposing the taking must prove that the specific condemnation at issue is not reasonably necessary to implement the plan. *Id.* at 591.

The application of this test to the facts of *Kelo* led the dissent to conclude that the taking was not constitutional

because the evidence was not clear and convincing that the property taken would actually be used for a public purpose. *Id.* at 601.

It should be noted that the dissent appeared to limit this four-prong test to takings for economic development purposes. However, the test can and should be adapted to apply to all takings cases in which a private party stands to benefit. There is a strong possibility of abuse in all cases where a private party benefits from a municipality's exercise of eminent domain against another private party, not just in those instances where the taking is for economic development purposes. The dissent even recognized that the "adoption of a burden shifting analysis also is consistent with the takings procedure followed in other jurisdictions that do not place the burden of attacking a routine taking on the property owner, as Connecticut does." *Kelo*, 843 A.2d at 591. A standard of review which does not give complete deference to local legislative bodies has been adopted by other states in takings cases not based on economic development. As the *Kelo* dissent points out, "judicial review to determine whether a particular use will *in fact* be for a public or private purpose has been an accepted practice for nearly a century." *Id.* at 585.

B. Other Jurisdictions Have Given Less Deference to Local Legislative Determinations of Eminent Domain.

While Connecticut is not the only jurisdiction to allow municipalities great deference in their decisions to condemn land, many jurisdictions look at the actual use as well as the intent of the municipality in taking the land. These jurisdictions give less deference to the local legislative body's determination and perform a more stringent judicial



review of the taking. Those jurisdictions which perform a more exacting review demonstrate proper ways to review a taking of private property for a use which is alleged to benefit the public. While not specifically called heightened scrutiny by these jurisdictions, the court's independent analysis of whether the use will actually benefit the public, without deference to the municipality's determination, functionally serves the same purpose.

The Washington Supreme Court, in considering whether a particular taking was for the public use, looked at the facts and circumstances surrounding the taking to determine whether the use of the property would actually be for the public use. *State ex. rel. Tacoma Industrial Co. v. White River Power Co.*, 82 P.150 (Wash. 1905). The court held that the general public must have a definite and fixed use of the property to be condemned; that "this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience"; and that "it must be impossible, or very difficult at least, to secure the same public uses and purposes other than by authorizing the condemnation of private property." *Id.* at 152.[3]

Washington has continued to apply this test over the years and presently requires that "[a] decree of public use and necessity to condemn may be entered only when (1) the use is really public, (2) the public interests require it, and (3) the property to be condemned is necessary for the purpose." *Schreiner v. City of Spokane*, 874 P.2d 883, 887 (Wash. Ct. App. 1994). The Supreme Court of Washington has acknowledged that "not every legislative declaration of

[3] *Amicus* recognizes that the taking at issue in the White River case would have condemned the property for the use of a private corporation. Nonetheless, the examination of the circumstances surrounding the taking can be applied in other takings cases.

public use will survive scrutiny by the court, which has, under the constitution, the responsibility of determining whether the use be really public." *Petition of Seattle*, 638 P.2d 549, 558-599 (Wash. 1981) (affirming trial court's holding that project which condemned private land for the principal reason of providing more shopping areas was not a valid public use). Thus, Washington has looked beyond whether the local legislative body's determination was rational and requires a showing that the public interest requires the public use and that the taking of the particular property is necessary.

Delaware has also looked at the actual effects of a project in determining whether it is truly for the public use. The Delaware Supreme Court has held that "a primary purpose determination in a constitutional context will normally turn upon the 'consequences and effects' of a proposed project. However . . . a reviewing court may consider evidence concerning the 'underlying purpose' of a public authority in proposing a project." *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 232 (Del. 1987). Delaware has held that private property may not constitutionally be condemned "if the primary purpose of the condemnation is the transfer of the property to private use." *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

Illinois, even though noting that economic development is an important public purpose, has held that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (finding that it was not a sufficient public purpose that the taking would allow a



private corporation to grow, prosper and contribute to positive economic growth in the region).

Arkansas courts have also not allowed municipalities unfettered deference in reviewing whether a use is truly for the public. "Whether or not a proposed use for which private property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts." *City of Little Rock v. Raines*, 411 S.W.2d 486, 493 (Ark. 1967).

Kentucky has held that "no 'public use' is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center." *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979). The court expressed concern that:

> [i]f public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion. *Id.* at 6.

The Supreme Court of South Carolina has also examined whether or not the property to be condemned would truly be used for public use. The

court reasoned that the "involuntary taking of an individual's property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property." *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 857 (S.C. 2003).

New Hampshire courts examine the proposed condemnation to determine "whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used." *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985). In *Merrill*, the court conducted an independent examination of the extent to which the proposed project would benefit the public. *Id.*

C. Some Jurisdictions Have Specifically Applied "Heightened Scrutiny" to Takings Which Will Benefit Private Interests.

Some jurisdictions apply a type of heightened scrutiny to takings which will benefit private interests. Although not identical to the four-prong, burden-shifting form of heightened scrutiny suggested by the *Kelo* dissent, these forms place more of a burden on the taking party to show that the use will benefit the public and do not allow the local legislative body complete deference.

Michigan has applied a type of heightened scrutiny to eminent domain cases where a specific private interest stands



to benefit from the taking. In *Poletown Neighborhood Council v. City of Detroit*, the court held that, where "the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." 304 N.W.2d 455, 459-460 (Mich. 1981). Interestingly, the majority opinion of the Connecticut Supreme Court in *Kelo* relied heavily on *Poletown* to support its holding that revitalizing the economic base of an area is primarily a public purpose, with the private interest being incidental. *Kelo*, 843 A.2d at 528-31. Yet the *Kelo* majority declined to follow *Poletown*'s standard of applying heightened scrutiny when specific and identifiable private interests will be benefited by the taking. *Id.* at 531.

Notably, just months after the Connecticut Supreme Court decided *Kelo*, *Poletown* was overruled by the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The *County of Wayne* court essentially adopted the position of the dissent in *Poletown*, which argued: "this Court has *never* employed the minimal standard of review in an eminent domain case which is adopted by the [*Poletown*] majority . . . . Notwithstanding explicit legislative findings, this Court has always made an *independent* determination of what constitutes a public use for which the power of eminent domain may be utilized." *County of Wayne*, 684 N.W.2d at 785, citing *Poletown*.

The Michigan Supreme Court, in *County of Wayne*, held that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *County of Wayne*, 684 N.W.2d at 786. The court held that

the condemnations at issue, which would condemn the land of private owners to build a technology park, were unconstitutional because they did not meet the public use requirement. The Michigan Supreme Court further noted that "if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.* at 786.

The Supreme Court of North Dakota followed the precedent of Michigan in *Poletown* and applied heightened scrutiny where the condemnation power was being used in a way that benefited specific and identifiable private interests. *City of Jamestown v. Leevers Supermarkets*, 552 N.W.2d 365, 373 (N.D. 1996). The court held that in order for a taking to be valid, "the project must be primarily for a public rather than private purpose." *Id.* at 374.

Florida has placed the burden on the *taking party* to show that the use is truly a public use and that the taking is reasonably necessary. The Supreme Court of Florida has noted that:

> [t]he power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political unity or agency, a strict construction must be given against the agency asserting the power. The burden is on the condemning authority to establish a public purpose and reasonable necessity for the taking. *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 (Fla. 1975).



In *Baycol*, the Florida Supreme Court reversed the order taking the petitioner's property, finding that, "without the private development there would be no public need for the parking cited as the sole basis for condemnation." *Id.* at 458. The court examined what the actual use of the property would be and determined that there must first be a showing of public necessity or public use before eminent domain can be utilized. *Id.*

As the dissent in *Kelo* explains, Connecticut's general procedure for condemning land under any circumstances is harsh on the landowner. In Connecticut, the burden is on the property owner attacking a taking. *Kelo*, 843 A.2d at 591. In Connecticut, the taking party only needs to allege that the taking is necessary for a public use and the burden is on the property owner to attack it by filing an injunction. *Id.* at 592. In many other jurisdictions, the taking party must file a petition in court to take property, in which the property owners are joined. *Id.* at 592; 27 AM. JUR. 2D *Eminent Domain* § 479 (2004). A hearing is then held where the court determines if the taking party has the right to condemn the land and sometimes the necessity of the condemnation. *Kelo*, 843 A.2d at 592; 27 AM. JUR. 2D at § 479. The burden in these jurisdictions is on the taking party to establish its right to condemn. *Kelo*, 843 A.2d at 592; 27 AM. JUR. 2D at § 479.

### D. Heightened Scrutiny Must Be Applied to Eminent Domain Cases or the Fifth Amendment of the Constitution Loses Its Meaning.

This Court has previously taken the approach that as long as "the exercise of eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the

Public Use Clause." *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). In the present case, the court is reconsidering that standard as it applies to economic redevelopment takings. However, whatever standard of review this Court decides to apply in economic redevelopment takings ought to apply to other takings actions where private interests stand to benefit as well, given the same potential for municipal overreaching.

The four-prong test set out by the dissent in *Kelo* provides a methodical manner in which to assess whether the proposed use is truly for the benefit of the public. The dissent's four-prong test requires the court to look at whether the project is *actually* likely to produce a public benefit, not just whether the condemning party *intends* it to produce a public benefit. The petition for certiorari in this case was granted to restore meaning to the public use requirement of the United States Constitution. While the specific issue for this Court to determine is the appropriate checks on eminent domain power in reviewing condemnations for private economic development, the standard set forth by this Court will be influential in all takings cases, including the one to which *amicus* is a party.

A heightened scrutiny standard should be adopted not just when the purpose of a taking is economic development, but in any takings case in which a private party is alleged to receive a disprportionate benefit at the expense of a property owner whose property is subject to condemnation. Otherwise the individual municipality can determine what it considers a public purpose without meaningful judicial review. The reviewing court should examine what the real public benefit is going to be; otherwise municipalities will be allowed to succumb to pressure by more powerful or wealthy private interests. Based on the decision of the Connecticut Supreme Court in *Kelo*, the public use requirement of the



Constitution has virtually no meaning since any determination by a municipality with any rational explanation will meet the standard.

In *Kelo*, Pfizer, by wanting to expand into New London, was able to influence the City of New London's development plan. Likewise, Cross Sound's plans to build a terminal and its desire for the pedestrian bridge have influenced the City of New London's development plan in the action to which *amicus* NLRR is currently a party. Private entities cannot be allowed to control a municipality's decisions on when and where to take land by eminent domain. If such a policy is condoned by this Court, any wealthier private party could persuade a municipality to condemn property so that it can be used for its own private purposes, with the argument that it will benefit the public.

If a municipality is given unbridled discretion to determine if a condemnation is for the public use, local politics and pressure can lead to a municipality taking the land of one private party to its detriment and to the benefit of another private party. The Fifth Amendment of the Constitution cannot be interpreted so broadly as to allow the taking of private property for only ancillary public benefit. Allowing a municipality unfettered discretion to determine what it considers public use is more than just state experimentation; it is municipality experimentation. This court must articulate a heightened standard of review for public use determinations in order to restore some amount of uniformity to takings law.

The Connecticut Supreme Court dissent's four-prong test should be adopted, but not just to apply to condemnations for economic development, but for all condemnation actions in which a private interest stands to benefit from the taking. The condemnation currently

affecting *amicus* NLRR is not for economic development in the sense of creating new jobs or increasing tax revenues, but rather is to benefit the private business of Cross Sound over the private interest of private landowners. There should be grave concern with the broad definition of public use being employed by the City of New London, regardless of whether the stated purpose is for economic development. There need to be guidelines set out by this Court so that a municipality cannot define public use in any way it wishes without a meaningful form of judicial review.

## CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Connecticut should be reversed.

Respectfully Submitted,

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No. 04-108

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

-against-

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT**

# BRIEF AMICUS CURIAE OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE AMICUS CURIAE

The City of New York has been in the forefront of the urban renewal movement. History has shown time and again that, in a city as densely populated as New York, assembly of parcels suitable for redevelopment – for whatever purpose – is frequently impossible without the public aid of condemnation. Lincoln Center for the Performing Arts was created through the use of condemnation, and it, in turn, not only became the anchor for many of the City's leading cultural arts venues, but it also spurred tremendous private residential development on Manhattan's Upper West Side. With the assistance of condemnation, 13 acres in and around Times Square were reborn as a tourist-friendly destination that, in the 2003-2004 season, drew an estimated 11.6 million people to the Broadway shows in that neighborhood, while the area west of Times Square has since become a new residential neighborhood. A formerly blighted and underutilized area of Brooklyn was, in partnership with a local university, transformed into Metrotech, an urban office park that, in turn, has attracted additional development activity, including Brooklyn's first new hotel since the 1930s. Before its destruction, the World Trade Center, another economic redevelopment project made possible by condemnation, revitalized acres of lower Manhattan and led to the private development of an entirely new mixed-use neighborhood – Battery Park City – built nearby on Hudson River landfill. All those projects (and many others) were accomplished through the use of eminent domain to accomplish the same critical public planning objectives at issue in this appeal.

Thus, pursuant to Supreme Court Rule 37.4, the City of New York submits this brief in support of the respondents in this case in order to illustrate for the Court how, in the quintessential U.S. urban setting, economic

redevelopment is simply the evolutionary heir to traditional urban renewal, why condemnation for this purpose is a "public use" under the Takings Clause of the Fifth Amendment, and finally, why "one size fits all" fails when it comes to what constitutes a public use, so that the issue, as this Court has long recognized, is best left to the States to decide on a case-by-case basis.

## SUMMARY OF THE ARGUMENT

With eight million residents, New York City is the quintessential urban environment, and its prosperity has always been inextricably linked to business and industry. New York is a major transportation hub and port that is also home to the United Nations, 2,000 non-profit art and cultural organizations, the financial markets, legendary retailers and sports venues, 17,312 restaurants, Broadway, communications giants, renown universities with more than 600,000 undergraduate and graduate students, 40,000 film and television production shoots a year, cutting-edge research and medical facilities, and burgeoning multi-cultural pockets throughout the City's five boroughs that reflect the richly diverse ethnic mosaic of its residents. Nearly 40 million people visited the City in 2004, and they spent approximately $15.1 billion while here.[1]

In Fiscal 2002, 36 development projects just for cultural institutions were begun in the City, including a new dance performance facility for the Dance Theater Workshop, the development of shared office space for the Alliance of Resident Theaters in New York, and a new 76,000 square foot facility for the renown Alvin Ailey Dance Foundation. Indeed, owing in part to the need for cultural institutions to maximize their land resources, New

[1] The figures in this section are from the website of the New York City Conventions and Visitors Bureau: http://www.nycvisit.com/content/index.cfm?pagePkey=57.



York enacted a law allowing the creation of cultural trusts that can use condemnation for the purpose of building combined-use facilities that financially support both the institution and private enterprise. *Hotel Dorset Company v. Trust for Cultural Resources of the City of New York*, 46 N.Y.2d 358, 1 N.E.2d 153 (1978).

One would be hard pressed to find anywhere in the nation where the need to expand and utilize available land resources to their utmost capacity is greater than in New York City, and this is particularly so as the City continues to recover from the events of September 11, 2001. The site of the former World Trade Center is being substantially reconfigured, but areas adjacent to the site that were either seriously damaged or that suffered economic devastation in the aftermath of the attack are also undergoing transformations as well.

At the same time, the City is committed to observing prudent standards of planning, land use, and construction to insure the growth and development of sound and prosperous communities, with the requisite services, and open space, for the people who live, work, and visit here.

The availability of marketable vacant land is critical to these goals. The acute shortage of usable vacant land makes such land one of the City's most precious resources. Its waste obstructs and impedes vitally important programs to keep and attract business to the City, combat the degradation of neighborhoods, and insure the sound growth and prosperity of the City and its residents.

Although there are 301 square miles in New York City, there are only 22.7 square miles in Manhattan. The percentage of land in the City overall that is zoned for commercial or manufacturing purposes is, moreover, quite limited. While there are more than 4,553.8 million square

feet of residential land area in the City, there are only 251.6 million square feet of commercial land and 731.2 million square feet available for manufacturing purposes.[2]

That is why the urban renewal movement that began in the early 1900s – focusing on "blight" in "slums" – grew into a federally-funded policy embracing and financing economic redevelopment as well, in order to facilitate the proper growth and utilization of unmarketable areas. Those programs recognized that no community, much less the City, can thrive with a single land use. This brief *amicus curiae* will show that a community's economic redevelopment is an entirely appropriate – and, indeed, essential – end, which justifies the prudent and well-reasoned use of the condemnation power, because it serves the public good and constitutes the kind of "public use" contemplated by the Fifth Amendment.

## ARGUMENT

### I. ECONOMIC REDEVELOPMENT IS CONCEPTUALLY INDISTINGUISHABLE FROM EARLIER URBAN RENEWAL EFFORTS THAT THIS COURT FOUND, IN BERMAN, COULD PROPERLY JUSTIFY THE USE OF THE CONDEMNATION POWER, AND AS PRACTICED IN NEW YORK CITY, IT UNDENIABLY CONSTITUTES A PUBLIC USE UNDER THE FIFTH AMENDMENT.

The economy changes in unpredictable ways, but attracting and keeping a stable and varied base of employers, taxpayers, and commercial and industrial interests in the City is a fundamental obligation of City government and advances the public good. Consequently,

[2] Figures reflect 2002 real property data from the City's Department of Finance, as calculated on www.nychanis.com/NYU/NYUCHANIS.



economic redevelopment has become an integral element of sound land use and urban planning. Should this Court broadly decide, as petitioners urge, that the power of condemnation can never be used to advance those goals, because it can never be a "public use," then a crucial tool in the City's ability to meet its future, and create balanced and prosperous neighborhoods, will be lost.

#### A. Soundly planned economic redevelopment makes the difference between urban decline and healthy municipal growth, because economic dead zones lead to blight, decrease the availability of urgently needed land resources, and force both residents and businesses to move out of the City.

The menace of slums in New York City and other larger cities dates to the mid-1800s, but it soon became apparent to government officials that the police power (in the form of zoning and building codes) and taxing power were inadequate to solve that grave problem. *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936). In fact, the power of condemnation was also necessary in order to clear, redesign, and reconstruct unsanitary and substandard housing conditions.

New York's Constitution, however, recognized that replacing slum housing, alone, was inadequate without the clearance and rehabilitation of substandard *areas*, as a means to protect public health and to restore and preserve the financial stability of municipalities, "which suffer indirectly from conditions existing in those blighted districts." *Murray v. La Guardia*, 291 N.Y. 320, 331, 52 N.E.2d 884, 889 (1943), *cert. denied*, 321 U.S. 771 (1944).[3]

[3] Article XVIII, § 1 of New York's Constitution grants to the Legislature authority to provide for low-rent housing for persons of low income "*or*" to provide for "the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas."

Moreover, it did not matter that some private developer might benefit from a project, so long as, if upon completion of the project, "the public good is enhanced." *Id.* at 329-330.[4]

New York soon enacted General Municipal Law section 72-n, to authorize the reclamation and redevelopment of vacant "dead" areas and to facilitate assemblages for that purpose. *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395, *appeal dismissed,* 371 U.S. 4 (1962). In doing so, the Legislature found that reclamation and redevelopment of such areas for residential, commercial, industrial, community, public or other uses, is "necessary to protect health, safety and general welfare, [and] to promote the sound growth of the community." *Id.* at 213, 182 N.E.2d at 396. That standard applied "with or without tangible physical blight," although the area had to be "predominantly vacant." *Id.*

In that law, the Legislature recognized that tangible physical blight was not a prerequisite to condemnation and redevelopment, because the statute was aimed primarily at eliminating physical, sociological, and economic obsolescence which causes social and economic blight as real and as detrimental to the public welfare as any tangible physical blight.[5]

[4] This objective became a matter of federal urban planning policy when Congress passed the National Housing Act of 1956 (42 U.S.C. §1460), providing federal aid for, *inter alia*, the acquisition of land that "substantially impairs or arrests the sound growth of the community" and for redevelopment of such land for predominantly non-residential uses where local authorities determine "that such redevelopment is necessary and appropriate to facilitate the proper growth and development of the community . . . and afford maximum opportunity for the redevelopment of the project area by private enterprise."

[5] At any rate, in New York, many factors and interrelationships of factors may be significant to a finding of "blight." *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 483, 335 N.E.2d 327, 332 (1975). "These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. . . . It is 'something more than deteriorated structures. It involves improper land use. Therefore, its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic." *Id.* Nor is this susceptible to precise formulas, "since the combination and effects of such things are highly variable. These matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion." *Id.*



All the foregoing was consistent with this Court's view of the law in *Berman v. Parker*, 348 U.S. 26, 34-35 (1954), where the Court recognized that attacking blight "on an area rather than on a structure-by-structure basis" was an entirely appropriate approach and "plainly relevant" to the long-term goal of building stronger communities. Indeed, Congress had already enacted similar legislation for Washington, D.C., which became the subject in *Berman*. Noting the broad discretion accorded legislative determinations regarding what is in the public interest, this Court recognized that "[w]e do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33.

Modern urban planning was born.

In *Cannata*, the property proposed for condemnation was to be redeveloped for new industrial buildings. 11 N.Y.2d at 215, 182 N.E.2d at 397. As New

York's Court of Appeals reasoned, "an area does not have to be a 'slum' to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings." *Id.* In New York, the Court noted, condemnation of "substandard" property for development by private corporations has long been recognized as a species of public use." *Id.*

Fifteen years after *Cannata,* New York enacted the Eminent Domain Procedure Law ("EDPL"), a comprehensive statutory scheme providing the exclusive method by which property in the State could be taken by condemnation. The law intended to standardize the means for the exercise of eminent domain throughout the State and the methods to determine just compensation. *East Thirteenth Street Community Assoc. v. New York State Urban Dev. Corp.,* 84 N.Y.2d 287, 293-94, 641 N.E.2d 1368, 1370 (1994). The EDPL recognized other purposes as well, including public participation in the process, and consideration of numerous factors, such as the quality of the environment, the need to take property only for a "public use, benefit or purpose." and the legitimate interests of private property owners and local communities. *Id.*

The EDPL requires public notice and comment about the proposed land acquisition, and a public hearing. Afterwards, an agency is required to publish its determination and findings, which, at the least, must specify (1) the "public use, benefit or purpose" to be served by the proposed public project; (2) the location for the project and the reasons for the selection of that location; and (3) the general effect of the proposed project on the environment and local residents. EDPL § 204(B).[6]

[6] This hearing may be one conducted pursuant to EDPL §§ 201-204, or its functional equivalent. EDPL § 206.



The EDPL permits judicial review of four questions as to whether: (1) the proceeding conformed with the Federal and State Constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in the EDPL; and (4) whether a public use, benefit or purpose will be served by the acquisition. EDPL § 207(C).

Historically, therefore, "urban renewal began as an effort to remove 'substandard and insanitary' conditions which threatened the health and welfare of the public, in other words, 'slums,' whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed." *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 481-82, 335 N.E.2d at. 330. "Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose." *Id.*

Government must either plan for redevelopment or watch its cities become more congested, deteriorated, obsolescent, stagnant, inefficient, and costly. *Wilson v. Long Branch*, 27 N.J. 360, 370, 142 A.2d 837, 842-43, *cert. denied,* 358 U.S. 873 (1958). Those purposes are intimately related to the public health, welfare and safety and so are wholly consonant with the federal Constitution. *Id.*

**B. Appropriately exercised, condemnation to advance economic redevelopment is not for the use of a private corporation but rather, the corporation is used to accomplish the public purpose.**

As this Court recognized in *Berman*, "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." 348 U.S. at 34. Indeed, this Court has frequently found a public interest even where the eventual ownership of condemned property will benefit, and title will be held by, a private party. *See e.g.*, *Clark v. Nash*, 198 U.S. 361 (1905)(this Court upholding as a public use Utah statute permitting condemnation by individual of neighbor's property to gain water for his land); *Rindge Co. v. Los Angeles*, 262 U.S.700, 707 (1923)("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."); *Hawaii Housing Auth. v. Midkiff*, 467 U.S.229, 244 (1984)("The Court long ago rejected any literal requirement that condemned property be put into use for the general public.").

The courts of New York have long recognized that even where a private party enjoys some benefit from a redevelopment project, that still will not diminish a valid "public use" and "public purpose." *Waldo's Inc., v. Village of Johnson City*, 74 N.Y.2d 718, 721, 543 N.E.2d 74, 76 (1989); *Cannata v. City of New York*, 11 N.Y.2d at 215, 182 N.E.2d at 397. *See also Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 371, 385 N.E.2d 1284, 1290 (1978)(the term incidental "does not mean that the public use . . . must outweigh the private use to which the facility is put."); *In re Glen Cove Community Dev. Agency*, 259 A.D.2d 750, 750-51, 712 N.Y.S.2d 553, 554 (2d Dept. 1999)(proposed condemnation will serve a valid public purpose because record shows "economic stagnation caused by persistent vacancies in the retail stores and



restaurants in the central business district . . . [and the] deteriorating physical condition of the buildings in the area," and proposed redevelopment "would attract other businesses, revitalize the neighborhood and strengthen the City's economic base"); *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d 1, 7, 744 N.Y.S.2d 121, 126 (1st Dept.), *appeal dismissed*, 98 N.Y.2d 727, 779 N.E.2d 187 (2002), *cert. denied*, 537 U.S. 1191 (2003)("Virtually all of the anticipated outcomes of [the 42nd Street redevelopment] project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood. That a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the Urban Development Corporation has been furthered); *In re Fisher*, 287 A.D.2d 262, 263, 730 N.Y.S.2d 516, 517 (1st Dept. 2001)(condemnation of 45 Wall Street by Urban Development Corporation to clear space for construction of new New York Stock Exchange facilities is a public use because the departure of Stock Exchange from the City's financial district "would be detrimental to the City and State economy," and retention of the Stock Exchange will "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center").

A developer's motives need not be altruistic, because that is of no legal consequence, so long as the public good is enhanced by the effort. *Waldo's v. Village of Johnson City*, 74 N.Y.2d at 721, 543 N.E.2d at 76. In short, profit making does not strip a project of its public utility, because the privately generated revenue helps to finance the public use aspects of the project. *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.* 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, *appeal dismissed*, 375 U.S.

78 (1963). *See also Rosenthal & Rosenthal, Inc. v. The New York State Urban Dev. Corp.*, 605 F.Supp. 612, 618 (S.D.N.Y.), *aff'd* 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)("It is not enough that the Project planners were *partially* motivated by the desire to make money for private developers. Such mixed motivations seem politically inevitable and perhaps are necessary to the success of this kind of project. To constitute a purely private taking and thus fit within the narrow exception of *Midkiff*, plaintiffs must demonstrate that no public purpose exists for the Project").

Indeed, there is nothing "malevolent" about private participation, because most private interests are profit motivated, and "unless there is such a reliable projection of profitability, the soundness and stability of the sponsor's project may come into question." *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d at 482, 335 N.E.2d at 331. Moreover, there is nothing "inherently wrong" in combining the City's need for renewal of its substandard land, and its desire to retain or attract business. *Id.* That is because "the "very purpose of urban renewal subsidies is to attract new or existing sponsors to undertake the land clearing, the construction and other commitments the community desires of them, where the cost of acquiring the land privately, on a piece by piece basis, would be sufficiently expensive or difficult to deter private entities." *Id.*

As New York's Court of Appeals reasoned in *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 482, 335 N.E.2d at 331:

> Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for



> renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible nature of the taking of the substandard property. Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.

Thus, in New York, if a municipality determines "that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain." *Vitucci v. New York City School Construction Authority*, 289 A.D.2d 479, 481, 735 N.Y.S.2d 560, 562 (2d Dept. 2001), *appeal denied, motion dismissed*, 98 N.Y.2d 609, 775 N.E.2d 1288 (2d Dept. 2001).

Large-scale redevelopment projects of the type at issue in this appeal are intended to eradicate economic blight and revitalize a community. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F.Supp at 617-18 (broad purpose behind 42nd Street redevelopment project is to "eradicate blight in Times Square and to revitalize the area culturally and commercially" and that is "a substantial, legitimate public purpose").

It is immaterial that economic redevelopment may be accomplished with the help of private interests, so long as the public benefit is realized. It is the end, and not the means, which is subject to judicial scrutiny. *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 244 ("it is only the takings purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

**C. How an economically depressed, under-utilized, and blighted area of downtown Brooklyn was reborn as a successful commercial, academic, and business office complex that spurred additional development in surrounding neighborhoods.**

As early as 1969, the City had identified the area in Brooklyn surrounding Polytechnic University as an appropriate site for urban renewal.[7] Polytechnic, one of the nation's largest graduate engineering schools with one of the smallest endowments, had been part of the downtown Brooklyn landscape for more than 100 years, in an area of mixed uses. By the 1980s, however, the university had found local conditions had discouraged student enrollment and had made expansion and modernization impossible. All of Brooklyn had been suffering. According to a 1985 report from the Municipal Research Institute quoted in *The New York Times*, between 1977 and 1984, when Manhattan gained nearly 89,000 jobs in key white-collar industries, Brooklyn lost 4,500 such jobs.[8]

More specifically, the university's immediate neighborhood was developed to only 26 percent of its allowable zoning density, demonstrating significant underutilization. Seventeen percent of the area's buildings were completely vacant, while an additional 22 percent of the area was comprised of parking lots and vacant lots. The number of vacant buildings was twice the area's average.

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[7] Unless otherwise indicated, the facts in this narrative were taken primarily from Metrotech's Final Environmental Impact Statement, materials in this office's files on the project, and Forest City Ratner Companies' annual reports. Some current information on the project was supplied by the City's Economic Development Corporation and Forest City Ratner.

[8] Kirk Johnson, *Development Activity Advances in Brooklyn*, N.Y. Times, Aug. 11, 1985, §8, at 1.



The area's existing 123 lots were small and irregular, and their ownership was spread among 70 different owners, thereby impeding assemblage and development. Half the buildings in the area were deemed to be in either "poor" or "bad" condition (meaning in an advanced state of disrepair) by the City's Public Development Corporation. Commercial rental rates fell at the lower end for the area. Notwithstanding the availability of vacant lots and buildings, no new buildings had been constructed in the prior 20 years.[9]

The area also did not generate the number of jobs a centrally located downtown district could create. In 1985, there were 65 firms employing 754 people (excluding the 865 employed by Polytechnic). Of that number, 432 jobs were in government and 322 were private sector, primarily manufacturing and retail. U.S. Census figures for 1980 put unemployment in the area at 10.6 percent -- 3.6 percent higher than other areas in downtown Brooklyn. By 1984, the State Department of Labor pegged unemployment in the area at 11.3 percent, one point higher than for all of Brooklyn, and more than two points higher than for the City as a whole. When compared to other local neighborhoods, the number of criminal complaints in the area was between two to five times greater, depending on the particular kind of crime.

In the meantime, in 1983, the Regional Plan Association, an independent, not-for-profit regional planning organization, published a study arguing that the way to reverse the deterioration of the area was to turn it into the City's third central business district, after downtown and midtown Manhattan. Picking up on that idea, Polytechnic, which saw its future viability tied into to

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[9] For the Court's reference, we are annexing as Appendix A a site map of the Metrotech project area to illustrate the large number of sites that must be assembled to accomplish this kind of project in the City.

a revitalized neighborhood, proposed developing the area as an East Coast Silicon Valley.

That idea eventually became Metrotech, a phased office development project located between Jay Street and Flatbush Avenue, adjacent to Polytechnic and near Brooklyn's civic buildings. Polytechnic's development partner was the Forest City Ratner Companies. In addition to tax and other incentives, components for financing included federal Urban Development Action Grants, $10 million in Municipal Assistant Corporation funds, an interest-free loan to Polytechnic from the Port Authority of New York and New Jersey, and $31.5 million from the City's capital budget, partially reimbursed by the developers, for site acquisition, relocation, demolition, and infrastructure improvements. The project was expected to generate $54 million in annual local tax revenues (in 1985 dollars), much of which is being phased in over a 23-year period.

Just as the City was threatened with the loss of "back office" tenants – companies who felt Manhattan rents were too expensive for operations that could be located anywhere – Metrotech was marketed as an affordable, convenient back-office alternative, accessible by bus, subway, and public highways and within close proximity to Manhattan. Morgan Stanley & Company led the way when, in 1989, it moved into a 19-story office tower called Pierrpont Plaza, the first new office tower to be built in Brooklyn since the 1950s, on a site that was near, but not part of, Metrotech.

Metrotech eventually became a seven million square foot academic and office "urban campus" on a 16-acre, ten-block site adjacent to the university, encompassing eight new and three renovated buildings, ground floor retail space and restaurants, and a three-acre plaza at its center. Its current tenants include Bear Stearns



& Company, KeySpan (formerly the Brooklyn Union Gas Company), Chase Manhattan Bank, Goldman Sachs, Morgan Stanley & Company, and the Securities Industries Automation Corporation, which is the data processing location for every trade on the New York Stock Exchange, NASDAQ, and the American Stock Exchange, as well as the Internal Revenue Service, the New York City Fire Department and its emergency 911 service. According to the developer, Metrotech has been 100 percent leased since 1992.

Metrotech also includes the first commercial office building developed in the City since the events of September 11, 2001, and two years ago, Empire Blue Cross Blue Shield, a former World Trade Center tenant, moved into that building.

Meanwhile, Polytechnic University was able to secure grants for several new and renovated buildings, including a state-of-the-art computerized library for electrical engineering and a second library of science and technology. A new wing was added to the main academic building and an atrium now links the university with Metrotech. Polytechnic also secured grants to establish its Center for Advanced Technology in Telecommunications to perform basic research in the field. At least one Metrotech tenant has commissioned research at the university.

Metrotech also made possible the Renaissance Plaza development, which houses a Marriott hotel with 384 guest rooms and large meeting spaces, as well as a 32-story office tower with a total of 1.4 million square feet of office space. It was the first new hotel in Brooklyn since the 1930s and it is so successful that Marriot just signed a deal to add 200 more rooms.

A project like Metrotech helps to jumpstart the local economy because it represents a compact area with high employment that helps to sustain retail and services businesses in the area. Metrotech drew thousands of jobs to Brooklyn. The Securities Industry Automation Corp. moved 700 employees to Metrotech, while Chase Manhattan Bank chose the City over New Jersey and now has nearly 4,000 employees in Brooklyn. Bear Sterns originally moved 1,500 to the area but now has more than 6,000 employees at Metrotech. The New York Times has called it "easily New York City's leading phased office development project, second in scale only to Olympia & York's World Financial Center at Battery Park City.[10]

Statistics from the City's Economic Development Corporation show that Metrotech has also returned to the City millions of dollars annually in sales taxes, employee income taxes, and real property taxes.

In the end, Metrotech caused displacement for about 200 people living in 100 scattered, one- and two-family and walk-up multiple unit structures, and legal and illegal loft units, approximately 60 businesses, and five government agencies. A relocation plan was devised that included new housing for displaced residents, priority listing for City-owned, subsidized, and public housing. Relocation assistance was also provided to businesses.

Economic redevelopment projects like Metrotech, which involved an assemblage of 123 separately owned sites, would never happen in a city like New York without the assistance of condemnation.

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[10] Alan S. Oser, *Perspectives: Developing in Brooklyn; Putting the Cleveland Connection in Play*, N.Y. Times, January 12, 1992, §10, at 3.



**D. The terms "public use" and "public purpose" have never been defined with precision, nor should they be. Localities, customs, and times change, and with them, the needs of the public may change.**

What constitutes a "public use" for Fifth Amendment purposes is a fact-specific inquiry that must take into account the particular time and place of the project. Thus, this Court has expressly recognized that local conditions can justify a public use in one place but perhaps not another. *Clark v. Nash*, 198 U.S. at 370 ("The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 244 (judicial deference to local findings of public use "is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use").

As a result, states have broad discretion to define public purposes and to formulate plans within the police power to address them. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. at 618.

That is what works and that is what makes sense, because each community's needs are different.

This Court's decision in *Berman* recognized that any attempt to define or "trace the outer limits" of the police power is "fruitless," because "the definition is essentially the product of legislative determinations addressed to the purposes of government." 467 U.S. at 239. New York's courts understand that as well, and have held that the notion of a public use, as used in connection with the right of eminent domain, is not easily defined. *Pocantico Water-Works Co. v. Bird,* 130 N.Y. 249, 259 , 29 N.E. 246, 248 (1891). Nevertheless, more than 100 years ago, New York's State Court of Appeals reasoned, quite simply, that, where the proposed project would benefit and be used by "many," that would "establish that the use was for the public benefit." *Id.*

To formulate anything "ultimate" to define the term public use, "even if that were possible, would, in an inevitably changing world, be unwise if not futile." *New York City Housing Auth. v. Muller*, 270 N.Y. at 340. Lacking a "controlling precedent," courts can "deal with the question as it presents itself on the facts at the present point of time," because the law of each age is ultimately what that age thinks should be the law (internal citation omitted)." *Id.*

We agree. It is, moreover, a system that has worked remarkably well. The briefs of both the petitioners and their *amici* are replete with instances where state courts, applying their unique knowledge of local conditions, have struck down uses they did not consider to be public.

In this particular appeal, the City of New London is trying to jumpstart its broken-down economy by revitalizing its biggest and most valuable real estate asset – its waterfront – with a well-considered and forward-



thinking multi-use plan. In New York, the conditions and circumstances are entirely different, and, in fact, quite unique. Each community faces its own competing pressures, its own land use challenges, and devises its own best way to accommodate them. In short, "one size fits all" simply does not apply, which is why the "public use" determination has always been, and should continue be made and reviewed, locally.

## CONCLUSION

**II. THIS COURT SHOULD CONTINUE TO RESPECT THE STATES' ABILITY TO RESOLVE THE PUBLIC USE ISSUE IN LIGHT OF UNIQUELY LOCAL CONDITIONS AND PUBLIC NEEDS, INCLUDING A DETERMINATION THAT ECONOMIC REDEVELOPMENT PROJECTS ARE PUBLIC USES THAT SUBSTANTIALLY CONTIBUTE TO THE PUBLIC GOOD.**

Certainly, minds will differ on the wisdom of using condemnation for the purpose of economic redevelopment, but that is, essentially, a political question. Petitioners, moreover, have given this Court no good reason to turn its back on decades of judicial deference to those determinations and have, instead, proposed a "bright-line" rule that will deny localities a fundamental tool in their ability to keep meeting the demands of their changing communities. As their own brief confirms, the system works, because state courts continue to review, and find fault with, individual "public use" determinations under state law.

The Court, instead, should adhere to its long-standing deference to such legislative and municipal determinations, and leave to the State courts the job of reviewing what, under local conditions and needs, is in fact a reasonable and appropriate public use.

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**APPENDIX A**

BEST AVAILABLE COPY

No. 04-108

IN THE

# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

## BRIEF *AMICUS CURIAE* OF NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION IN OPPOSITION TO PETITION

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## INTEREST OF THE AMICUS

New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") respectfully submits this brief as an *amicus curiae*.[1] ESDC is a public benefit corporation and political subdivision of the State of New York, created by the New York State Legislature in 1968.

ESDC's primary public purpose is to foster economic revitalization by creating employment, increasing state and local tax revenues, constructing viable commercial, industrial and residential development, and contributing to urban stabilization and revitalization.

One of ESDC's most important economic revitalization tools is its power of eminent domain. Compensated takings are essential to the assembly of diversely-owned parcels for large-

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[1] This brief is filed with the written consent of all parties; the requisite consent letters have been filed with the Clerk. No part of this brief was authored by counsel for any party, and no person or entity other than ESDC or its counsel made a monetary contribution to the preparation or submission of the brief.

scale economic revitalization projects, particularly in urban areas, which are densely layered with public infrastructure and often competing private interests.

At issue on this appeal is whether the Court should disturb the considered decision of the court below that the use of eminent domain for the purpose of economic revitalization, as determined by local conditions and public needs, will serve a public use. ESDC is vitally interested in continuing to undertake projects in New York which revitalize its economy and promote an optimally functioning society, particularly in a post-industrial age and in an increasingly global competitive economy. Accordingly, ESDC urges this Court to affirm the decision below.

## SUMMARY OF ARGUMENT

Throughout American history, states have used eminent domain to take non-blighted properties for economic development projects. This Court should not disturb those precedents.



## ARGUMENT

### ORIGIN AND EARLY HISTORIC USE OF EMINENT DOMAIN

The concept of government appropriation of private property for public use has ancient origins and has evolved with changing times, conditions and technologies. In 1625, Hugo Grotius coined the term "eminent domain" to refer to what he called the government's "inherent power" to use private property for public advantage, where the owner of such property is compensated at public expense. Matthew Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245, 1249 (2002).

As early as 1421, the English Parliament authorized the taking of privately-owned property for the purpose of repairing roads and bridges. *Id.* at 1260. During the 16th Century, Parliament authorized compensated takings for the development of public water and navigation systems. *Id.* at 1261. A 1514 statute authorized the City of Canterbury to improve a river, but required that compensation be paid to anyone whose mill, bridge or dam was removed. Errol E. Meidinger, *The "Public*

*Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 12 (1980-81).

FOR CENTURIES, THE POWER OF EMINENT DOMAIN HAS BEEN USED IN THE UNITED STATES FOR INDUSTRIAL AND COMMERCIAL DEVELOPMENT

Since colonial times, it has been recognized that the power of eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom v. Patterson,* 98 U.S. 403, 406 (1879). Indeed, eminent domain is "the most ancient of sovereign prerogatives ... a power which antedates our State and Federal Constitutions...." *Fifth Avenue Coach Lines, Inc. v. City of New York,* 11 N.Y.2d 342, 229 N.Y.S.2d 400 (1962).

From pre-constitutional times to the present, the history of compensated takings tells a fascinating story about its application in an ever-evolving economy. Before the Constitution, the power of eminent domain was used by the colonies to promote industrial development, with early uses including the building of mills. Harrington, at 1300. From 1667, landowners



directly benefited from the use of eminent domain by virtue of the so-called Mill Acts. These acts allowed "downstream riparian owners to dam streams and condemn the flooded property of upstream owners, rather than negotiate for the rights or be subject to traditional nuisance remedies." Meidinger at 15.

The Maryland Mill Act of 1669 authorized the taking of private land for use as a watermill to be operated by a private owner. John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property,* 39 AM. J. LEGAL HIST. 1 (Jan. 1995). That Act was the Maryland legislature's effort to diversify the local economy, which suffered intermittent gluts of its chief cash crop, tobacco. *Id.* at 3. The goals of the act were to increase trade and stimulate local industries, all for the primary benefit of the general public, even if specific private enterprises garnered secondary short-term economic gain. *Id.* at 5

Pointing to the numerous Mill Acts, scholars have observed that "the founding generation approved the constitution-

ality of takings that did not vest the entire public with rights of use, but only produced an indirect benefit to the public." Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement,* 49 DUKE L. J. 339, 374 (1999) (citing Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 599, 605 (1949) ("No clearer instance of a taking of property for the benefit of private individuals could be presented, and literal application of the 'use by the public' test would seemingly require invalidation."); *See also,* Lawrence Berger, *The Public Use Requirement in Eminent Domain,* 57 Or. L. Rev. 203, 206-07 (1978) ("Arguing that the Mill Acts signal 'the early acceptance of the broad view that it was the great advantage to the public which justified the taking, even though a private individual undoubtedly received a substantial and perhaps greater benefit, and even though the public had no right to use the property.'")). In 1816, the Virginia Supreme Court concurred with this view, upholding the state's Mill Act and identifying



the public purpose as the benefit to the community conferred by productive mills. Sales at 374; *Skipwith v. Young,* 19 Va. 276 (1816).

Shortly after the American Revolution, the power of eminent domain was also used for the construction of dams for mills, and the flooding of lands for harnessing water power:

> Both [roads and flooding lands for water power] were of course closely linked to economic development. Roads were essential to opening up the ever-expanding interior [of the United States] and exploiting its resources...Ready water was equally critical to the development and implementation of new industrial technologies.

Meidinger at 18, 23.

During the 1800's, the Mill Acts were expanded to a variety of new, privately-owned manufacturing industries. *Id.* at 23. In 1832, landowners challenged New Jersey's act authorizing takings to allow a private corporation to build 70 factory mills along the Delaware River. *Scudder v. Trenton Delaware Falls Co.,* 1 N.J. Eq. 694 (N.J. 1832). The court rejected the

landowners' claim that the taking was for private rather than public use after examining

> the objects, the purposes, and the results of the undertaking ... The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other work dependent on such power. ... It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the results here. Take the town of Paterson as an example. The water power there is in the hands of individuals--a company like this. They are under no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation. **Paterson is now the manufacturing emporium of the state** .... It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here?
>
> * * *
>
> The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being.

*Id.* at 728-29 (emphasis supplied).



That same year, the Massachusetts Supreme Court upheld a similar statute and other states followed suit, all holding that takings "which contributed to the *overall benefit* of the community met the public use test." Meidinger at 24; *Boston and Roxbury Mill Corp. v. Newman,* 29 Mass. 467 (1832). In *Roxbury,* the Massachusetts legislature gave a mill corporation the right to use landowners' private property for the purpose of working its mills. Referring to the old mill statutes, the court noted that mills are described as greatly beneficial to the public and, if the mills become inoperable, the public good will be harmed. *Id.* at 478.

At issue in *Roxbury* was whether the taking of the landowner's property for use by a private enterprise to operate its mills was unconstitutional. The landowner sought to distinguish the taking of his property for the mills with the taking of property to build turnpike roads by asserting that the public has a right to use the roads by paying a toll, whereas the public does not have the right to use the mill factories. The court disagreed:

> [I]n regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? And are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and to that kind of employment, is prevented from its exercise? This becomes a matter of interest, which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works.

*Id.* at 477.

Upholding a Mill Act which benefited a private company, New Hampshire's highest court held that the concept of public use depends on local industry and the natural resources of the state. *Great Falls Manufacturing Co. v. Fernald,* 47 N.H. 444, 460 (1867). The court explained :

> The public use may have relation to any purpose ... which subserves the general interest. The only test and criterion of the admissibility of the power are that the particular object tends to promote the general interest in its relation to any legitimate objects of government.... [T]he use is to be regarded as public, if a general public benefit results from it.'



*Id.* at 456 (citations omitted).

Beginning in 1817 and despite vehement public ridicule and protestations of economic infeasibility, New York State willingly paid to take non-blighted private property to permit the construction of the Erie Canal, as approved by its Legislature, a taking which even antedated the Takings Clause in New York State's Constitution. The purpose of the then highly speculative project (dubbed "Clinton's Folly" after Governor DeWitt Clinton) was, in part, "to promote agriculture, manufactures and commerce" and, in the words of the Governor, to transform the City of New York into "the granary of the world, the emporium of commerce, the seat of manufactures, the focus of great moneyed operations."[2] The Canal established a trading

[2] 40 N.Y. Sess. Laws. Ch. 262 (1817); New York State Canal Corporation, *The Erie Canal, A Brief History,* http://www.canals.state.ny.us/cculture/history (updated June 29, 2004).

route to the Midwest, operated by private carriers, which expanded the Nation's economy, creating jobs and public wealth along the way. *See* Meidinger, at 26, n. 91; *Rogers v. Bradshaw*, 20 Johns. 735, 738-39 (N.Y. Ct. of Errors 1823). The Canal was also an avenue for social reforms, such as women's rights and the abolition of slavery.[3]

During the late 1800's, eminent domain spurred industrial growth in other States, even in non-blighted areas. Private property was taken to enable miners to develop transport facilities. Meidinger at 28. Colorado's constitution still permits takings for "private ways of necessity, ... reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes." COLO. CONST. Article II, §14. Idaho's constitution deems mining and irrigation to be public uses, as well as "any other use necessary

[3] *See* Parks and Trails New York, http://www.ptny.org/canalway/history.shtml.



to the complete development of the material resources of the state." IDAHO CONST., Article I, §14. New Mexico permits any person to exercise condemnation for "the conveyance of water for beneficial uses". N.M. Ann. Stat. § 72-1-5 *See Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P. 2d 986 (1970).

As the 20th Century progressed, public needs changed. Worn infrastructure and advancing technologies required new strategies. Massachusetts, for example, amended its constitution to provide: "The industrial development of cities and towns is a public function...." MASS. CONST., Article LXXXVIII (Amended 1966).[4]

[4] See *also, Opinion of the Justices to the Governor*, 369 N.E.2d 447, 373 Mass. 904 (1977) ("Reducing unemployment and stimulating the economy are public purposes."); MASS. CONST., Article LXXXVIII).

## THE ORIGINAL WORLD TRADE CENTER

In 1962, New York and New Jersey authorized an ambitious project known as the "World Trade Center." The World Trade Center enabling legislation provides for a:

> facility of commerce ... for the centralized accommodation of functions, activities and services for or incidental to the transportation of persons, the exchange, buying, selling and transportation of commodities and other property in world trade and commerce....

Chapter 209 of the Laws of New York 1962, N.Y. Unconsol. Laws §6601, *et seq.* (1964).

To effectuate the project, the Port of New York Authority (the "Port Authority"), a bi-state authority, in its effort to assemble 143 parcels with diverse ownership, undertook to condemn properties in Lower Manhattan. Landowners opposing the condemnation sought a declaration that the enabling statute was unconstitutional. As with the Erie Canal, naysayers abounded.

The Port Authority's brief to the New York Court of Appeals discussed the then recent loss of import-export trade in



New York, threatening the Port of New York's status as the leader in international trade. (A 2-4).[5] The Port Authority cautioned:

> Such a threat imperils the economy of the whole region since one out of every four persons in the area is dependent for his livelihood directly or indirectly on Port activities....[T]he New York Port cannot hold its own in the vigorous competition with other ports unless it can offset the disadvantages by continuing its leadership in the back-up services which has been one of its major special advantages. The World Trade Center was proposed and authorized to reverse the trend of the Port's decline by attracting more shipping.

(A 1).

The purpose of the World Trade Center project was to:

> restore the vitality and growth of our declining Port and thus preserve the economy of the New York metropolitan area. The technique to be used is the centralization and coordination in a single location of the many scattered governmental agencies and private organizations which must work together to administer the

[5] References to ESDC's Appendix are cited as "A __".

> movement of world trade through the bi-State Port.

(A 3).

Thus, "[t]he World Trade Center, as a facility intended to provide a permanent benefit to the entire economy and not just a temporary stimulus and edification, presents an *a fortiori* example of a public purpose." (A 22).

The New York Court of Appeals upheld the validity of the enabling statute, holding that "facilitating the flow of commerce and centralizing all activity incident thereto is a public purpose supporting the condemnation of property for any activity functionally related to that purpose." *Courtesy Sandwich Shop, Inc. v. Port of New York Authority,* 12 N.Y.2d 379, 389, 240 N.Y.S.2d 1, 6 (N.Y. 1963), *appeal dismissed* 375 U.S. 78 (1963) (for want of a substantial federal question), *rehearing den.* 375 U.S. 960.

The court's opinion described the concept of the World Trade Center as:



> the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York.

12 N.Y.2d at 389, 240 N.Y.S.2d at 6.

The court also observed:

> Even the centralization of inland trade has supported the exercise of the power of eminent domain for the establishment of public markets wherein private merchants plied their trades.

12 N.Y.2d at 389, 240 N.Y.S.2d at 6.

In the years that followed, the office complex constituting the World Trade Center became a world symbol of America, particularly as New York City reinforced its position as the capital of international trade and commerce. The secondary benefits to the private entities who participated in the project paled in comparison to the enormous primary public benefit to the entire metropolitan region.

In 2001, terrorist attacks destroyed all seven office buildings comprising the World Trade Center. New York, with

the assistance of Congress, has undertaken a massive rebuilding project. As a first step, ESDC recently used its power of eminent domain to permit the expedited rebuilding of 7 World Trade Center, the first building to be rebuilt. Not only will that rebuilding restore the City's economy and spirits, it will also secondarily assist the privately owned lessee thereof.

Today, ESDC's subsidiary, Lower Manhattan Development Corporation ("LMDC"), is charged with assisting New York City in recovering from the 2001 terrorist attacks and ensuring that Lower Manhattan continues as a strong, 21st century central business district. LMDC contemplates the use of eminent domain in furtherance of the project.

RECENT ESDC PROJECTS

A. Revitalization of Times Square

Beginning in 1980 and continuing through 2002, ESDC successfully revitalized approximately 13 acres of land in the Times Square area of Manhattan. The project was developed in response to decades of rampant economic disinvestment in Times Square by the private sector.



As an example, ESDC recently condemned a large underutilized parcel to construct a 50-story plus building, which will produce an exponential increase in real estate taxes, income taxes, and sales taxes.

The project would have been inconceivable without eminent domain because the project site consisted of more than 60 separately owned, small and underutilized lots, and many of the owners refused to sell their properties except for exorbitant sums. Despite concerted efforts extending over generations, various private interests had been unable to assemble large enough parcels to revitalize the area. There were instances where even a "hold-up" price proved insufficient. Some owners had simply refused to sell at any price and thus thwarted assemblages which would benefit the commonweal. *See* Andrew Alpern, *New York's Architectural Holdouts* (1997) (Detailing numerous, insoluble and typical holdout problems throughout New York City despite the use of creative and sophisticated techniques). Condemnation permitted ESDC to as-

semble sustainable development sites permitting, to date, the construction by the private sector of six major office towers, two major hotels, and myriad retail opportunities of enormous benefit to all New Yorkers. No New York court deemed it a justiciable issue to undertake an independent economic risk analysis of the likely success of the project in determining if those compensated physical takings should proceed.

New York City and other large, densely populated, older American cities will be enormously disadvantaged if they are not permitted to use the power of eminent domain for the commonweal. Without ESDC's use of compensated takings to revitalize Times Square, low tax revenues and limited job opportunities would have persisted.[6] Now, despite private benefits, the predominant economic and social benefits have accrued to the public.

[6] As illustrated by the title to Columbia University's Lynne Sagalyn's *Times Square Roulette* (MIT Press 2001), there were risks. There were greater risks in doing nothing.



B. The New York Stock Exchange

In 2001, the New York State Legislature expressly authorized ESDC to use eminent domain to acquire non-blighted property in Lower Manhattan for the construction of a new, state-of-the-art securities trading facility for the New York Stock Exchange (the "NYSE").[7] *See* New York Stock Exchange Project, 2000 N.Y. Laws Chpt. 590.

The purpose of the project was to retain the NYSE in the City. The NYSE faced limitations on its ability to expand and incorporate critical technological upgrades at its existing facility and its fragmented operations threatened its future ability to function effectively in its existing location. The Legislature found that the loss or reduction of the NYSE would adversely impact the economic environment of the City and the State; that the maintenance and promotion of such markets pro-

[7] The use of eminent domain was necessary to obtain property from newly ensconced residential and commercial holdouts.

vides significant contributions to the taxing base of the State, to the economic development of related industries, and to job creation; and that the presence of such markets in the City enhances the credibility and prestige of the State and the City as a financial and commercial center worldwide.

This global marketplace is now as much an instrument of commerce as were the factory water mills of the 18th and 19th Centuries. New York has become "the focus of great moneyed operations" as envisioned by the 1817 legislation creating the Erie Canal. The importance of the securities industry in New York City is illustrated by the large number of firms and employees engaged in securities exchange, the substantial amount of office space occupied by these firms, and the volume of tax revenues generated by these firms, all of which generate economic benefits for the City, State and country.

ESDC contemplated the use of its eminent domain power to assemble the several complexly-owned parcels necessary for the creation of a large trading floor for the NYSE. Al-



though the state appellate court upheld the use of condemnation for the non-blighted NYSE project site, unfortunately, shortly before the decision issued, the 2001 terrorist attacks and the resulting drain on State and City resources meant that the project could not proceed. *In re Fisher,* 287 A.D.2d 262, 730 N.Y.S.2d 516 (1st Dep't 2001) (Upholding condemnation for economic development).

## THE SUPREME COURT HAS HISTORICALLY DEFERRED PUBLIC USE DETERMINATIONS TO THE JUDGMENT OF THE LEGISLATURE

In 1923, this Court held that the determination of what constitutes a public use "is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 705-06 (1923). In *Rindge,* the Court focused on whether the taking was a legitimate exercise of the government's police power, thereby implicating the Fourteenth

Amendment's Due Process Clause, rather than the Takings Clause, which focuses solely on the issue of compensation.[8]

Three decades later, the Court rejected a challenge to the condemnation of a non-blighted parcel for the purpose of urban redevelopment in the District of Columbia. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954). The Court made clear that:

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.... This principle admits of no exception merely because the power of eminent domain is involved.

[8] *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S. Ct. 1434, 1437 (1949) (In the context of compensation, Justice Frankfurter, writing for the majority, explained that given "the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."). This Court has never equated condemnees' subjective losses with unconstitutionality.



*Berman*, 348 U.S. at 33, 75 S. Ct. at 102. The Court defined "[t]he concept of public welfare [as] broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33, 75 S. Ct. at 102-03. It may include beautification and the creation of a healthy, spacious, clean, well-balanced and carefully patrolled area. 348 U.S. at 33, 75 S. Ct. at 102-03. As in *Rindge*, the *Berman* Court held that once the legislature is deemed to have the authority to carry out a project, "the right to realize it through the exercise of eminent domain is clear." 348 U.S. at 33, 75 S. Ct. at 103. "The question of whether a use is public is determined by looking at whether the government can legitimately exercise the police power in respect of that use, and that question cannot be answered by looking at the Takings Clause, as *Berman* makes clear." Edward J. Sullivan and Nicholas Cropp, *Sources of 'Public Use' Limitations -- Taking or Due Process*, ZONING AND PLANNING LAW REPORT (Sept. 30, 2004) at 3.

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984), the Court held with "no trouble" that a state's use of eminent domain is a "classic exercise" of its police powers and may be used to effect property transfers from oligopolist landowners to lessees in an effort to reduce inflated land prices. In so holding, the Court made clear that "the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." Indeed, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the *Public Use Clause*." 467 U.S. at 241, 104 S. Ct. at 2329. *See also National Railroad Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422, 112 S. Ct. 1394, 1404 (1992) ("[T]he public use requirement of the Takings Clause is coterminous with the regulatory power....") In a compensated taking context, the *Midkiff* Court concluded that it would not substitute its judgment for that of the legislature "unless the use be palpably without reasonable foundation ... because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power...." 467 U.S. at 244, n. 7, 104 S. Ct. at 2331, n. 7.[9]



The holdings of these cases and the early 19th Century decisions discussed above should not be overturned. They were correct when they were decided and they are correct now.

## CONCLUSION

Throughout the history of this country, compensated takings have been used to promote economic, commercial, and

[9] Petitioners and some *amici curiae* contend that there is a crisis in eminent domain law and that *Midkiff* must be overturned. This contention, however, is based upon an analysis of news and magazine articles by petitioners' counsel, the Institute for Justice. Such news articles are notoriously self-serving, frequently misstate facts, and are generated for strategic purposes. In 2003 and 2004, the Institute for Justice contributed to 46 news and magazine articles out of the 385 published on the subject of public use in condemnation. Dec. 29, 2004 Westlaw search of ALLNEWS database for ("Institute for Justice", "Public Use", or "Dana Berliner") and "Eminent Domain" in headline or lead paragraph.

industrial revitalization by maximizing local resources, assembling diversely-owned or landlocked parcels, and creating and sustaining employment opportunities, all for the primary benefit of the public. Consistent with the principles of federalism and judicial economy, this Court has always afforded due deference to the respective state legislatures' use of compensated takings for the purpose of economic revitalization as a legitimate exercise of their government's police powers. This Court has similarly deferred to state judiciaries in reviewing public use challenges to compensated physical takings. For centuries, what constitutes a permissible public use of eminent domain under the Constitution has been an elastic concept, reshaped to accommodate local conditions and ever-changing social and economic circumstances.

*Amicus* ESDC urges the Court to continue to permit local governments and states to use condemnation as a vital tool for the purpose of economic revitalization. Accordingly, ESDC



respectfully requests that the Court affirm the March 9, 2004 decision of the Supreme Court of Connecticut.

Dated: New York, New York
January 19, 2005

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## Appendix

**STATE OF NEW YORK**
**COURT OF APPEALS**

*Courtesy Sandwich Shop, Inc.*
*v.*
*The Port of New Authority*

Excerpts from the brief of
Port Authority Appellants
(March 4, 1963)

* * *

**With the Port of New York suffering a severe decline in its share of the Nation's import-export general cargo, a threat has grown to the Port's leadership. Such a threat imperils the economy of the whole region since one out of every four persons in the area is dependent for his livelihood directly or indirectly on Port activities....[T]he New York Port cannot hold its own in the vigorous competition with other ports unless it can offset the disadvantages by continuing its leadership in the back-up services which has been one of its major special advantages. The World Trade Center was proposed and authorized to**

reverse the trend of the Port's decline by attracting more shipping.

* * *

## POINT II

**The purpose of the Legislatures in authorizing the World Trade Center is preservation of the status of the Port of New York. This constitutes a vital public purpose.**

While the Appellate Division majority found the Act invalid for exceeding the World Trade Center concept, it found that "There is no question but that the creation of a world trade center, in concept, is a public purpose."

On oral argument Respondents' counsel was equivocal on this point. When asked by counsel whether he would concede that the World Trade Center concept represented a public use, he said "No." On his own argument, however, he expressly said "a world trade center can be a public use" but argued that a 72 story trade center building would necessarily represent a private real estate venture.

The World Trade Center has a simple, practical public



objective—liberating the New York Port's world trade from the waste, the costly delays, the inefficiencies which stem from the existing helter-skelter pattern of offices and agencies concerned with moving cargo through the Port. The purpose is, by curing these evils, to restore the vitality and growth of our declining Port and thus preserve the economy of the New York metropolitan area. The technique to be used is the centralization and coordination in a single location of the many scattered governmental agencies and private organizations which must work together to administer the movement of world trade through the bi-State Port.

**(1) The decline of the Port of New York.**

The Port of New York is not guaranteed leadership by any law of economics, science or nature. The Port has been the nation's principal gateway of trade with the rest of the world. But the east and gulf coasts offer many competitive gateways.

New York is a great metropolitan area because it has a great port. This is not a great port merely because it serves a

great metropolitan area.

Whereas ten years ago this Port handled about 33% of the nation's general cargo, today it handles only about 21%–the Port has suffered a major decline in its share of the Nation's general cargo, which is the kind of cargo which contributes most to a port's economic well-being.

The Port is only managing to hold on to the absolute tonnage it handled ten years ago. It has not enjoyed its share in the growth of foreign trade being generated by the country as a whole. The competitor ports have absorbed the growth almost entirely and our Port is suffering a decline in relative importance.

These are the basic concerns which culminated in the agreement of the two States embodied in the Act. The account we shall give in this brief of the reason for authorizing the World Trade Center and the exposition of what the World Trade Center concept truly is are paraphrases of the 1961 and 1962 Reports to the Legislatures.



**(2) The critical importance of the Port to the economy.**

In this Port District of New York and northern New Jersey, world trade is the very life blood of the local economy. It was reported to the Legislatures that direct port activities create 430,000 jobs in the Port District which pay over two billion dollars in wages each year. Each of these 430,000 jobs creates an economic condition in ancillary services equal to additional jobs for a total of 1.3 million jobs representing an annual pay check of over six billion dollars. Adding the job-holders' dependents produces the total of over three million persons and a ratio of one out of every four persons dependent directly or indirectly on the movement of international trade throughout the tri-State Port.

**(3) Port development is traditionally a public responsibility.**

In making their findings, the Legislatures and Governors were merely following views uniformly held by the Courts of this State since the end of the past century when they came to appraise the public importance of retaining and promoting the

commerce of the Port of New York. Compare Judge Andrews' statement in *Ferguson v. Ross*, 126 N.Y. 459, 465 (1891), where he said :

> "The citizens of New York city may possibly have a greater stake in the matter than citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state."

A year later, in *Matter of Mayor of the City of New York*, 135 N.Y. 253 (1892), this Court upheld the condemnation of land for wharves and piers as a taking for a public use though the City intended to lease them to private companies to the exclusion of all others. The Court said (p. 262):

> ". . . The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders."

As stated in *Commissioner v. Ten Eyck*, 76 F. 2d 515, 517 (2nd Cir. 1935) :

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people."



**(4) The Port problem today.**

We mentioned at the outset the freight rate discriminations and other factors making it impossible for the Port of New York to compete merely on the basis of freight costs.

How then has the Port of New York retained even its declining share of the Nation's world trade? The answer lies in the fact that our Port has generated many advantages which can counteract such disadvantages as we have listed. One of the principal offsetting advantages of the Port of New York has been the range and completeness of its Port services, particularly those services that *support* and *back up* the direct berthing, loading, unloading and haulage of cargo. These have given the American exporter or importer confidence that here at New York he will have available the public services, administrative help and the wide range of financial and marketing resources that are essential to the flow of world commerce.

Since the shipper will tend to use only that port which he believes will produce the lowest *net* cost to him, our Port can

maintain its position and reverse the trend against it only if we can continue to provide more and better back-up port services than the competing ports.

In past centuries a port might have been viewed as limited to wharves, docks, piers and other terminal facilities solely for the physical transit of cargo and passengers. But today it must be deemed to include the numerous and complicated governmental and administrative services necessary for their movement.

If at the Port of New York such shipping services are not adequate or efficient, the Port lacks modern and efficient port facilities, even though it might possess the finest piers, docks and wharves.

The States are at another crossroads such as confronted them in 1922 when Alfred E. Smith, as a Port Authority Commissioner recommending adoption of the Comprehensive Plan to implement the Port Compact he had sponsored as Governor, said:



> "We can sit here and talk engineering figures for a year. We can draw plans for five years, but if there isn't a healthy vigorous determination on the part of localities and organizations and people generally in the port district to make some change in the old-fashioned, worn-out, dilapidated ways of doing business in this port, the figures would amount to nothing." Bard, The Port of New York Authority (p. 47, 1942).

For decades the very size of the Port of New York generated the specialization and variety of services which permitted the Port not only to compete but to grow. But the growth of other ports in recent years, while we have remained static in our tonnage, is permitting them in ever increasing degree to match the advantages which have produced our premier position.

In other words, our Port is losing its ability to provide services which are *superior* as the ability of other ports to match our services has been increasing.

The other ports are missing no opportunity to capture trade from the Port of New York. There are today, in this, our own Port, offices of fifteen other United States ports, each of which conducts a competitive program aimed at diverting trade

from New York.

If New York stands still in what it offers as it tries to attract world trade, there is only one logical conclusion as to what the future holds. The Port will move from a period of holding its own to a period in which it will lose not only proportionately but absolutely much of its cargo to its competitors at an accelerating rate. The end must be that this Port will be reduced from the Nation's gateway to a mere local port, handling only cargo with local origins or destinations.

And so the Legislatures determined that if the Port of New York is to be successful in resisting the present erosion of its status, it cannot stand still. Even with the vitalized pier program conducted by the Port Authority and the City of New York, the decline of this Port's relative position has persisted. The danger of losing the superiority in services has grown. The result is increasing danger of the erosion of one of the major foundation stones on which the economy of the New York metropolitan region rests.



**(5) The legislative remedy – The basic World Trade Center concept.**

The Legislatures' approach is to capitalize on and increase the Port's leadership in back-up port services. Recognizing the waste, the costly delays and the inefficiences which stem from the haphazard distribution of port service offices and agencies in the bi-State Port, they have authorized the World Trade Center in an effort to remove these clogs by centralizing the world trade community of the Port.

Respondents chose to ignore the realities of world trade when they suggested in the Appellate Division that the legislative purpose is merely to effect "a small saving in messenger service between various offices". Let us analyze what is happening to the Port while this messenger is finding his way through the City's congested arteries from, let us say, the Custom House to a foreign consulate on upper Fifth Avenue. As he is held up in trying to feed the document he carries into the administrative processes of the foreign consulate, the cargo which the document describes can miss being loaded on a freighter or

the cargo may depart with invalid documentation causing financial penalty.

Multiply these example thousands of times and the immensity of the problem emerges.

The costs at which the Legislatures are aiming are not the piddling messenger costs which the Respondents deride. They are the prohibitive and cumulative costs which result from delays in the chain of administrative processing of 30,000,000 documents a year in the "scattered locations" to which the Legislatures referred (§1(6)). To ignore the problem any longer is to build up a situation where more and more shippers with a choice of ports will decide to try another port for the next shipment and perhaps to give up using the Port of New York altogether. To expedite this processing is to make for an efficient port just as truly do modern piers.

What we are judging, then, is a modern port facility to keep pace with the needs of the two States' great port in its continuing and urgent effort to attract and maintain its proper share



of world commerce.

The reasoning which has always impelled Courts to recognize port facilities as a public use applies with full strength to the World Trade Center, a port facility for which the two States have now found a vital public need.

If the question is asked how far the Legislatures may go in providing new port facilities in meeting their duty to preserve the Port, this Court has already answered in upholding port facilities as a public use:

> " . . . The only standard by which to judge of the extent of the duty consists in the necessities of the business. If a permanent pier and an exclusive right to its use be a necessity of those large steamship lines, without which business cannot be properly transacted, and in the absence of which steamers will be sent across the river to New Jersey or to some other port, then the duty rests with the state or municipality to furnish such quarters for a fair compensation or else the state is bound to permit the steamship companies to obtain such accommodations from private owners. Having undertaken the duty imposed upon it by the state to provide such accommodations as the interests of commerce fairly require, all appropriate acts by the city done in the performance of that duty are for a public purpose." *Matter of Mayor of the City of*

*New York*, 135 N.Y. 253, 263 (1892). (Emphasis added.)

By this Court's "standard by which to judge of the extent of the duty" the "necessities" of today dictate a holding that the basic World Trade Center concept is directed to the identical public purpose of providing adequate cargo handling facilities. Many other cases uniformly hold that the improvement of a port is a public use.[1]

We cannot emphasize too strongly that the basic World Trade Center concept is not only to provide "accommodation" of the port community, but its centralization.

The Respondents have utterly missed this distinction when they dismiss the legislative purpose as merely an attempt to take their property for the use of some customs broker who would lease space in the World Trade Center. The two states have no interest in merely accommodating this customs broker.

[1] The application of this doctrine to The Port of New York Authority appears in *Port of New York Authority v. City of Newark*, 20 N.J. 386 (1956); *Commissioner v. Ten Eyck*, 76 F.2d 515, 518 (1935); *cf. Commissioner v. Shamberg's Estate*, 144



The facility contemplated is not for him or any of its tenants as such. It is to achieve the advantages to all the public of centralizing his services and the services of his counterparts and all of the other port administrative services to the end of providing an efficient port capable of survival and growth.

The States can expect that each customs broker, just like each bus line in a public union terminal will, in time, recognize that the centralized facility is the place in which the public will expect to find that type of service. It is not the tenant's purpose which is being served, but the purpose of the State itself.

Furthermore, the basic tenants are govern-mental agencies and public utilities and other businesses affected with a public interest. Steamship lines and airlines are common carriers; freight forwarders are also common carriers under the Interstate Commerce, Shipping and Federal Aviation Acts;[2] and

F.2d 998, 1005 (2 Cir. 1944); *cert. den.*, 323 U.S. 792 (1944).

[2] 49 U.S.C. §1002(a) (5) ; 46 U.S.C. §841 ; 46 C.F.R. §510.2; 49 U.S.C. 425; 14 C.F.R. §296.2.

customs brokers are for the most part freight forwarders and therefore common carriers and are, in any event, engaged in a highly regulated business related to freight carriage and affected with a public interest.[3] While the centralization function does not stop with this nucleus, it does not extend beyond the port community. But, as we have seen in Point I, the Act delineates the hallmarks of the basic concept which permit judges in future condemnation cases to measure whether the statutory power or the constitutional test of public use have been exceeded.

The Legislatures certainly intended to centralize in the World Trade Center not only all of the back-up services of the Port but also to include "a central locale for exhibiting and otherwise promoting the exchange and buying and selling of commodities, and property in world trade and commerce, [which] will materially assist in preserving for the two States and the people thereof the material and other benefits of a prosperous

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[3] 19 U.S.C. §1641; 19 C.F.R. §31. See *Union Broker-age Co. v. Jensen*, 322 U. S. 202 (1943) for a description of customs bro-



port community." §l(7).

Government studies indicate that the bulk of export trade of the United States is done by less than 5 of all manufacturing firms and accounts for only about 4% of the Gross National Product. One of the reasons for these small percentages is the relative difficulty which any American firm faces in entering foreign markets. These markets are distant, there are cultural and language barriers, there are monetary problems and legal problems and monumental problems of red tape. Reciprocal problems face the potential foreign customer coming here to buy in the American market and the foreign merchant coming here to sell.

One of the purposes of the World Trade Center is to provide services that can minimize these barriers.

First of all, the overseas importer or exporter arriving in New York would not have to search around the commercial labyrinth of Manhattan to seek out assistance. He would know

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kers' services and regulation.

before-hand that the World Trade Center had an in-formation service which could supply him with names of suppliers and other international contacts, arrange introductions and smooth his way. He would know that there existed in the Center a World Trade Institute that would provide him with multi-lingual secretarial service, a library with research facilities and space for conferences on world trade.

The American exporter would, of course, maintain headquarters for the exhibition of his goods and negotiation with his prospective foreign customer. Permanent exhibition space for goods offered in world trade by both American and foreign manufacturers would be available in much the manner of a permanent public world's fair.

The World Trade Center would offer prospective importers and exporters from both here and abroad a one-stop facility. It would make it possible for an individual to complete an import and export transaction entirely within its walls, commencing with viewing the exhibited commodities and ending



with the administrative services. This means a business man on buying trips from Great Britain, Israel, Brazil, India or any other nation would be able to conclude his transaction in one, or, at the most, several days.

Other ports have begun to recognize the need. A public world trade center exists in San Francisco. A public world trade center exists in Houston. Florida has not only authorized a public world trade center in Miami, but its highest Court has approved it as a public purpose.

On June 20, 1962, the Supreme Court of Florida upheld the public purpose of the Inter-American Cultural and Trade Center to be provided under various Florida statutes by an Authority which is denominated a public corporation and agency of the State of Florida. *State v. Inter-American Center Authority*, 143 So. 2d 1 (Sup. Ct. Fla., 1962). The determination of public purpose was made in various connections, principal among which was the state constitutional provision prohibiting use of public funds primarily for the benefit of private parties.

The nature of the proposed Center was explained more fully in a 1955 opinion of the Florida Supreme Court which is followed in the 1962 opinion. *State v. Inter-American. Center Authority*, 84 So. 2d 9 (Sup. Ct. Fla., 1955).

The Court quoted and adopted the report of the Authority's consultants that "the functional purpose of the proposed Center is to increase trade and strengthen cultural relations among the nations of the Western Hemisphere. This objective is to be accomplished mainly through industrial, commercial, educational and cultural exhibits of countries of the Western Hemisphere and other nations." The Court rejected as inapplicable its own prior decision holding that it did not constitute a public use to acquire land for the purpose of leasing it solely for industrial development by private developers.[4]

[4] This best distinguishes the industrial development cases Respondents cited below, like *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P. 2d 171 (1959), to disestablish the public use of the present World Trade Center. The various States have split on the question of industrial development as a public use. In New York certain property may be taken to establish an industrial development for blight prevention. *Cannata v.*



New York, even with its relative decline, is still the leading port and. therefore, still has the greatest opportunity to employ the traditional concept of a permanent public fair or market place for world trade to enhance its position. Most of the overseas prospective buyers will reach the Port of New York first. The idea is to meet all their needs in this Port and to attract them to ship through it.

The provision of this centralized accommodation of a permanent market place with exhibition and related facilities for goods moving in world trade clearly fits the public purpose tests of the cases dealing with public fairs and markets.

In dealing with the 1939 World's Fair, the Court affirmed, without opinion. an Appellate Division decision which cited *Bush Terminal Co. v. City of New York* in rejecting a me-

*City of New York*, 11 N.Y.2d 210 (1962), app. dism. 371 U.S. 4 (1962).

chanics lien on World's Fair property. *John Kennedy & Co. Inc. v. New York World's Fair 1939 Inc.*, 288 N.Y. 494 (1940). The Second Department said 260 App. Div. 386, 389 (1940):

> "It would seem that under the authorities, the World's Fair is of such a nature that it is a 'public purpose.' The Fair has the sponsorship, in different degrees, of the city, State and Federal Governments. It includes exhibits of art, science, business, states and nations, and educational and recreational facilities. . . . any surplus resulting is to be turned over to the city and the State for public purposes."

The World Trade Center, as a facility intended to provide a permanent benefit to the entire economy and not just a temporary stimulus and edification presents an *a fortiori* example of a public purpose.

The Coliseum on Columbus Circle in New York City is a public exhibit hall, owned by the Triborough Bridge & Tunnel Authority. The site was condemned for slum removal purposes. In *Kaskel v.* Impellitteri, 306 N. Y. 73 (1933). Judges Van Voorhis and Fuld, while dissenting from the majority holding that the site was properly taken for slum removal, nevertheless concluded in a dictum that the Coliseum is for a "public purpose." (p. S5)



A public fair with provision for exhibits and exhibition facilities is hardly a new idea in this State. A State Fair was called for by Ch. 346, Laws of New York 1900 and it is today a duty of the State Department of Agriculture and Markets to hold such a State Fair annually. Agriculture and Markets Law §16 (28); §31. Since Ch. 870, Laws of New York 1939, this State has had an Industrial Exhibit Authority for "a state or interstate or international industrial exhibition in connection and cooperation with the annual state fair." Public Authorities Law §§1653-4.

Public markets similarly have a traditional acceptance as a public use in this State. Their history, going back to 1686, was traced in *Matter of Cooper*, 28 Hun 515 (1883), app. dism. 93 N.Y. 507 (1853). The philosophy of the 1962 Legislatures is not better expressed than in this 1883 Court decision. At page 525 the Court said:

> . . The learned counsel for the appellant, ... seems to think that because all persons for the sale of commodities would not be admitted to the market, it is not a public market for a public use. But this is a grave error. It is a market for the concentration of a particular kind of produce, a centralization of it so to speak, and a benefit to the public, who know that in a particular locality they can find the articles designated to be sold there."

Times have changed, the problem is greater, the solution requires a greater effort and the subject of the fair and market place under inquiry is the more significant one of world trade rather than local produce. The public purpose persists. It has already been so held for an International Trade Mart in Miami, *State v. City of Miami,* 76 So.2d 294, 297 (Sup. Ct. Fla.. 1954).

Here the public purpose is fortified because it joins together the public purposes of port preservation and development, public markets and public fairs.

**(6) The effectiveness and wisdom of the remedy are for legislative determination.**

While it is true, of course, that the question of public



use is ultimately a judicial one, controlling weight is normally given to legislative and gubernatorial findings and conclusions such as those in the present case. In fact, the United States Supreme Court has said:

> " . . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature not the judiciary, is the main guardian of the public needs . . . *Berman. v. Parker*, 348 U. S. 26, 32 (1954) (Emphasis added.)

The 1962 Act itself contains extensive declarations, findings, and conclusions of the two States all of which establish that effectuation of the World Trade Center will constitute a governmental and public use within the meaning of our state and federal Constitutions. Typically, §10 recites the States' agreement that effectuation of both the World Trade Center and the Hudson Tubes railroad:

> " . . . will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be re-

garded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto."

The Legislatures determined that the effectuation of the project

> " . . . by the port authority has the single object of preserving, and is part of a unified plan to aid in the preservation of, the economic well-being of the northern New Jersey-New York metropolitan area and is found and determined to be in the public interest." (§1 (9))

Section 14 declares that property required for the purposes of the Act is "required for a public use."

The Senate Commerce Committee Report (No. 744, 1961) on the proposed United States Foreign Commerce Act declares (p. 10) :

> " . . . there has been expressed a need for permanent exhibits of our products both overseas and in the United States. The Department of Commerce has already made a start in this direction by opening its center in London. *The plan of the Port of New York Authority to establish a permanent trade center in our Nation's largest city is, similarly, an admirable project.* The Department of Commerce should take an active lead in fostering such centers, and in encouraging our manufacturers to exhibit their products in such permanent trade fairs." (Emphasis added.)



There is nothing to the Respondents' suggestion that the States have any burden to prove to the Court's satisfaction that the World Trade Center will in fact halt the decline of the Port's relative economic position. This Court has said

> " 'Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature' . . . . In other words, was the legislative choice without rational basis?" *Lincoln. Bldg. Associates v. Barr.* 1 N.Y.2d 413, 415, 418 (1956).

The Legislatures recited their belief that realization of their purpose "will materially assist in preserving for the two states and the people thereof the material and other benefits of a prosperous port community." (§1 (7)) The Governor, in his message of approval, said that "The Center will be an essential and effective factor in attracting and retaining for the Port of New York its proper share of world commerce." (McK. Sess. Laws 1962, p. 3613).

We recognize, of course, that the Court is not abso-

lutely bound by these legislative findings. But they cannot be rebutted merely by the Respondents' questioning whether the legislative remedy of a World Trade Center is wise and will actually work to correct the existing evil. Certainly as this Court said in *People v. Nebbia, 262* N. Y. 259, 265 (1933) :

> "The legislative declaration of facts ... was entitled to great respect and was confirmed by common knowledge."

This Court's holding was affirmed by the United States Supreme Court which said:

> "The legislature is primarily the judge of the necessity of such an enactment . . . ." 291 U. S. 502, 537-8 (1934).

The same rule was clearly set forth by Chief Judge Lehman in upholding mortgage moratorium legislation in *East New York Savings Bank v. Hahn,* 293 N. Y. 622, 627 (1944), *aff'd,* 326 U. S. 230 (1945):

> " ... the legislative findings are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established."

In *Lincoln Bldg. Associates v. Barr,* 1 N.Y.2d 413, 415



(1956), this Court said that:

> "A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known to the Legislature.
>
> * * *
>
> "Nor may courts substitute their judgment for that of the Legislature so long as there can be discovered 'any state of facts either known *or which could reasonably be assumed"* to afford support of the legislative decision to act." (Emphasis added.)

See also *DeVeau v. Braisted.* 5 N.Y.2d 236, 241-2 (1959), aff'd.363 U.S. 144 (1960).

Remembering that the Act cannot be invalidated unless there are no "facts either known or which could reasonably be assumed" and unless the determination is "without rational basis," how can the Legislatures be called irrational in making the determinations underlying this Act? By the same token, the public use cannot be destroyed because of the architectural treatment of the structures to accommodate the functions, activities or services to be centrally accommodated. Whether one tall building will serve the public use better than two low fiat

buildings is an administrative determination of detail, without constitutional significance.

**(7) The appropriateness of a public agency to administer the program.**

The States have found that the Port Authority "is the proper agency to act in their behalf" to effectuate this public facility. (§1(8))[5]

The basic reason, as reported to the Legislatures, is that a private company must have the objective of maximum profit and derive a maxi-mum economic return on its investment in every square foot of land and structure. The World Trade Center concept cannot possibly be accomplished with such an approach.

To begin with, the United States Government requires hundreds of thousands of square feet of expensive land and structures in the Center to accommodate its customs space. The

[5] It is legally immaterial, of course, whether or not only a public agency could accomplish this public purpose, Cf. *New York City Housing Authority v. Muller*, 270 N.Y. 333 (1936); *Cannata v. City of New York*, 11 N.Y.2d 210 (1962), *app. dism.*, 371 U.S. 4 (1962).



Federal Government has obvious economic advantages in constructing its own accommodations which no private developer enjoys. The Government therefore would not expect to pay over the years as much rent as an ordinary private business would pay for the same space. A public agency like the Port Authority can narrow the gap between a private developer's cost base and the theoretical cost base of the Federal Government itself. It can do so even within the confines of its statutory and contractual responsibilities to support its own facilities without burden to the taxpayers.

Furthermore, the whole concept of the World Trade Center is to centralize as many tenants of the world trade community as possible, even though their individual space requirements may not be large. A private developer procures maximum economic advantage by having as few ten-ants as possible with large individual holdings, instead of a multitude of smaller tenancies. Again, the World Trade Information Service could be

provided only by a public agency because it cannot be expected to furnish a substantial financial return and would simply be a wasteful use of equivalent space in private ownership.

Finally, on the most optimistic cost estimates, the World Trade Center would be in the red for years. We reported to the Legislatures that we would expect that it would not become self-supporting until the tenth year after the commencement of its construction. Perhaps private investors can be found who would willingly assume a ten year moratorium on any return and would contribute in addition to their original investment operating and debt service losses that would be incurred over a decade, all in the expectation of a fairly meager return judged by the standards of the private investment market. We doubt it and the Legislatures doubted it, and they were not willing to wait any more than they were willing to wait for slum clearance or urban renewal to be accomplished exclusively by private developers looking for profit alone.



**(8) The World Trade Center is no less a public use because space therein would be leased to public and private tenants.**

Respondents contend that condemnation for World Trade Center purposes would not be for a public use since the Act contemplates the leasing of space to the persons who would be centrally accommodated. Respondents therefore characterize the facility as only a "real estate business."

Respondents' assertion is almost identical to that made and rejected in *Bush Terminal Co. et al. v. City of New York*, 282 N. Y. 306 (1940). There as here, it was contended :

> "The Port Authority is purely and simply the landlord. Similar space for the institution of an Inland terminal by the carriers jointly might well be arranged with the owner, for instance, of the Chrysler Building or the Empire State Building or of any other building within the City of New York." (Appellants' Brief in *Bush*, p. *32)*.

In *Bush*, as in the present case, the leasing of the facility by the Port Authority was the very public purpose which the Legislature had authorized the Port Authority to effectuate.

The New Jersey Supreme Court has recently expressly

stated that a study of the *Bush* opinion "leads us to accept its basic principle," although it found the building in question taxable under the particular statutory definition. *Borough of Moonachie v. Port of New York Authority.* 38 N. J. 414 (1962).

In *Matter of Mayor of the City of New York, supra,* this Court sustained the condemnation of land for marine terminal improvements against a challenge that, because the City intended to lease them to private companies for exclusive use, the taking was not for a public use. This Court said (135 N. Y. at pp. 263-4) :

> "Land which is thus taken is taken for a public use, although some portion of all the land actually used may be thereafter in the discretion of the city, divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the trans-action of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers."

This Court has said:

> "The modern city functions in the public interest as proprietor and operator of many activities formerly and in some instances still carried on by private enterprise." *New Fork City Housing*



> *Authority v. Muller, supra,* 270 N Y. 333, 342 (1936).
>
> See also *Berman v. Parker.* 348 U.S. 26, 33-4 (1954).

To this day almost all New York City and Port Authority piers are leased for the exclusive use of individual private companies. Public airports, public markets, public bus and truck terminals, public fairs and public housing almost universally include space and structures leased to private persons for their exclusive use.

We know that in asking the Court to appraise the basic World Trade Center concept we bear the burden of the fact that a World Trade Center may look like an ordinary private office building, such as a real estate venturer might build. By the same token, a public housing facility looks exactly like a private apartment house. And the State Office Building in Albany looks like a private office building. So does the Port Authority's Inland Terminal Building, upheld by this Court in *Bush Terminal Co. v. City of New York,* 282 N. Y. 306 (1940), *supra.* Public purpose is not destroyed by such external similarities.

Respondents habitually make a related statement—that the World Trade Center has no other purpose than to produce surpluses to offset the anticipated deficits of the Hudson Tubes. This is simply not true and there is not a word in the record which supports it. If the suggestion is that the Port Authority has a secret intent to exceed the legislative authorization then, aside from the falsity of the charge, it is utterly immaterial at this point in judging the constitutionality of the legislative determination. If it is meant that the Legislatures had an ulterior motive in authorizing a facility which is properly classed as a public purpose, then, aside from its falsity, it should be observed that the motive of the Legislatures is legally immaterial. As stated in *New Orleans v. Warner*, 175 U. S. 120, 145 (1899), "from the case of Fletcher v. Peck to the present time, we have uniformly refused to in-quire into the motives of legislative bodies."

If such unsupported and false accusations are to be allowed to raise questions as to the constitutionality of the statute,



then the presumption of constitutionality has been repudiated. "While this presumption is rebuttable, unconstitutionality must be demonstrated *beyond a reasonable doubt.*" *Wiggins v. Town of Somers*. 4 N. Y. 2d 215, 218 (1958). (Emphasis added.) When the Legislature makes a finding and lists the statute's objectives, "mere disagreement may not cast doubt on the statute's validity." *New York State Thruway Authority v. Ashley*, 10 N.Y. 2d 151, 156 (1961).

**(9) While the concept of public use is expanding to meet the public need, the World Trade Center meets the most traditional test of a public use.**

Our Courts have always held that the concept of public use tends to be co-extensive with the public need in changing times to meet current public problems which can only be met effectively by use of the eminent domain power. *New York City Housing Authority v. Muller*, 270 N.Y. 133, 340 (1936).

The most recent and authoritative discussion of the problem is the recent decision of the Court of Appeals in *Cannata v. City of New York*, 11 N. Y. 2d 210 (1962), app. dism.

371 U. S. 4 (1962). That case concerned the constitutionality of a statute authorizing New York City to condemn predominantly vacant property for sale to private industrial developers if the property would merely "tend to arrest the sound growth of the community" even though the property was itself "without tangible physical blight" and might not even "tend to create slums and blight areas."

In that case the owners of homes which were neither substandard nor unsanitary sought a declaratory judgment that the act was unconstitutional as applied to them. Chief Judge Desmond writing for the Court said that

> "an area does not have to be a 'slum' to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings." (p. 215)

We cite *Cannata* at this point not because we rest our claim on slum clearance or urban renew-al grounds.[6] We cite it

[6] The present Act (§7) would permit the Port Author-ity, for World Trade Center purposes, to cooperate with the City of New York, if the City selected the Hudson Tubes-World Trade Center area for urban renewal purposes. In view of the substandard, deteriorated condition of the area the urban renewal approach to land acquisition will receive active consideration. If the statutory standards are met condemnation of this area for the conceded public purpose of urban renewal would, of course be beyond challenge on constitutional grounds. *Kaskel v. Impellitteri*, 306 N. Y. 73 (1953).



because it is the latest case on the law of public use and reflects acceptance of a public use concept much broader than is required to encompass the World Trade Center.

In *Cannata*, unlike this case, the property taken did not end up in public ownership but was sold outright to private persons. There no facility resulted, to continue to operate in the public service, but rather an "industrial park" of private factories. And none of the occupants were, in *Cannata* governmental agencies nor public utilities, whereas the principal occupants of the World Trade Center would be Federal, State, local and foreign governmental agencies and common carriers and other regulated businesses affected with a public interest.

In *Cannata* the determination and selection of site limits was not even made by the Legislature itself, as in this case,

but under delegated authority to local agencies with only a set of standards to govern the delegation.

The trend of the cases in this State, culminating in the *Cannata* case, has been an ever broadening view of what constitutes a public use for which property may be taken by a public agency.

In this case, however, we are not asking the Court to advance the public use concept. Our principal cases are an 1883 case announcing that public markets constitute a public use *(Matter of Cooper, 28* Hun 515, app. dism. 93 N.Y. 507). and an 1892 case which said that it was a public use to accommodate the necessities of oceanborne commerce using the Port of New York *(Matter of Mayor.* 135 N. Y. 253). In both these cases, the City was to be a landlord and, we suppose, was a "real estate venturer" in one sense of the term. But in both, this Court discerned the true public purpose, ignored the surface similarity to private operations and permitted the Legislature to discharge its responsibility to promote the general welfare.

(47)

DEC 3 - 2004

OFFICE OF THE CLERK

No. 04-108

IN THE

# Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

*Petitioners*,

*v.*

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

## BRIEF *AMICUS CURIAE* OF JOHN NORQUIST, PRESIDENT, CONGRESS FOR NEW URBANISM IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*

With the consent of the parties, Mr. John Norquist respectfully submits this brief as an *amicus curiae*.[1] Mr. Norquist currently serves as President and CEO of the Congress for New Urbanism ("CNU"), a non-profit organization with 2500 members, most of whom are architects, planners, engineers or developers. CNU is headquartered in Chicago, Illinois and is dedicated to restoring and promoting the urban form in cities and suburbs of America.[2]

John Norquist's work promoting New Urbanism as an alternative to sprawl and antidote to sprawl's social and environmental problems draws on his experience as big-city mayor and prominent participant in national discussions on urban design. John was the Mayor of Milwaukee from 1988-2002. Under his leadership, Milwaukee experienced a decline in poverty, saw a boom in new downtown housing and became a leading center of education and welfare reform. He has overseen a revision of the city's zoning code and reoriented development around walkable streets and public amenities such as the city's 3.1-mile Riverwalk. He has drawn widespread recognition for championing the removal of a .8 mile stretch of elevated freeway, clearing the way for an anticipated $250 million in infill development in the heart of Milwaukee.

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1. Pursuant to Supreme Court Rule 37.6, counsel for Mr. Norquist state that no counsel for a party authored this brief in whole or in part and that no person, other than Mr. Norquist, his counsel, Mr. Robert W. Wilson, Mr. Stephen B. McGuire, and Mr. Toby P. Brigham, made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

2. *See* http://www.cnu.org.

A leader in national discussions of urban design, Mr. Norquist is the author of *The Wealth of Cities*,[3] and has taught courses in urban policy and urban planning at the University of Chicago, University of Wisconsin-Milwaukee School of Architecture and Urban Planning, and at Marquette University. He also previously represented Milwaukee's south and west sides in the Wisconsin Legislature, chaired the National League of Cities Task Force on Federal Policy and Family Poverty, and served on the Amtrak Reform Council.

Mr. Norquist's years of public service and experience with redevelopment have informed his firm conviction that the use of eminent domain should be limited to the provision of infrastructure and/or the elimination of true slum conditions. He believes strongly that municipal involvement in the real estate market should continue in its successful tradition of platting, zoning, and provision of basic infrastructure (water, sewer, bridges, streets, transit, etc.), but that it should not venture into investment in private business, attempts at which have mostly failed nationwide.

## SUMMARY OF ARGUMENT

The opinion in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) presents the Court with the question of whether it is constitutionally permissible for a local government to exercise the power of eminent domain to transfer private property from one owner to another private party for the sole purpose of economic development—with the goal of hopefully creating jobs, enhancing the tax base and revitalizing the local economy. This brief aims to demonstrate, through historic and current examples, that land assembly for real estate development naturally occurs in the marketplace and that limitations on the

3. John Norquist, *The Wealth of Cities*, (Basic Books 1998).



use of eminent domain for such economic development would not halt the improvement of local economies.

Economic development in this country (as distinct from slum eradication or infrastructure provision) has traditionally been accomplished by the private sector. There is no real economic reason for the recent departure from that tradition evident in the suddenly rampant use of eminent domain to assemble private property for re-conveyance to private developers upon the allegation that the desired property is "underutilized." In addition to the liberty interests, potential for corruption, history of over-subsidized failures, and burden of public bond debt which militate against such a distortion of the "public use" clause (discussed in other briefs supporting the Appellants in this case), there is the simple economic reality that naturally occurring economic incentives have and will continue to adequately promote healthy economic development by the private sector. Moreover, where government wishes to stimulate economic development, there is a vast array of development incentives available to accomplish that without resort to the lend-lease of its eminent domain power for land assembly. Such speculative over-use of eminent domain may actually have a chilling effect on the rigorous economic screening of projects naturally occurring in the private marketplace, and may result in an increased number of unsustainable development projects.

## ARGUMENT

### I. The private sector has been and will continue to be successful in bringing about healthy economic development without the use of eminent domain.

The economy of this country was built by the private sector. Though government has at times played an important role in facilitating development, it has been the actions of the private sector that have assembled and cleared the land, and built the factories, businesses and homes which have created the economic foundation of local economies.

Today, the same economic incentives which have always attracted private investment and spawned sustainable development continue to draw private real estate developers all over America. Private developers continue to mobilize to opportunities born of supply and demand, whether they are build-to-suit projects or speculative ventures (premised upon the idea that once the project is underway, it will attract users that will rent space or purchase the project).

Obviously, land is a key component for any real estate project—from suburban development to urban infill or redevelopment. Developers can acquire land at many stages of the development process. Some land bank property for years, waiting for the appropriate market opportunity. Others purchase the land from long term owners or land speculators who have assembled the land. They may purchase the property without a specific development in mind, but with the recognition that the market is ready for some development of the site. For speculative ventures, developers commonly acquire an option and close or lease the land only after substantial predevelopment analysis has been done and the developer is confident enough to commit to the project. If the location is right, and the value can be generated by the assembly, the private sector has a variety of



negotiating techniques to induce individual private owners to either sell or joint venture in the project.

In metropolitan areas, significant land assembly efforts are often necessary for major real estate development, but the private sector does this well. For example, in Las Vegas, Focus Property Group acquired 2,400 acres of land (consisting mostly of parcels of five acres or less) in order to build a master-planned community now known as Mountain's Edge. Though it took over five years to assemble the land, the project is now under construction and will ultimately consist of 10,000 single family residences, 3,000 multi-family units, 150 acres of commercial development, parks, trails, and several schools. Focus Property Group (a company established in 1990 which specializes in the study of real estate patterns, assemblage of land, and development of planned communities) successfully secured a re-zoning, obtained development approvals, and installed preliminary infrastructure necessary to launch construction.[4] Similarly, in Howard County, Maryland, more than 15,000 acres were assembled to create the new city of Columbia.[5]

The private sector is also effective in urban land assemblage. For instance, in 1999, Commonwealth Development Group

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4. Hali Bernstein Saylor, *Focus Provides Service to Builders*, Las Vegas Newspapers, Jan. 17, 2004, available at http://*www.lvnewspapers.com/realestate/REJan-17-Sat-2004/Front/22950800.html*; Andy Flaherty, *Land Development in Nevada: From Dirt to Dream House*, Builder & Developer Magazine, June 2004, available at *www.bdmag.com/issues/jun_2004/d_headlines.htm*; Larry Bross, Nevada's Land Disposal Lauded by Federal Government, Builder & Developer Magazine, July 2004, available at http://*www.bdmag.com/issues/jul_2004/d_headlines.htm*.

5. Robert Moxley, *Creating a New City: Columbia, Maryland* in *Land Acquisition: The Realtor's Perspective* 23, (Robert Tennenbaum, ed., Perry Publishing, 1996).

assembled 21 separate parcels of land in Providence, Rhode Island to construct a 1.4 million-square-foot mall with space for 160 shops and Nordstrom's as the anchor tenant. The $460 million project included a four-level mall built atop a five level parking deck and is designed to compliment the architecture surrounding the nearby state capitol building.[6]

Likewise, in the mid-1980s, two West Palm Beach, Florida developers discreetly assembled all of 26 contiguous blocks of a run-down inner city area by purchasing over 300 separate parcels from 240 different landowners in nine months (using twenty different brokers), and then convinced the city to approve a master plan for a mixed use development, then dubbed "Downtown/Uptown." All the buildings, except for an historic church, were razed. But for the real estate crash of the early 1990's, these developers would likely have successfully completed the project. They were, however, forced into foreclosure, and the city purchased the assemblage and issued bonds for infrastructure. This attracted major developers from New York and Miami who leased the land from the City and developed it successfully. Thus, the 77 acre area that had been privately assembled is now the thriving mixed use development (residential, retail and entertainment) known as "CityPlace," and its economic impact on West Palm Beach has been compared by some to the impact of Disney World on Orlando.[7] (Disney

6. Jon Springer, *Providence Place Debuts Under Deadline*, Shopping Centers Today, Nov. 1, 1999, available at http://*www.icsc.org/srch/sct/current/sct9911/14.html*.

7. *See* Johanna Marmon, *Urban Renewal-West Palm Beach*, South Florida CEO, May 2002, available at http://*www.findarticles.com/p/articles/mi_m0OQD/is_4_5/ai_100500854*; Becky Swann, *The Story of CityPlace*, International Real Estate Digest, Feb. 27, 2001, available at *http://www.ired.com/news/2001/0102/cityplace.htm*; David Takesuye, *Reuniting Assets*, Urban Land Institute, Sept. 2003, available at *http://*
(Cont'd)



World, of course, was a paradigmatic private assemblage, the success of which is known worldwide).[8]

These examples of successful private land assemblage, driven by naturally-occurring economic forces, are in stark contrast to many publicly-funded, speculative real estate assemblages which have failed miserably. Examples of such failure are not hard to find.

Consider the recent sale of "Block 37" in Chicago, publicly acquired and cleared by the city more than fifteen years ago to foster redevelopment on State Street. The land sat idle, and the City finally sold it this year for a $23 million loss.[9] Or, the half

(Cont'd)
*research.uli.org/Content/Awards/2002/CityPlace.htm*; Susan Salisbury, *Paydirt*, Palm Beach Daily Business Review, Dec. 16, 1998 at A1. Though not mentioned in these articles, the City condemned a few small parcels for CityPlace. This was because a few original owners (who had readily sold to the two developers during the original private assemblage) had gotten their properties back through foreclosure and were unwilling to re-sell to the City for the same price range later. By the time the City sought to acquire them, the large assemblage had occurred, land had been cleared for development, zoning approvals had been obtained, and their land had increased in value. When these few owners refused to accept the City's offered price (because it was premised on appraisals which included no assemblage value), the City filed eminent domain proceedings.

8. Richard E. Foglesong, *Married to the Mouse: Disney World and Orlando* (Yale Press 2001); Kent Wetherell, *Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes Involving Walt Disney World*," 4 Fl. Coastal L. J. 1 (Fall 2002) at 1-3; Mark Derr, "Tommorrowland Today," *St Petersburg Times*, Oct. 22 1989.

9. Gary Washburn, *City Loses on Block 37 Sale, Bets on Future*, Chicago Tribune, Oct. 13, 2004; William Sluis, *Block 37: New Partner Sought; Tenant Wavers*, Chicago Tribune, Nov. 28, 2004.

city block (formerly eight separate properties) on Wisconsin Avenue (a main retail corridor) condemned, cleared, and consolidated by the City of Milwaukee in 1985 for hotel development—it has been used as a parking lot ever since.[10] Demolition and consolidation of parcels failed miserably in Detroit and St. Louis where populations dropped significantly from 1950 to the year 2000 after urban renewal, intended to foster economic growth, backfired.[11] Several abysmal failures have resulted more recently from economic development condemnations in California.[12] These are but a few examples of

10. Tom Daykin, *Hotel Planned to Complement Midwest Airlines Center*, Milwaukee Journal Sentinel, Nov. 13, 2004, available at http://www.jsonline.com/bym/news/nov03/184819.asp; Tom Daykin, *City Sells Downtown Site for $1*, Milwaukee Journal Sentinel, Mar. 24, 2004, available at *www.jsonline.com/bym/news/mar04/217054.asp*; Mark Savage, *New Hotel Planned for Downtown*, Milwaukee Journal Sentinel, Nov. 28, 1999, available at *www.jsonline.com/news/metro/nov99/hotel29112899.asp*.

11. Regarding Detroit's decline despite (or perhaps because of) urban renewal efforts, see Joel Kotkin, *The Future of the Center: The Core City in the New Economy* (Davenport Inst. Nov. 1999), available at: *http://www.publicpolicy.pepperdine.edu/davenportinstitute/reports/center/center3.html* and Julia Vitullo-Martin, *Detroit Fights Back*, 5 City Journal 55 (Summer 1995), available at: *http://www.city-journal.org/html/5_3_detroit_fights.html*. Regarding the ineffectiveness of urban renewal in St. Louis, see the City's own website available at *http://stlouis.missouri.org/citygov/planning/research/data/about/history.html*, stating "urban renewal efforts and public housing development programs could not stem the tide of population loss, and in some cases contributed to the decline." *See also* M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964).

12. *See* Douglas Shuit, *Long Beach Mall Finds Its Niche, But Not Survival*, L.A. Times, June 15, 1999 at. B13; Anne Rackham, *Legal*

(Cont'd)



municipal land speculation, underwritten by taxpayers, which were never economically sustainable. Several more are discussed in S. Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (2004).

This pattern of failure is often the result of inadequate planning and economic evaluation by governments and/or undue influence of special interests. As one commentator put it:

> The greater involvement of business in setting local public policy, the increasing competition for jobs between localities, and a concomitant rise in the amount of state and local government subsidy of corporate activity all suggest that local government is extremely susceptible to corporate influence when making its economic development decisions. Such influence may prevent local officials from performing the rational calculus needed to decide whether a taking's displacement costs—including the loss of valuable affordable housing stock, small business matrices, and viable communities—are indeed outweighed by unenforceable promises, or no promises at all, of job creation, income, sales, and property tax revenue, and speculative spin-off spending.[13]

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*Costs, Failed Project Plan Carry Hawthorne to Brink, Auditor Reports*, L.A. Bus. Jour., Apr. 24, 1995 at 1; Michael Flagg, *Troubled Hotel Becomes Symbol To Critics*, L.A. Times, Sep. 12, 1994; Ted Rohrlich, *City Made Bad Realty Investments, Report Shows*, L.A. Times Mar. 30, 1998 at B1.

13. Adam Hellegers, *Eminent Domain as an Economic Development Tool*, 2001 L. Rev. M.S.U.-D.C.L. 901 (2001) at 903. See also John Gibieaut, *The Money Chase*, A.B.A. Jour., Mar. 1999 and Robin Paul Malloy, *The Political Economy of Co-Financing America's*

(Cont'd)

**II. Prohibiting the exercise of eminent domain for purely economic development purposes will not prevent redevelopment given the array of other incentives available to government authorities interested in stimulating economic development.**

The use of eminent domain may appear expedient, but it is not essential to economic development. As illustrated by developments like Mountain's Edge and CityPlace, discussed above, there is a wide array of economic incentives which government can offer to facilitate economic development without resort to eminent domain. The favorable rezonings granted for Mountain's Edge and CityPlace or the bond-financed infrastructure provided for CityPlace are common examples of how local governments have effectively encouraged sound economic development without undertaking land speculation themselves or virtually loaning out their eminent domain power to vicarious private speculators, at taxpayer expense. One treatise described the respective roles of government and the private sector as follows:

> Development in the United States has traditionally occurred through a conventional process in which the public and private sectors perform independent functions and therefore tend to remain at arm's length

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*Urban Renaissance*, 40 Vand. L. Rev. 67 (1987) which advocates leaving commercial/retail economic development to the marketplace because:

> Under current practices for facilitating urban revitalization through co-financing activities, special interest groups are using the political means to reallocate resources to their own uses. This results in a distortion of market allocations because allocations are made on the basis of pure political power rather than according to competitive criteria. *Id.* at 99-100.



> from one another. As a general rule, simple projects in strong markets have historically followed conventional modes of development, and any mix of function between the public and private sectors has been seen as a conflict of interest on the part of local government . . . , the public sector was expected to perform the functions of regulation and broad planning, providing the needed services—schools, roads, water, sanitation, fire and police protection—to support new development. The private developer originated projects based on information about the market and formulated a specific plan for a project with public policy in mind—all without the public's direct involvement in stages one and two of the process. Consequently, the public sector did not assume any of the entrepreneurial risks or absorb any project-specific costs typically borne by the private sector.[14]

Much has been written about the departure from this traditional model, when government took on more of an entrepreneurial role during the period of federally-funded urban renewal, and there has been substantial criticism of how local government handled the roles of land assembly and developer selection, and the resulting impacts on municipalities.[15]

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14. Mike E. Miles, Gayle Berens and Marc A. Weiss, *Meshing Public and Private Roles in the Development Process* in *Real Estate Development: Principles and Process* 269 (Nancy H. Stewart, ed, 3d ed., Urban Land Institute 2000).

15. *See, e.g.*, M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964) and C. Hartman, *Between Eminence & Notoriety: Four Decades of Radical Urban Planning*, (CUPR Press, 2002).

As a result of cutbacks in federal urban aid in the late 1970's, local governments were forced to return to the more traditional model of providing catalytic incentives for development instead of themselves undertaking land assemblage. The cessation of federal funding for massive acquisition and demolition programs necessitated use of other means to attract developers to financially risky redevelopment. Developers had not done very well with urban renewal, and were therefore concerned about whether project economics were realistic.[16]

A popular text on real estate development[17] provides the following exhaustive list of incentives which local governments have devised. It illustrates that there are many catalytic alternatives beside use of eminent domain:

Strategies and Incentives for Public Assistance:

Strategies for Enhancing the Risk/Return Relationship of Private Investment
—Reduce capital costs
—Absorb demands for new or improved infrastructure
—Lower operating cost

16. M. Anderson, *id.* p.122. recites that

> . . . the developer's investment is relatively small and the potential profit is high, but so are his risks, and the past experience of private developers indicates that urban renewal under federal auspices has not been as lucrative or as easy as originally anticipated. Most of the developer's profits are still on paper, and though they may be large, his chances of getting them are small.

17. Mike E. Miles, Gayle Berens and Marc A. Weiss, *Real Estate Development: Principles and Process* (Urban Land Institute, 3d ed., 2000).



—Increase opportunity for development
—Reduce debt service burden
—Reduce predevelopment risk of approval
—Enhance availability to private capital

Direct Financial Assistance
—Land Assembly
Acquisition
Demolition
Relocation
Writedowns

—Capital Improvements
Infrastructure
Parking garages
Open space and amenities
Programmatic facilities

—Grant Assistance
Cost sharing of private improvements
Payment for predevelopment studies

—Debt Financing
Direct loans
Below-market interest rates
Loan guarantees
Credit enhancements

—Indirect Assistance
Zoning or density bonuses
Transfer of development rights
Transfer of air rights
Regulatory relief from zoning and building codes
Reduced processing time for project inspections
Quick take by eminent domain
Design coordination in public/private projects

Below-cost utilities if publicly owned
Arbitration of disputes that might arise
Government commitments to rent space

—Financing Strategies
Intergovernmental Grants
Community development block grants
Section 108 guaranteed loans
State economic development grants
Local Debt Financing
General obligation bonds
Industrial development bonds
Off-Budget Financing
Lease/purchase agreements
Ground leases
Land/building swaps
Property tax abatements

Dedicated Sources of Local Funds
Special district assessments
Tax increment financing
Earmarked sales or special-purpose taxes
Reuse of UDAG loan paybacks
General Budget Revenues[18]

The most common form of government incentive, and historically, the most effective, is the provision of infrastructure. Investments in water, sewer, bridges, street grids and transit helped create, for example, the high real estate values in New York City's Manhattan Island. A pattern of such successful intervention extends across the nation.

18. *Id.* at p. 281. This list is not comprehensive. Other sources include lists with additional incentives. *See, e.g.*, T. Lyons and R. Hamlin, *Creating an Economic Development Action Plan: A Guide for Development Professionals* (Praeger Publishers, 2001).



Other common and effective government incentives are zoning and density allowances to attract corporate relocation and to increase the economic feasibility of the desired development. This regulatory form of incentive can be further augmented by fast track regulatory processes for desired types of development, including one-stop permitting program where a staff person is assigned specifically to shepherd targeted types of projects efficiently through the administrative process.

Waivers and rebates of fees are also substantial regulator incentives. Direct financial assistance is common in the form of property tax abatements, bond financing, low interest loans, infrastructure improvements, or utility rate incentives. The list of examples could go on and on, and it illustrates the "let's make a deal" ability of local government to work with a developer to make the economics of a desired project work.

The public sector therefore has many tools at its disposal to foster redevelopment and economic development. Land assembly is just one of them, and there are many techniques to facilitate land assembly without resort to eminent domain, including contribution of surplus government property,[19] land exchanges or swaps between the public and private sectors, and relocation assistance from the public sector for owners or space users in the property slotted for redevelopment.

## III. Allowing existing landowners to participate in economic development projects is a common practice in many countries, and is a viable alternative to condemning out existing property owners.

The United States is a relatively young country, and has not had the wealth of experience in land assembly that many

19. A sizable chunk of the Mountain's Edge assemblage was government surplus land acquired by auction. *See* sources cited at note, *supra*.

older nations have accumulated.[20] During the modern era, it has used eminent domain for land reassembly to a much larger extent than many other countries because of the spate of federally supported condemnations for slum and blight clearance. This, and the more recent trend of using eminent domain for purely economic development/re-conveyance, has arguably retarded the use of resourceful assembly techniques developed in other countries.

Over time, the practice of including property owners in redevelopment through economic incentives, rather than condemning them out, may nonetheless increase in the United States because of the lack of funds to acquire the property, objections to the use of eminent domain, and the growing recognition that, for truly successful economic development, the existing landowners must be brought to the table as one of the important "stake holders." [21] The following are just a few examples of how this can be done:

### A. Government-Created Incentives: An Historic Example

Though land assembly in partnership with existing landowners has become more common in other countries, the United States is not without some precedent for it. President George Washington resourcefully accomplished the land assembly needed to develop our nation's capital by involving landowners in the process and allowing them to share in the economic rewards.

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20. W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982).

21. Florida Atlantic University / Florida International University Joint Center for Environmental and Urban Problems, *Development Without Displacement Community Handbook* (August 2000), available at http://www.catanese.fau.edu/3publications/dvlp_wo_displacement.pdf.



He accomplished this without any exercise of eminent domain, through a joint venture by which land would be voluntarily pooled, re-zoned (agricultural land to platted developable lots), and redistributed among the contributing landowners, who would be compensated for the new public spaces in cash and swap-backs of up-zoned land. One historical account described Washington's program as follows:

> The Proprietors Enter Partnership with the Government. The new arrangement provided that the proprietors should convey their land to the federal government, and after the city plan had been prepared they would receive back, in exchange, every other one of the platted lots. For a set price of twenty-five pounds per acre, the proprietors would be compensated for federal building reservations as well as for the unplatted lands required for public use as squares, walks, and similar elements. The land required for streets and alleys would be dedicated by the proprietors without charge. At one stroke, this new arrangement placed the proprietors in partnership with the federal government—and with each other—in urban development.[22]

This historic example is still timely, given the array of economic incentives which governments can extend, as discussed in Section II, *supra.*

### B. Landowner-Organized Assembly

There are also instances where the landowners themselves recognize the economic benefit of assembly and act on their

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22. F. Gutheim, *Worthy of the Nation: The History of Planning for the National Capital*, The Smithsonian Institution Press, 1967), p. 23. For the full text of the agreement, *see* H. P. Caemmerer, *Washington: The National Capital* (1932), pp. 19-21 and W. Tindall, *Standard History of the City of Washington* (1914), pp. 76-78.

own to mobilize to the economic opportunity. An interesting account of this is chronicled in the magazine piece, *When Neighbors Sell as a Group*, Changing Times Magazine, August 1985, as follows:

> To Randy and Susan Campbell the prospect of selling their Atlanta home at anything near its appraised value looked dim. Newly erected office buildings had hemmed in their neighborhood, forever changing the rural character that had attracted them to the area just four years ago. The traffic had become so bad that it blocked the entrance to their subdivision during morning and afternoon rush hours. To top it off, property values were on the skids.
>
> But you needn't feel sorry for the Campbells; their property is now under contract for $225,000, which is easily twice what it normally would have fetched as a residence. That, however, is a fair price when the Campbell's half-acre lot is packaged with other lots that make up the Lake Hearn subdivision and sold as part of an 83-acre tract of commercial real estate. One of these days their neighborhood will turn into six office buildings, a hotel and possibly even a museum.
>
> Other sets of neighbors who have banded together to cut deals with commercial developers are reporting that they're getting prices three and four times higher than the going residential prices. It hasn't been easy by any means, but the handful of neighborhoods that have succeeded (there have been about a dozen to date, with dozens more taking a stab at it) have blazed a trail for those who want to try it.")[23]

23. *Id.*, pp. 45-48.



In addition to describing steps for neighbors to follow in assembling their properties, finding a developer, and selling as a single site, the article discusses "holdout" problems and compensation issues, as follows:

> More than likely there will be a few holdouts, but they don't have to stop you at this point. Architects have produced any number of ingenious designs that can skirt missing pieces. . . .
>
> The 22 residents of the Courtlands neighborhood in Arlington, Va., and 45 Atlanta families in the Peachtree-Dunwoody Valley subdivision agreed that sellers would get an equal number of dollars for each square foot of land they owned. . . .
>
> The 46 Oak Brook, Ill., residents living in the Ernie Pyle subdivision also worked out a compromise. They developed a formula for sharing the wealth that was weighted in favor of land area owned, with some concessions made to the value of the homes.[24]

The obvious economic incentive for voluntary landowner participation in projects that will enhance the tax base and stimulate local economic vitality is the ability to be compensated, not on the current use market value, but on the basis of the value of their land for the more intensive use envisioned. That is why the owners band together and work in concert with a selected developer to obtain local government approvals for the redevelopment project.[25]

24. *Id.* at 46.

25. The landowners in both the Lake Hearn neighborhood of Atlanta, Georgia and the Courtlands neighborhood of Arlington, Virginia assisted the developer during the rezoning process, the success of which was a precondition for the purchase by the developer of the properties (Cont'd)

This is well illustrated by yet another example of self-organized assembly involving a Boca Raton, Florida condominium. As a result of a deal which closed in early 2004, the aging "Villa del Mar" building will be replaced by a new condominium project known as the "Luxuria. To accomplish this, all the existing owners agreed to dissolve their condominium and sell everything to a developer. Rather than paying a necessary assessment of over $1 million to address structural and safety upgrades to their aging building, each unit owner will receive about $600,000, about three times the fair market value of their existing units.[26]

Self-organized reassembly also occurs in the commercial setting. An effort by a group of downtown Schenectady, New York, businessmen to pool their business property in the mid-1970s led to the rebirth of the deteriorated downtown business district into a two-level shopping mall that vied with the suburban centers for beauty, charm and variety. Their efforts won them an Award for National Excellence in the National

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at the higher price. *See When Neighbors Sell as a Group*, Changing Times Magazine, August 1985 at 48, T. Clary and P. Rasmussen, *The Buyout Phenomenon*, Planning, October 1985, at 18, and Robert Guenther, *Atlanta Neighborhoods Unite to Sell Homes to Developers*, The Wall Street Journal, May 23, 1984, Page 33, col 1.

26. R. Londoner, *Trump Group to Raze and Raise in Boca Raton*, South Florida Business Journal, Mar. 5-11, 2004, at 16. *See also*, Robyn Friedman, *Name of Pricey Boca Condo to Says it All: Luxuria*, Sun-Sentinel, October 19, 2004, at 1D. For more examples of landowner-driven assembly, see Frank Schnidman, *Suburban Land Assembly* in 1991 *Zoning and Planning Handbook* 125 (Clark Boardman, 1991), based upon a study of a substantial number of landowner assemblages in the metropolitan areas of Atlanta, Phoenix and Washington, D.C.



Recognition Program for Community Development Partnerships from President Ronald Regan in 1982.[27]

### C. Third Party Private Sector Assemblage

Brokers and developers have also discovered the merit of involving existing landowners in assembly and development. Real estate brokers often specialize in neighborhood buyouts, seeking areas that fit a profile for profitable assembly and then packaging them for sale to a developer.[28] For example, in the mid-1980's, a strong trend of such brokerage assembly in older residential neighborhoods led the City Commission of Dallas, Texas to adopt a policy for dealing with the increased number of neighborhood requests for rezoning and redevelopment.[29]

In Northern Virginia, a real estate broker hired by a group of neighbors in the Poplar Terrace subdivision is currently working with a selected developer toward a rezoning which would replace their 70 existing homes on 40 acres with 1,326 residential units. This development project has been cited as an example of "Smart Growth" because of its proximity to public transit, and even has support from environmentalists. The average price of the homes in Poplar Terrace is currently

27. *See* P. Jansak, *Private Lot Pooling for Urban Revitalization: The Case of Schenectady, New York*, The Platted Lands Press, October 1985, at 4. Though for a variety of economic and management reasons, the corporation filed for bankruptcy, it was not because of the assembly effort, and in spite of the financial problems, the merchants who formed the corporation did what the local government had not been able to accomplish—they instigated the multi-million dollar renaissance of a truly blighted downtown.

28. *See* R. Knack and J. Peters, *Starting to Spread*, Planning, October 1985, at. 21.

29. Dallas, Tex, Res. 852290 (July 17, 1985). A similar ordinance became necessary in Arizona. *See* Scottsdale, Ariz., Res. 3157 (May 15, 1989) on "Neighborhood Assemblage Policy."

around $400,000. Under the terms of their agreement, the selected developer (Centex Homes) will pay participating homeowners $760,000, or more depending on the number of homes approved by local government. There are five holdouts among the 70 owners in the subdivision, but "Centex can just build around them," according to the leader of the neighborhood association.[30]

Developers also go directly to landowners to negotiate for the sale of their assembled land or for their participation in the development project on the economic premise that the value of the future assemblage justifies either buying out existing landowners at premiums above current appraised value[31] or allowing them to share in the profits of the future development through joint venture.[32]

An example of a premium buyout is the 1984 sale of forty-five acres in the underutilized "Farmer's Market" area of Downtown Dallas, Texas, comprising 5 percent of the downtown. Under the lead of a private developer, existing landowners formed an assemblage partnership. Though this project began with the expectations that the partnership would be involved in the development, a syndicate of investors and developers who saw the potential of the project made the traditional "offer too good to refuse."[33]

30. P. Whoriskey, *N.Va. Neighbors Hoping to Raze, Rebuild, Profit*, The Washington Post, Sept. 20, 2004, p. A1.

31. *See When the Commercial Builders Invade Suburbs*, U.S. News & World Report, Apr. 29, 1985, at 70 for a discussion of instances where landowners have sold directly to developers—for the right price.

32. *See* R. Knack and J. Peters, *Starting to Spread*, Planning, Oct. 1985, at .21 for a discussion of the growing experience with neighborhood assemblages.

33. For a discussion of the land assemblage and development partnership in the Farmer's Market area in Dallas, *see* J. Northrup, (Cont'd)



A good example of joint venturing with existing landowners is found in Ft. Lauderdale, Florida where a successful urban townhome development, known as The Ellington at Victoria Park, is underway. It all started when a developer approached the owner of the first of three sites needed along 6th Street and persuaded him to contribute his properties to a joint venture. Through a refinance, the owner was given some cash out of the deal immediately, and he then assisted the developer in obtaining contracts from his neighbors. In total, the joint venture accomplished nine separate purchases of older homes, apartment buildings, motels, duplexes, etc. to assemble the land for the now award-winning (American Institute of Architects Award for Excellence) development.[34] By remaining with a project in this fashion, existing owners can share in the risks and rewards of redevelopment.

### D. Foreign Experience Involving Landowners in "Land Readjustment"

Providing land owners with the opportunity to assemble their own property and work with developers, to either participate in the redevelopment project or benefit from the increased value created by the assemblage, has existed for many

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*The Land Assemblage and Development Partnership*, 16 Real Estate Review 1986)at 90. A case study of this effort can be found at J. Northup, *The Farmer's Market District: A Land Assembly and Redevelopment Program in Downtown Dallas*, Urban Land, Nov. 1984 at 19. This article also outlines the role that the city played to assist in the success of the District's redevelopment.

34. *See* Robyn A. Friedman, *Townhouse Project Slated for Victoria Park*, Sun-Sentinel, Jul. 8, 2002 at 10, Hannah Sampson, *Up on a Roof; a New High Life*, Miami Herald, Aug. 2, 2004 at B1, and *http://www.theellington.net*. Some facts surrounding the private assemblage are based on the personal knowledge of undersigned counsel from written correspondence with the developer, Scott Brenner.

years in a number of foreign countries. Referred to as "Land Readjustment," "Land Consolidation," "Land Pooling," etc., this process essentially pools the land parcels into a single site with the owners retaining a percentage share of ownership rights before and after the development.[35]

An interesting case study of foreign land assembly is Roppongi Hills in Tokyo, Japan. Roppongi Hills is a widely acclaimed, $5 billion mixed-use project on 27 acres (11 hectares) in the heart of the city. It was privately assembled over several years, involving negotiations with more than 600 separate land-right holders. In the end, 200 of these owners chose not to wait for the completion of Roppongi Hills and sold to the developer/ landowner partnership, but 400 landowners have remained in

35. *See* W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982) for the first book in English on land readjustment. Though not a technical guidebook or manual, it provides an overview of agricultural and urban land readjustment. It includes chapters on Japan, South Korea, Taiwan, West Germany and Australia. *See also* F. Schnidman, *Land Readjustment*, Urban Land, Feb. 1988 at 2, which outlines the foreign experience with land readjustment and discusses how it can be used as a technique for urban development and redevelopment; M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 The Urban Lawyer 197 (Spring 1990) for a discussion of how foreign concepts of owner participation can be fostered in the United States, including examples where it has happened without general enabling legislation by traditional real estate techniques; G. Larsson, *Land Readjustment: A Modern Approach to Urbanization* (Avebury, Ashgate Publishing Limited, 1993), containing a manual-like discussion of land owner participation under land readjustment and the process by which it operates; and L. Minerbi, P. Nakamura, K. Nitz, and J. Yanai, *Land Readjustment: The Japanese System: A Reconnaissance and a Digest* (Oelgeschlager, Gunn & Hain in association with the Lincoln Institute of Land Policy, 1986) for a very detailed examination of how the process of land owner participation works in Japan.



partnership with the developer. They hold shares in the development partnership, and many have relocated to the newly constructed residential buildings.[36]

The idea of formalizing landowner participation in development and redevelopment through a land readjustment process has been of interest for a number of years, and many academics and scholars, as well as developers and government officials, continue to hold conferences and seminars on how it can be accomplished.[37]

36. *Roppongi Hills*, Vol. 33 Urban Land Institute Case Studies # 17, Oct.-Dec. 2003 also available at *http://www.casestudies.uli.org/DCS_Frameset_Other.asp?Section=8&CSID=C033017A.*

37. United States land readjustment possibilities are examined in M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 The Urban Lawyer 197 (1990). See also, G. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 The Urban Lawyer1 (2000). W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982), is a product of the proceedings of a 1979 conference on "Land Consolidation: Potential for New Urbanization at the Rural Fringe" held in Taoyuan, Taiwan. Since that time a dozen major international conferences have been organized with a goal of expanding the understanding and adoption of legislation to provide a framework for landowner participation in urban development and redevelopment. The most recent session was held March 21-22, 2002 in Cambridge, Massachusetts at the Lincoln institute of Land Policy. This session, "Tools for Land Management and Development: Land Readjustment," brought together experts from Japan, Korea, Israel, Finland, The Netherlands and the United States to once again review and analyze approaches to implementing a more efficient and effective process of including existing land owners in the land planning and development process.

## CONCLUSION

Land assembly for healthy economic development occurs without the use of eminent domain. Just look at any big city and take notice of the tall cranes at work. A vast majority of them are not involved in public redevelopment projects. Private enterprise has built and rebuilt America's cities, and will continue to do so without over-use of eminent domain, in response to sound economic trends. The exercise of governmental authority to transfer property from one person to another is simply not an essential component in redevelopment

Moreover, the use of eminent domain to act as real estate broker to the private sector or as public land speculator, are just not appropriate roles for local government. Land assembly for purely economic development is best left to the private sector because it has the developed skill and expertise to more effectively evaluate risk, to understand the complexities of real estate development, and produce sustainable economic development. Government should maintain the limits of its traditional, complementary role in economic development by extending regulatory, infrastructure and tax incentives where appropriate.

But, taxpayers are now being asked to underwrite the risks of real estate-related economic development, and it is no longer just the costs or forgone revenue from these traditional government incentives—it is for speculative acquisition of real estate. This has resulted from the recently acquired taste for expediency among certain members of the private development community who hunger for government to speed up the development process and/or cut existing landowners off from the economic potential of their land by assembling land for them through condemnation. Lured by proffered visions of tax base enhancement and upscale amenities, some local officials are



supporting this sort of "corporate welfare," and it not only raises serious Fifth Amendment questions, but skews the evaluation of projects and their long range community impacts.

For all the reasons stated here, this Court need not be concerned that a ruling in favor of the Appellants in this case will stifle economic development in America. On the contrary, this Court should rightly be concerned that allowing the unbridled use of eminent domain for economic land assembly and re-conveyance will lead to many ill-conceived, special interest projects, and have a chilling effect on the rigorous economic evaluation traditionally carried out by the private sector.

Respectfully submitted,

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(9)

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IN THE

# Supreme Court of the United States

SUSETTE KELO, ET AL.,

*Petitioners,*

v.

CITY OF NEW LONDON, ET AL.,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Connecticut**

## BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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IN THE

# Supreme Court of the United States

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**No. 04-108**

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SUSETTE KELO, ET AL.,

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CITY OF NEW LONDON, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Connecticut**

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## BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Property Rights Foundation of America, Inc. ("PRFA"), is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grassroots organization committed to assisting citizens, policymakers, and those in the media concerned with protecting the rights of property owners against governmental abuse.

PRFA has been recognized for its public events, publications, and outreach programs. PRFA sponsors the Annual New York Conference on Private Property Rights, where

experts from across the country speak on topics of prime importance to property rights advocates and policymakers. In addition, since 1994, PRFA has published *Positions on Property*, which initially cataloged and exposed the multitude of land use regulations and controls in New York State. Finally, PRFA helps other grassroots organizations seeking advice or assistance by connecting them to PRFA's National Advisory Board and other experts.

PRFA has a particular interest in *Kelo* v. *City of New London*, 843 A.2d 500 (Conn. 2004), because this case raises a constitutional question of fundamental importance—namely, what limits does the Constitution impose when government decides to take property from one private party and transfer it to another private party for the stated purpose of stimulating economic development? As the sad facts of this case show, residents of the Fort Trumbull area of the City of New London stand to lose cherished family homes for the sake of projected job creation and tax revenues. PRFA believes that the City's condemnation actions are a misuse of its eminent domain power, particularly since the Fort Trumbull area is in no sense a slum or blighted area.

Unfortunately, and of great concern to PRFA, the affected residents of Fort Trumbull are not alone. Across the Nation, local governments are taking private property to permit its development by private entities as an exercise of the authority to take property for public use. *See, e.g., County of Wayne* v. *Hathcock*, 684 N.W.2d 765, 769-770 (Mich. 2004) (involving Wayne County's plan to condemn 19 parcels of land and transfer them to private parties for the construction of a business and technology park) (overruling *Poletown Neighborhood Council* v. *City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam)). Although just compensation must be paid when property is taken, there is no compensating for "intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Poletown*, 304 N.W.2d at 481 (Ryan, J., dissenting).



This case presents an opportunity for this Court to clarify the limits of government's ability to use the eminent domain power to transfer private property from the hands of one party to the hands of another, and to ensure that, when state and local governments take private property for the purpose of economic development, such a taking is in fact for a valid public use.

PRFA filed a brief *amicus curiae* supporting petitioners at the certiorari stage of this case. The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.[1]

## SUMMARY OF ARGUMENT

I. The transfer by the government of private property from person A to person B for the latter's private benefit is unconstitutional. The taking of property at issue in this case, if it does not directly violate this "no A to B" principle, comes uncomfortably close to doing so. Respondents propose to take property from its current owners—property that no one contends is not being put to traditionally-appropriate or economically-productive use—and give that property to a for-profit private developer. No direct or immediate public benefit would be realized by the proposed transfer from A to B. Instead, respondents contend that the economic benefits of developing the property will trickle down to the public at large.

The asserted power of the government to transfer property between private parties for the purpose of economic development is not supported by the so-called Mill Acts or this Court's decision in *Head* v. *Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885). The earliest Mill Acts permitted the

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Property Rights Foundation of America, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

owners of water-powered mills to flood the property of neighboring landowners to permit the operation of grist mills. Grist mills served an important public purpose in an agrarian society and were required to be open for use by the public. Early Mill Act condemnations of property thus were for public use since grist mills essentially functioned as public utilities. Later on, General Mill Acts authorized the taking of property for the operation of manufacturing mills, which were not open to the public but were operated for the private benefit of their owners.

*Head* involved a General Mill Act. This Court recognized in *Head* that the question whether a General Mill Act takes property for private use is "important and far reaching" but declined to answer the question. Instead, the Court upheld the General Mill Act before it on the ground that the statute was a permissible regulation of riparian owners' common interest in a stream of water adjacent to their lands. Thus, *Head* did not hold that it is permissible to take the private property of A and give it to B for the purpose of private economic activity by B.

II. This Court's precedents do not support the taking of property for generalized economic development. Unlike this case, *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), and *Berman* v. *Parker*, 348 U.S. 26 (1954), involved takings in furtherance of a state's traditional police powers. And neither *Midkiff* nor *Berman* contemplated that the public use doctrine would be extended to allow mere "economic development" as the basis for condemning private property. In contrast to the attenuated and speculative public benefits on which the proposed taking here relies, in both *Midkiff* and *Berman* the public benefit was direct and immediate.

This case is unlike any other in which this Court has upheld the exercise of eminent domain authority by a private corporation as a taking for public use. None of this Court's cases supports the transfer of privately-owned land to a corporate entity for the "public use" of generalized economic development.



## ARGUMENT

### I. THIS COURT'S CASES AND THE HISTORY OF THE PUBLIC USE REQUIREMENT CAST DOUBT UPON GOVERNMENT'S ABILITY TO TRANSFER PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER FOR THE PURPOSE OF ECONOMIC DEVELOPMENT.

History is on petitioners' side in this case, for two reasons. First, for more than two centuries, this Court has made clear that government may not take private property from person A and give it to person B for B's private use. Second, the historical Mill Acts do not support the proposition that property may be transferred from one private party to another for the purpose of economic development.

#### A. Private Property May Not Be Taken From A And Given To B For B's Private Benefit.

This Court's cases, and members of this Court, have always condemned the taking of property from one private party for the benefit of another private party. These cases describe the transfer of private property from A to B for the latter's private benefit as both unjust and unconstitutional.

In *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (C.C.D. Pa. 1795), Justice Paterson declared unconstitutional a Pennsylvania statute that attempted to resolve a dispute over the ownership of land by vesting settlers from Connecticut with title and providing compensation to the competing Pennsylvania claimants. In so doing, Justice Paterson (who had been a member of the constitutional convention) specifically considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." *Id.* at 310.

While acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," Justice Paterson opined that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to author-

ize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." *Id.* at 310-311. *See also id.* at 318 ("When the Legislature * * * attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to give it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation").

Three years after *Vanhorne's Lessee*, Justice Chase wrote in his now-famous opinion in *Calder* v. *Bull*, 3 U.S. 386 (1798), that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes *property* from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. *Id.* at 388 (opinion of Chase, J.) (emphasis in original).

Three decades after Justice's Chase discussion of the "no A to B" principle, Justice Story was able to declare in *Wilkinson* v. *Leland*, 27 U.S. 627 (1829), that

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [*Id.* at 658.[2]]

In *Missouri Pacific Railway Co.* v. *State of Nebraska*, 164 U.S. 403 (1896), this Court held that a state court order requiring a railroad corporation to permit petitioners, an association of farmers, to build a storage elevator upon the railroad's property adjacent to its track "was, in essence and

[2] *See also Citizen's Sav. & Loan Ass'n* v. *Topeka*, 87 U.S. 655, 663 (1874) (no court "would hesitate to declare void a statute * * * which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."); *Wilson* v. *New*, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (calling "the taking of the property of A and giving it to B by legislative fiat" as "that method which has always been deemed to be the plainest illustration of arbitrary action").



effect, a taking of private property of the railroad corporation for the private use of the petitioners." *Id.* at 417. This Court explained that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Id.*

Similarly, a state railway commission order directing a railroad to construct an underground pass so that cattle belonging to the owner of adjacent land could pass under the railroad's tracks was held by this Court to "deprive plaintiff of property for the private use and benefit of defendant." *Chicago, St. P., M. & O. Ry Co.* v. *Holmberg*, 282 U.S. 162, 167 (1930).

Although the principle that government cannot take one person's property and give it away for a private benefit was not always understood to derive from the Fifth Amendment,[3] it is now well established that the public use requirement of the Takings Clause prohibits such private-use takings. *See, e.g., Olcott* v. *The Supervisors*, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking property for a private use."); *Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("[T]his Court has many times warned that one person's private property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."); *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *See also Brown* v. *Legal Found. of Washington*, 538 U.S.

[3] *See, e.g., Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905) ("It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments.").

216, 231-232 (2003) ("[T]he text of the Fifth Amendment imposes two conditions on the exercise of [taking] authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."). In cases involving takings under state law, the Due Process Clause of the Fourteenth Amendment affords a property owner identical protection. *See Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 158 (1896) ("the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use").

If the proposed taking of property at issue in this case does not directly violate the principle that property cannot be transferred from A to B for B's private benefit, it comes uncomfortably close to doing so. Here, the City of New London proposes to take property from its current owners—property that no one contends is not being put to traditionally-appropriate or economically-productive use—and give that property—essentially free of charge—to a for-profit private developer. No direct or immediate public benefit would be realized by the proposed transfer from A to B. Instead, the City contends that the economic benefits of developing the property will trickle down to the public at large. *Cf. County of Wayne* v. *Hathcock*, 684 N.W.2d at 796 (Weaver, J., concurring in part and dissenting in part) (concluding on similar facts that "[t]his case is indeed a very straightforward example of government taking one person's property for the sole benefit of another.").

In the decision below, the Connecticut Supreme Court held that the taking of property for the purpose of economic development is a taking for public use so long as "the development plan primarily was *intended* to benefit the public interest, rather than private entities." *Kelo*, 843 A.2d at 543 (emphasis added). The court also indicated that the trial court had properly "[a]ssum[ed] * * * to be correct" the City's economic development projections. *Id.* at 542. Under the approach taken by the court below, any economic development taking would seem to pass the public use test. If the government's *intent* to benefit the public through economic development is enough to support a taking, and if a reviewing court should *assume* that the benefits of development projected by the public will, in fact, come to pass, it is hard to see what remains of the public use requirement in the context of takings for the purpose of economic development.



### B. The Mill Acts Do Not Support A Governmental Power To Transfer Private Property From A To B For The Purpose Of Economic Development.

It will no doubt be argued in this case that the asserted governmental power to transfer property between private parties for the purpose of economic development is supported by the so-called Mill Acts and this Court's decision in *Head* v. *Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885). Indeed, in the proceedings below, the trial court and the Connecticut Supreme Court relied heavily upon *Olmstead* v. *Camp*, 33 Conn. 532 (1866), a case involving a Mill Act. *See Kelo*, 843 A.2d at 520, 522-523, 535; *see also id.* at 593-594 (Zarella, J., concurring in part and dissenting in part) ("The court in *Olmstead* also advocated an interpretation of public use that could include private economic development").

The Mill Acts were statutes enacted by a number of American colonies and states beginning in 1667 and into the late 1800's. Although different Mill Acts varied in their particulars, in general these laws permitted riparian landowners to appropriate or make use of adjacent private land, for the purpose of operating water-powered mills. Thus, a miller who needed to dam a river in order to power his mill could flood his neighbor's land, so long as the miller paid compensation to the affected property owner. Under some Mill Acts, actual eminent domain authority was delegated to the mill owner; ownership of the flooded land would be transferred to the miller. Under other Mill Acts, the miller would pay damages to the owner of the flooded property but would not take title to the land.[4]

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[4] *See* Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. Chi. L. Rev. 248, 270-278 (1973); Lawrence Berger, *The Public Use Requirement in*

In *Head*, this Court observed that

> General mill acts exist in a great majority of the States of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware, and North Carolina, as well as in Massachusetts, New Hampshire, and Rhode Island, before the Declaration of Independence. [113 U.S. at 16.]

*See also id.* at 17 n.2 (listing Mill Acts enacted by 29 states through 1884).

At first glance, the Mill Acts seemed to permit the transfer of property from one person to another for the purpose of private economic development—in violation of the "no A to B" principle. Closer inspection, however, reveals that such a view of the Mill Acts is misguided.

In analyzing the Mill Acts, it is important to recognize that there were two types of Mill Acts. The earliest Mill Acts were enacted with an eye toward the operation of grist mills, which were regulated in terms of public access and price. *See Head*, 113 U.S. at 18 ("The principle objects, no doubt, of the earlier acts were grist-mills"); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 172 (1985) (grist mill "proprietors were required to process the grain of all comers on a nondiscriminatory basis"); Berger, *supra* note 4, at 206 ("In the earliest days the mills

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*Eminent Domain*, 57 Or. L. Rev. 203, 206-207 (1978); Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L.J. 339, 369-371 (1999). For discussion of certain specific state Mill Acts, see John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 Am. J. Legal Hist. 1 (1995); John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. Legal Stud. 455 (1998); Erik C. Martini, *Wisconsin's Milldam Act: Drawing New Lessons From an Old Law*, 1998 Wis. L. Rev. 1305.



were grist mills generally required to be open to the public for the grinding of corn.").[5]

The takings of property authorized by early Mill Acts to permit the operation of publicly-accessible and state-regulated grist mills—mills that essentially functioned as public utilities—clearly were for public use. *See Head*, 113 U.S. at 18-19 ("[I]t has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist-mill which grinds for all comers, at tolls fixed by law, is for a public use."); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 273 (1932) ("It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control").[6]

The second kind of Mill Act—the General Mill Act—authorized the taking of property for the operation of, not grist mills, but mills used in manufacturing. *See Head*, 113 U.S. at 19 ("In Massachusetts, * * * the mill acts have been extended to mills for any manufacturing purpose."); *Midkiff* v. *Tom*, 702 F.2d 788, 794 (9th Cir. 1983) ("General mill acts allow any owner of land upon a nonnavigable stream to build and maintain mills for manufacturing."), *rev'd*, 467 U.S. 229 (1984). Unlike grist mills, manufacturing mills were not required to be open to the public but were operated for the private benefit of their owners. *See* Berger, *supra* note 4, at

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[5] For example, the owners of "Public Mills" in North Carolina were required to "grind Wheat and Indian Corn for all such Persons as shall require the same." N.C. Mill Act art. V, *reprinted in* 1 The Earliest Printed Laws of North Carolina, 1669-1751, at 18-19 (John D. Cushing ed., 1977). North Carolina also imposed maximum rates that could be charged for milling services. *See id.* at 19. Other states had similar provisions. *See Sales*, *supra* note 4, at 373 & nn.164-166.

[6] In the 18th and early 19th centuries, the flow of water was the primary source of mechanical power in America—not overtaken until the 1860's by the steam engine—and thus was indispensable to the milling of grain in a predominantly agrarian society. The early Mill Acts therefore served a necessary public purpose—the harnessing of a very limited source of power to process food.

206 ("[I]n the nineteenth century, the dams were used to supply power for saw, paper, and cotton mills as well as other manufacturing enterprises. In these latter cases, the mills were often for the sole use and benefit of their owners."); Horwitz, *supra* note 4, at 276.

Accordingly, a number of state cases considering the public use question turned on whether the particular mill at issue was a public mill. In *Tyler* v. *Beacher*, 44 Vt. 648, 1871 WL 5994 (1871), the Vermont Supreme Court held that a proposed taking by the owner of a grist mill "would not be for public use," explaining that "there is no law to compel him or his heirs or assigns to grind for the public, or any part of the public, for any fixed toll or compensation, nor for any compensation unless they choose to do it." *Id.* The *Tyler* court added that

> Decisions from Virginia, North Carolina, Kentucky, Tennessee, and Georgia, are sometimes cited in support of the right to take property in this manner for mills. But in all these States the mills were made public mills, by being required by law to grind for all in due turn for regulated tolls, and in some of them the mills were made public by more explicit provisions. [*Id.*]

In *Harding* v. *Goodlett*, 11 Tenn. 41, 1832 WL 1095 (Tenn. Err. & App. 1832), the property at issue was to be taken to permit the building of a grist mill, a saw mill, and a paper mill. The court concluded that when "land is condemned for the purpose of building a grist mill" it "is emphatically a public use for which it is required, and to which it is appropriated." 1832 WL 1095, at *7. The court explained that "[t]he grist-mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of those duties; * * *." *Id.* But the saw mill and paper mill were another matter. As to them, the *Harding* court concluded that "[t]he saw-mill and paper-mill have no public character; the erection of these



mills would be wholly for the private use of these petitioners." *Id.*[7]

General Mill Acts are more problematic from a public use perspective than those early statutes involving grist mills because manufacturing mills were not open to the public and were operated principally for private benefit. This Court addressed a challenge to a General Mill Act in *Head*.[8]

*Head* involved New Hampshire's General Mill Act. Head argued that the statute was unconstitutional because it "contemplated the taking of his property for private use, in violation of the Fourteenth Amendment to the Constitution of the United States." 113 U.S. at 12. Although this Court upheld New Hampshire's law, the Court did so without answering the question whether the statute took property for private use. The Court stated that

> The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, *is so important and far reaching, that it does not become this court to express an opinion upon it*, when not required for the determination of the rights of the parties before it. [*Id.* at 20-21 (emphasis added).]

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[7] *See also Ryerson* v. *Brown*, 35 Mich. 333, 1877 WL 7142, at *3 (1877) (Cooley, C.J.) ("There is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it on for the benefit of the locality or the state at large.").

[8] It should be noted that General Mill Acts shed little light on the meaning of the public use language in the Takings Clause. Unlike the early Mill Acts, General Mill Acts were not in existence when the Fifth Amendment was ratified. *See* Sales, *supra* note 4, at 375 ("[N]ineteenth-century mills, of course, are of little value in explaining the founding generation's views.").

Instead of answering this "important and far reaching" question, the *Head* Court concluded that New Hampshire's General Mill Act was a permissible regulation of the common interest shared by riparian owners in the stream adjacent to their lands. As the Court stated:

> We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good is within the constitutional power of the legislature. When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified. [*Id.* at 21.]

Thus, the Court in *Head* did not hold that it is constitutionally permissible to take the private property of A and give it to B for the purpose of operating a private-benefit mill. *See* Steven M. Crafton, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 Emory L.J. 857, 875 (1983) (under *Head*, "the Mill Acts did not take private property from A and directly transfer it to B, but only reallocated existing public rights and awarded damages to those owners detrimentally affected by such reallocation.") (internal quotation marks omitted). Because the case at bar does not involve regulation of "the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed," *Head*, 113 U.S. at 21, *Head* is of no help to respondents. *See* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 Vand. L. Rev. 1447, 1494 (1997) ("The *Head* Court viewed such [general] mill acts not as a tool by which private property was confiscated for use by



other private actors, but rather as a means for regulating the rights of riparian owners").

## II. THIS COURT'S PRECEDENTS DO NOT SUPPORT THE APPLICATION OF THE PUBLIC USE DOCTRINE TO A TAKING FOR GENERALIZED ECONOMIC DEVELOPMENT.

The court below expressly relied on this Court's decisions in *Hawaii Housing Authority* v. *Midkiff*, *supra*, and *Berman* v. *Parker*, 348 U.S. 26 (1954), in support of its conclusion that "economic development projects * * * that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions." *Kelo*, 843 A.2d at 520. But neither *Midkiff* nor *Berman* contemplated that the public use doctrine would be extended to allow mere "economic development" as the basis for condemning private property. And, in contrast to the attenuated and speculative public benefits on which the proposed taking here relies, in both *Midkiff* and *Berman* the public benefit was direct and immediate.

Both *Midkiff* and *Berman* involved takings based on classic exertions of the state's police power. In *Midkiff*, the Hawaii legislature enacted land reforms to address an oligopoly of landownership under which 72 private landowners controlled nearly all of the privately-owned land on the islands. *See Midkiff*, 467 U.S. at 232 (noting legislative finding that the state and federal governments owned almost 49% of the state's land and that "another 47% was in the hands of only 72 private landowners"). The oligopoly had evolved from a feudal land tenure system in which one chief controlled all of the land and had been the subject of "largely unsuccessful" reform attempts since the early 1800's. *Id.* Based on these conditions, the Hawaii legislature "concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* In order to address the problems created by the oligopoly, the Hawaii

legislature enacted the Land Reform Act of 1967. *See id.* at 233.

Under the Act, tenants leasing single-family residential lots within developmental tracts of at least five acres could request that the Hawaii Housing Authority ("HHA") condemn the property on which they lived. *See id.* Once a statutorily-set number of tenants on a particular tract sought condemnation, the HHA held public hearings to determine whether condemnation would "effectuate the public purposes of the Act." *Id.* (quoting Haw. Rev. Stat. § 516-22). If so, the HHA would acquire the land, and then sell it to the former lessees. *See id.* at 234. Although HHA was statutorily authorized to lend the lessees up to 90% of the purchase price, in practice "funds to satisfy the condemnation awards [were] supplied entirely by lessees." *Id.*

This Court upheld Hawaii's Land Reform Act. The Court explained, first, that the public use requirement is "coterminous with the scope of a sovereign's police powers." *Id.* at 240. The Court then went on to explain that Hawaii had done no more than exercise those powers "to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." *Id.* at 241-242. This Court stated:

> The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. *Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.* We cannot disapprove of Hawaii's exercise of this power. [*Id.* at 242 (citations omitted) (emphasis added).[9]]

[9] The *Midkiff* Court also said that it would not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Midkiff*, 467 U.S. at 241 (quoting *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)). But the Court in *Gettysburg* also indicated that when the takings power is "delegated to a private corporation," "the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself." 160 U.S. at 680. *See also Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923) ("The nature of a use, whether public or private, is ultimately a judicial question."); *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930) ("[T]he [public versus private use] question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.").



*Berman* similarly involved a condemnation in furtherance of the state's traditional police powers. There, Congress had enacted the District of Columbia Redevelopment Act of 1945 to create a "comprehensive and coordinated planning" scheme to address urban blight conditions in Washington, D.C. *Berman*, 348 U.S. at 29 (quoting § 2 of the Act). The National Capital Planning Commission created by the Act conducted surveys showing that in "Project Area B" in southwest Washington, D.C., "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating." *Id.* at 30. The Planning Commission accordingly sought to condemn Area B and to develop housing, of which at least one-third would be low-rent housing. *See id.* at 30-31.

This Court upheld the taking on the ground that the taking involved "what traditionally has been known as the police power." *Id.* at 32. The Court explained that "[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Id.* Under these circumstances, the condemnation was for a permissible public use because it was "merely the means to the end" of addressing the social problems that were within the scope of the state's police powers to address. *Id.* at 33.

Unlike the takings in *Midkiff* and *Berman*, the condemnation here does not involve a classic exercise of the state's police power. *See Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals"). To be sure, states routinely enact legislation designed to improve economic conditions, and their general authority to do so cannot be doubted. But the question here is whether the proposed taking of petitioners' property would be a taking for "public use."

The City of New London proposes to foster economic development by ensuring that a private developer, Corcoran Jennison, is able to acquire land in order to build facilities to be used by a private corporation, Pfizer, Inc. Like any building project, the project here would create construction jobs, but surely that alone cannot be a sufficient basis for a public use; if it were, *any* condemnation could be justified so long as it contemplated new construction. Likewise, new jobs and increased tax revenues, such as those expected to result here, follow *any* corporate relocation to a new area. This Court has never held that the mere promise of a business relocation alone justifies a taking.[10]

Even if economic development alone could, under some circumstances, be sufficient to achieve the requisite public benefit that must flow from a public use, it does not do so here. Indeed, there is no guarantee that any public benefit will materialize here at all, because it ultimately is dependent upon the efforts of a private party, not the government. If either the developer or Pfizer do not succeed in their ventures, no public benefit will be realized. Moreover, the public benefits, if any, will necessarily be indirect; the hoped-for public benefit depends on a "trickle down" of jobs and tax revenues. *Cf. County of Wayne* v. *Hathcock*, 684

[10] The promise of increased jobs and tax revenues alone cannot be enough to justify a condemnation. If that were so, then any business would be subject to the constant threat of condemnation that could result if a competitor promised even a slight increase in jobs and tax revenues.



N.W.2d at 784 ("The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy.").

The public benefits at issue here—which are not only speculative but are also attenuated in time from the taking of property—are in stark contrast to the public benefits resulting from the takings in *Midkiff* and *Berman*. In *Midkiff*, the dissolution of the land oligopoly was accomplished by the act of transferring the property, regardless of its proposed future use. Likewise, in *Berman*, the removal of blight was accomplished when the government transferred possession of the blighted area. In this case, the public benefit—assuming any is ultimately achieved—will not be realized until *after* the land is transferred to the developer and construction begins. The primary beneficiary of the taking would thus appear to be the developer, not the public. *Cf. Daniels* v. *Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002).[11]

This case is unlike any other in which this Court has upheld the exercise of eminent domain authority by a private corporation as a taking for public use. This is not a case in which a corporation is taking property: "to construct bridges for the accommodation of interstate commerce by land," *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 530 (1894); for an aerial bucket line "dedicated to carrying for whatever portion

[11] In *Daniels*, the Area Plan Commission of Allen County, Indiana, sought to facilitate commercial development within a residential subdivision by vacating a restrictive covenant (a constitutionally-protected property interest) that limited the subdivision to residential use and then rezoning certain lots to allow such development. The Seventh Circuit held that the required public purpose was lacking. The court stated that "it is apparent that the public benefit of the vacation and rezoning action will not materialize absent any promised commercial development of the Lots" and thus the developer is "the primary beneficiary of the vacation of the restrictive covenant, and not Allen County." 306 F.3d at 462.

of the public may desire to use it," *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527, 532 (1906); to extend a railroad spur to be "operated under the obligations of public service," *Union Lime Co.* v. *Chicago & N.W. Ry. Co.*, 233 U.S. 211, 221 (1914); "to manufacture, supply, and sell to the public, power produced by water," *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916); "to build and operate a street and interurban railway," *Hendersonville Light & Power Co.* v. *Blue Ridge Interurban Ry. Co.*, 243 U.S. 563, 569 (1917); or to extend a railroad side track "at the service of all who have occasion to use it," *Chicago & N.W. Ry. Co.* v. *Ochs*, 249 U.S. 416, 419 (1919).[12] No case of this Court supports the transfer of privately-owned land to a corporate entity for the "public use" of generalized economic development.

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[12] *Cf. also National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (ICC order requiring conveyance of railroad track to Amtrak did not violate the Fifth Amendment's public use requirement because "the condemnation will serve a public purpose by facilitating Amtrak's rail service"—which is open to the public); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (state law requiring a landlord to permit a cable television company to install cable facilities upon the landlord's property effected a taking for which just compensation was required; this Court had "no reason to question" the lower court's determination that the law served the "legitimate public purpose" of rapid and widespread deployment of a means of public communication and community education).



## CONCLUSION

For the foregoing reasons, and those in petitioners' brief, the judgment of the Supreme Court of Connecticut should be reversed.

Respectfully submitted,

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No. 04-108

IN THE

# Supreme Court of the United States

SUSETTE KELO, ET AL.,

*Petitioners*,

v.

CITY OF NEW LONDON, ET AL.,

*Respondents*.

**On Writ Of Certiorari**
**To The Supreme Court Of Connecticut**

## BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Is the seizure of non-blighted private property a "public use" permitted under the Fifth Amendment's Takings Clause where the government intends to transfer the land to private businesses in the hope that building private homes and offices will stimulate the local economy?

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## BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Reason Foundation, as *amicus curiae*, respectfully submits that the judgment below should be reversed.[1]

### INTEREST OF *AMICUS CURIAE*

The question presented in this case is whether it is a "public use" under the Takings Clause for a city to authorize the condemnation of non-blighted private property to be handed over to private developers to build private residential and office space on the theory that such development may increase tax revenues and improve the local economy. As a national research and educational organization dedicated to advancing individual liberties, including private property rights, *amicus* Reason Foundation has an interest in the outcome of this case. Reason Foundation promotes voluntarism and individual responsibility in social and economic interactions, the rule of law, private property, limited government; and the seeking of truth via rational discourse, free inquiry, and the scientific method. The world leader in privatization, Reason Foundation is known for practical and innovative public policy ideas that emphasize competition, transparency, and accountability for results. Reason Foundation publishes *Reason*, the magazine of free minds and free markets. Reason Foundation has participated as *amicus curiae* in significant cases involving individual rights and the rule of law, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Ashcroft v. Raich*, No. 03-1454 (U.S. 2004).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

## STATEMENT

Petitioner Wilhelmina Dery lives in a house in the Fort Trumbull neighborhood of New London, Connecticut. Pet. 1-2. She was born in the house in 1918 and has lived there her entire life. *Ibid.* She is now threatened with the loss of her home, as are her neighbors—the other petitioners in this case.

On January 18, 2000, respondent City of New London adopted the Fort Trumbull Municipal Development Plan, which was prepared by respondent New London Development Corporation ("NLDC"), a private corporation. Pet. App. 8. The development plan covers approximately ninety acres of land in the Fort Trumbull neighborhood, including fifteen properties owned by petitioners. *Id.* at 4-6. The development plan contemplates that the NLDC will own this land and lease it to private developers for the construction of residences, offices and related projects. *Id.* at 5-6.

When it adopted the development plan, the City purported to delegate to the NLDC the power of eminent domain to acquire properties within the Fort Trumbull development area. Pet. App. 8. The NLDC has sought to wield this purported authority to acquire properties in the Fort Trumbull area from owners who would not sell voluntarily, including homes owned by petitioners. *Ibid.*

To save their homes from seizure or forced sale, petitioners sued the City and the NLDC. Pet. App. 8. They alleged, among other things, that the NLDC's attempt to exercise the power of eminent domain in these circumstances violated the Takings Clause of the federal Constitution because the NLDC sought to acquire the properties for a *private*, not public, use. *Id.* at 191-92. The trial court sustained petitioners' constitutional claims as to certain properties, but denied the claims as to others. *Id.* at 9, 424. The state supreme court, by divided vote, rejected petitioners' constitutional claims with regard to *all* properties. *Id.* at 3, 28, 39, 42.



## SUMMARY OF ARGUMENT

The City of New London, Connecticut has purported to authorize the NLDC, a private development corporation, to condemn property in the Fort Trumbull neighborhood, including petitioners' homes. The purpose of the proposed condemnation is to allow private developers to construct private residences, office space and other projects. Respondents contend that the NLDC's attempt to wield the eminent domain power in this fashion is for a public use because the construction of expensive condominiums and offices will supposedly help develop the local economy by generating increased tax revenues and more jobs. This "economic development" rationale, by itself, has never been recognized by this Court as a valid public use justifying the seizure of private property. Moreover, the practice of taking non-blighted property and transferring it to private parties for their own private use cannot be squared with the Court's takings jurisprudence.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. AMEND. V. This Court has consistently enforced the "public use" limitation on the eminent domain power by holding that takings of private property for *private* use are forbidden. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 605-06 (1908); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

Although this Court has never defined explicitly what constitutes a "public" use within the meaning of the Fifth Amendment, its decisions have established five categories of public uses that may justify a taking: (1) direct government use of property; (2) highways, roads and other public facilities to which the citizens have a right of access; (3) railroads,

utility lines and other facilities operated by common carriers or those acting in the manner of common carriers; (4) urban renewal plans to remedy the public nuisance created by blighted neighborhoods; and (5) Hawaiian land reform. A survey of these categories and the policies underlying them highlights the purely private character of respondents' proposed seizure of petitioners' properties.

## ARGUMENT

The public use requirement of the Takings Clause is a substantive limitation on the exercise of the eminent domain power. This Court has enforced this limitation by prohibiting governments from engaging in actions that merely transfer property from one private owner to another. In *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896), for example, a group of farmers obtained an order from the Nebraska State Board of Transportation directing a railway company to permit the farmers to build a grain elevator at one of the railway stations. This Court held that the order amounted to an unconstitutional taking of private property for private use: "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another" is unconstitutional. *Id.* at 417.

The Court has declared on many other occasions that takings of private property for private use are prohibited. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid"); *Hairston*, 208 U.S. at 605-06 (condemnations for private use are forbidden (collecting cases)). *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("a law that takes property from A. and gives it to B. . . . is against all reason and justice").



Recognizing that the concept is highly fact-dependent and contextual, this Court has not previously attempted a complete definition of "public use." *See Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896) ("what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned"). In its most recent pronouncement on the public use requirement, the Court construed the term "public use" to mean a use that is "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241; *cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) ("An attempt to define [the police power's] outer limits is fruitless, for each case must turn on its own facts."). But to find, as did the Connecticut Supreme Court, that the private development of property for typical private use actually qualifies as a *public* use effectively would delete the "public use" language from the Takings Clause.

An examination of the types of public uses previously approved by the Court will help illuminate the proper distinction between public and private uses under the Takings Clause, and establish that the proposed seizures in this case fall on the unconstitutional side of this line.

1. *Property Used By The Government.* It is well-settled that the government may take private property for its own use in carrying out its governmental functions. After the Civil War, the Court upheld the federal government's condemnation of portions of the Gettysburg battlefield for placement of publicly owned monuments and tablets. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681-82 (1896). The Court declared that the taking of property by the government for its own activities was presumptively for public use:

> Where the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation pro-

> poses to take the land is public, is not so strong as where the government intends to use the land itself.

*Id.* at 680. Similarly, in *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), the Court upheld the federal government's condemnation of land for its own use. The government had leased the land during World War I and erected buildings on it for military purposes. After the war, the government tried to buy the land, but its offer was refused, leading the government to exercise its eminent domain power. The Court observed that this was a taking for public use, because the government was going to use the land to carry out its own functions – specifically, its military functions. "[T]he military purposes . . . clearly were for a public use." *Id.* at 66.

The public character of governmental use of property is manifest: the government owns the property and occupies it to perform governmental functions. Even if the facility is partially or completely closed to the public (as in the case of military bases and prisons, for example), the condemnation still fulfills a public use, because the government's own activities are presumptively undertaken for the benefit of the general public.

Obviously, the NLDC's condemnation does not fit into this category, as the condemned property will neither be owned by the government nor used for a government function.

2. *Property Used By The Public.* The government may take property to build highways, roads, public parks, and other public facilities to which the general public has a right of access. Indeed, this was the original conception of the term "public use" – that the general public was entitled to use, in a physical sense, the property in question. *See* P. Nichols, EMINENT DOMAIN § 7.02[2], at 7-26 (3d ed. 2003); Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166 (1985) (discussing



characteristics of public goods, such as city streets and parks, that are often more efficiently provided by government).

This Court has upheld many takings of this kind. In *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923), for example, the Court upheld the taking of land on a private ranch that was needed to construct a public road. The Court explained that "a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use." *Id.* at 706. That is because "[t]hese roads will . . . be open to the general public to such extent as it can and may use them." *Id.*; *see also United States ex rel. TVA v. Welch*, 327 U.S. 546, 551-52 (1946) (condemnation of private property for transfer to the National Park Service as part of the Great Smoky Mountains National Park was a public use).

The NLDC's proposed condemnation does not fit into this category, as the property taken will not be open to the public, but will be under the complete and exclusive control of private parties.

3. *Property Used By Common Carriers.* The government may take private property for common carriers to lay railroads, deploy power or cable TV lines, or provide other services to the public. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (taking of railroad track for use by Amtrak was public use); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (taking of land and water rights by Alabama Interstate Power Company was public use).

In some instances, railroad and utility companies may themselves be authorized to condemn property necessary to supply rail or utility services to the public. However, these companies must operate under the legal obligations of common carriers – that is, they must provide service to all members of the general public on equal and reasonable terms. Black's Law Dictionary defines "common carrier" as a carrier that is "generally required by law to transport . . . passengers or freight, without refusal, if the approved fare or

charge is paid." BLACK'S LAW DICTIONARY 226 (8th ed. 2004). This Court has upheld several condemnations by those acting as common carriers. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424-25 (1982) (cable TV company with exclusive franchise to provide service to all comers at a reasonable price in a nondiscriminatory manner was properly authorized to install its cables in private apartment buildings); *National R.R. Passenger Corp.*, 503 U.S. at 422 (Amtrak is a common carrier); *Mt. Vernon-Woodberry*, 240 U.S. at 32 (Alabama Interstate Power Company operated as a common carrier).

In the nineteenth century, the mill statutes of many states authorized grist mills to operate in a manner that would flood upstream lands of other property owners. The Court observed that these statutes satisfied the "public use" requirement because members of the local community were entitled to use the mills – *i.e.*, the mills operated as common carriers. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885) ("a grist mill which grinds for all comers, at tolls fixed by law, is for a public use").

Part of the concern underlying common carrier condemnations is the desire to avoid the bilateral monopoly problem that might prevent common carriers from providing public services. *See* Richard Posner, ECONOMIC ANALYSIS OF LAW 36-39 (5th ed. 1998). The problem arises, for example, when a railroad needs to acquire a series of connected land parcels in order to lay its rails. Because the railroad needs to obtain every parcel in the chain in order to build the line, each of the landowners who own the needed property has the ability to hold out for an exceedingly high price or even block the project altogether. The eminent domain power helps alleviate the otherwise intractable problems that common carrier railroads might otherwise face in building their rail systems.

Neither the NLDC nor the private parties who may eventually own the residences and offices in the Fort Trumbull neighborhood are common carriers. They will not be legally bound to serve the general public as would a common carrier.



The prospective new owners of the condemned property will be no different than any private residential or business owners. Consequently, the NLDC's condemnation does not fall into this category of public use.

4. *Property Used To Combat Blight.* The need to clear blighted buildings or slums that create public health and safety hazards may justify the use of the eminent domain power. In *Berman v. Parker*, 348 U.S. 26, 32 (1954), the Court upheld the federal government's attempt to acquire and redevelop a blighted area in the District of Columbia, reasoning that the removal of blight was a "public use" because blighted property endangered the public welfare. Some state supreme courts have similarly likened blighted areas to a public nuisance. *See Randolph v. Wilmington Housing Auth.*, 139 A.2d 476, 482 (Del. 1958) (the "elimination of slums" is "the abatement of a public nuisance" and therefore a public use); *Allydonn Realty Corp. v. Holyoke Housing Auth.*, 23 N.E.2d 665, 668 (Mass. 1939) ("The analogy between a slum and a public nuisance cannot be overlooked.").

Although the *Berman* Court permitted a non-blighted department store to be taken as part of the project, the Court emphasized that this was essential to achieving the public purpose of "eliminat[ing] the conditions that cause slums." 348 U.S. at 34. The case thus offers no basis for taking non-blighted property outside the context of "slum clearance and prevention." *Id.* at 31.

Here, of course, there is no suggestion that the Fort Trumbull neighborhood was blighted. The neighborhood did not possess any of the characteristics of the properties at issue in *Berman*: there was no "overcrowding of dwellings," "lack of parks," "lack of adequate streets and alleys," "absence of recreational areas," "lack of light and air," or "presence of outmoded street patterns." 348 U.S. at 34. Indeed, the NLDC did not bring its condemnation actions under Connecticut's urban renewal law (Conn. Gen. Stat. Chapter 130, §§ 8-124, *et seq.*), which permits the use of eminent domain to clear slums or blighted areas, but rather under

Conn. Gen. Stat. Chapter 132, §§ 8-186, *et seq.*, which governs Municipal Development Projects. The condemnation was not aimed at removing blight, but at transferring desirable land in a prime location to a private developer for its own private use.

5. *Property Used For Land Reform.* This Court recognized a very unusual type of "public use" in the case of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). As the Court explained, the early Polynesian immigrants who settled the Hawaiian Islands had established a feudal system which divided the islands into large estates held by a small group of nobles. The concentration of land ownership survived Hawaiian statehood and led to a situation in which a small group of landholders held the vast majority of the state's non-governmental land. The Hawaii legislature found that the land oligopoly distorted the market for residential property, caused a shortage of fee simple residential lots, and inflated residential land prices. It enacted the Hawaii Land Reform Act of 1967 to transfer residential lots from landowners to their lessees, and this Court found that the Act served a valid public purpose: "The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." *Id.* at 241-42 (footnote omitted).

The land reform at issue in *Midkiff* does not delineate a broad category of public use, but rather a one-time solution to a unique problem arising from the peculiarities of Hawaiian history. Were governments to redistribute land every time they perceived an inequity in distribution, the consequence would be substantial instability in real estate markets. *See* Nick Dancaescu, *Land Reform in Zimbabwe*, 15 Fla. J. Int'l L. 615, 633 (2003) (discussing how land redistribution in Zimbabwe has created great insecurity in land rights, severely damaging agricultural productivity).

The NLDC's condemnation in this case is nothing like the one in *Midkiff*. The NLDC's development plan was not



designed to remedy excessive land concentration left over from an earlier politico-economic system. Instead, the plan merely transfers the Fort Trumbull property from one set of private owners to another, without any justification beyond the desire to generate more tax revenues and jobs.

* * *

The Fifth Amendment demands a more rigorous judicial inquiry than simply asking whether the government has declared a particular exaction to be a "public use." This Court's takings jurisprudence provides a useful guide as to what constitutes a legitimate public use, and as shown above, the proposed condemnation in this case cannot be upheld by reference to any of this Court's prior rulings.

The Takings Clause safeguards the rights of citizens in their own property by limiting the government's right to take that property to those circumstances in which the government puts the property to "public use" (and pays just compensation). That respondents may view the proposed development in this case as beneficial – in the form of increased tax revenue and a strengthened local economy – cannot alter the private nature of the use. This is simply an attempted transfer of property from one set of private owners to another. Declaring this use to be public would deprive the "public use" language in the Takings Clause of any constraining force.

## CONCLUSION

The judgment of the Connecticut Supreme Court should be reversed.

Respectfully submitted.

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In The
# Supreme Court of the United States

SUSETTE KELO, et al.,

*Petitioners,*

vs.

CITY OF NEW LONDON, et al.,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Connecticut**

## BRIEF AMICI CURIAE OF ROBERT NIGEL RICHARDS, CHARLES WILLIAM COUPE, JOAN ELIZABETH COUPE, AND JOAN COUPE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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## INTEREST OF AMICI CURIAE

Amici curiae Robert Nigel Richards, Charles William Coupe, Joan Elizabeth Coupe, and Joan Coupe (Richards Family) respectfully submit this brief in accordance with Supreme Court Rule 37.[1] The Richards Family is the owner of private real property situated on the western slope of Hualalai, an active 8,200 foot volcano on the island of Hawaii. Their property is not blighted. Like Petitioners, the Richards Family's property, which has been in their family for generations, has been threatened with the exercise of eminent domain to benefit private developers. In *County of Hawaii v. Robert Nigel Richards, et al.*, Civ. No. 00-1-0181K (Haw. 3d Cir. filed Oct. 9, 2000), the County of Hawaii at the sole discretion of a private developer, is attempting to condemn portions of the Richards Family's property to site a road without which a neighboring Pebble Beach-style project could not be developed. In order to obtain its land use approvals, the developer must construct an access highway from the main road to its project site. The developer chose a route though the Richards Family's property that cleaves their parcel in two.

The County has relinquished to the developer the responsibility of selecting and acquiring the Richards Family's property for its highway.[2] The developer and the

---

[1] The parties consented to the filing of amici curiae briefs, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amici curiae and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The developer is not an agency of government or a public utility authorized by law to exercise the power of eminent domain. *See* Haw.

(Continued on following page)

County entered into a development agreement under which, at the demand and sole discretion of the developer, the County must exercise its power of eminent domain to take the Richard Family's property for the developer's highway. The developer, not the County, is required to pay the costs and expenses associated with the condemnation of the property. The Richards Family was not a party to the development agreement, and did not receive personal notice or an opportunity to provide input or comment prior to its execution. The court is currently considering the Richards Family's objections to the taking of their property, including challenges under the public use clauses of the Fifth Amendment and the Hawaii Constitution.

Hawaii property owners understand the impact of harsh application of eminent domain, having lived for more than thirty-five years under the Land Reform Act at issue in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).[3] The Richards Family has borne entirely the cost of preparing this brief, as they believe the issue before the Court is of vital importance to their family and other private property owners nationwide who find themselves on the business end of eminent domain abuse, threatened with having their property taken away for the benefit of another private party who has promised the government that they will make "better" use of it.

Rev. Stat. § 101-4 (2003) (authorizing certain utility companies to condemn private property).

[3] Perhaps sensing that The Land Reform Act's oligopoly-busting public use rationale is no longer applicable and that some exercises of eminent domain have gone "too far," Honolulu has given preliminary approval to repeal its version of the Act. Honolulu Revised Ordinances chapter 38 permits condominium lessees to petition the city to seize their leases from the lessors and turn them over to the lessees upon payment of just compensation. The city council has voted 7-2 to repeal and final approval is pending. *See* Gordon Y.K. Pang, *Council Favor End to Condo Law*, The Honolulu Advertiser (Aug. 12, 2004).



## SUMMARY OF ARGUMENT

In undertaking the review of public use issues reserved to the judiciary in *Midkiff*, 467 U.S. at 240, this Court should adopt the same heightened scrutiny for exercises of the eminent domain power justified by promises of a better economy as it has established for suspect regulatory takings: a taking justified only by economic development is invalid if it fails to substantially advance a legitimate state interest. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (regulation is an illegal taking if it "fails to substantially advance a legitimate state interest").

Under the Fifth Amendment's Takings Clause, the affirmative exercise of eminent domain to take private property is valid only if it is for "public use" and just compensation is provided. U.S. Const. amend. V. In regulatory takings jurisprudence, a regulation has the same effect as an exercise of eminent domain when it either fails to substantially advance a legitimate state interest, or deprives an owner of beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). A regulation substantially advances a legitimate state interest when there is a nexus between the regulation and a legitimate aim of government, and the regulation is tailored to achieve its end. *Nollan v. California Coastal Comm'n*, 482 U.S. 825, 834 (1987) (nexus required); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("rough proportionality" between goal and means used to achieve it).

Amici suggest this takings standard is applicable in this case. The "substantially advance" test is a restatement of the public use requirement and should govern affirmative takings as well as regulatory takings. There is no principled distinction between eminent domain and regulatory takings, and this case presents the Court with an opportunity to clarify the public use requirement and hold that unless the government shows that taking the property will substantially further the goal of an improved economy or increased tax revenue, it is invalid under the Public Use Clause.

## ARGUMENT

### I. UNSHACKLED FROM MEANINGFUL JUDICIAL REVIEW OF PUBLIC USE, TAKINGS JUSTIFIED ONLY BY PROMISES OF "MORE" OR "BETTER" ARE BECOMING MORE COMMONPLACE

Next to the power to prosecute criminals, eminent domain – government's power to confiscate private property against the will of the owner – is perhaps the most formidable power wielded by government against individuals. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (use of eminent domain to take property from one private owner and vest it in another is "despotic"). With eminent domain, completely innocent families can be forced from their homes and established businesses shut down against their will, and the property owners are nearly powerless to prevent it.

Because eminent domain is too easily subject to abuse, the Fifth Amendment and the constitutions of all fifty states permit the government to take private property



only if the owner is justly compensated and only if the property is taken for "public use." *See, e.g.*, U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); Haw. Const. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation.").

The government has wide latitude in defining the public objectives of exercises of eminent domain, but use of the power solely to confiscate one owner's property and turn it over to another is barred. *See Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310 (legislature has "no authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation."); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("law that takes property from A and gives it to B" is "against all reason and justice.").

This Court has upheld the exercise of eminent domain to remedy what amounted to public nuisances by taking severely blighted property and turning it over to a redeveloper. *Berman v. Parker*, 348 U.S. 26 (1954). Other courts, however, stretched that rationale to take non-blighted property, allowing government to use eminent domain to condemn perfectly good property and vest it in others who promised to make "better" use of it. These takings could not be justified by urban renewal, only a "better" economy. For more than twenty years until recently overruled, the seminal case permitting such "economic development" takings was *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, an entire Detroit neighborhood was condemned for a new plant for General Motors. There was nothing wrong with the neighborhood and it was not

blighted, so the public use advanced was that the sprawling 450+ acre auto plant would pump up the city's declining tax base. The citizens whose 1,400 homes, businesses, and churches stood in the way of this "progress," however, had a different view. Their neighborhood was hardly a slum – it was a vibrant working-class community, and they didn't want to leave. The Michigan Supreme Court, however, permitted the taking. *Poletown* was the first case in which a court upheld the "economic development" rationale, and the case served as the model for other governments around the country when they began flexing their eminent domain muscle.[4]

Not surprisingly, governments facing declining tax revenues, stagnant economies, and strained infrastructure have become more and more aggressive in their use of eminent domain to appease private interests that promise to alleviate these problems, straying from traditional uses to more and more outlandish exercises, such as selling zoning along with eminent domain power. Thus, Costcos were slated to replace churches (non-profits don't pay property taxes and big box retailers emphatically do). *Cottonwood Christian Center v. Cypress Redev. Agency*,

[4] Condemning agencies have also been emboldened by *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). In that case, the Court held that pronouncements of public use by the legislature deserve deference, but reminded that "[t]here is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use," even if it is a narrow one. *Id.* at 240. Even though the Court acknowledged that the question of public use remained a judicial one, many view *Midkiff* as a free pass, mistakenly assuming that virtually any use declared by the condemning agency will be considered public by the courts. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) ("most observers today think the public use limitation is a dead letter").



218 F. Supp. 2d 1203 (C.D. Cal. 2002). In Atlantic City, a casino attempted to evict a widow from her home to build a parking lot for limousines. *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Sup. Ct. Law. Div. 1998). In Las Vegas, a 72-year old homeowner vainly fought attempts to take her home for a parking lot to service off-Strip casinos. *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004). All of these uses were considered "public" by the government. And the actual list of owners like Petitioners and Amici whose properties are targeted and who must turn to the courts for protection is much longer. *See* Dana Berliner, *Public Power, Private Gain – A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Whatever protection the Public Use Clause offers against eminent domain overreaching is in danger of very nearly disappearing altogether.

## II. THE RIGHT TO KEEP YOUR HOME IS FUNDAMENTAL AND DESERVES THE HIGHEST PROTECTION

Pervading this case is the undeniable fact that Petitioners are making lawful, non-noxious use of their property, and the only reason it is being targeted for acquisition is that someone else has convinced the condemning agency that they will make *better* use of it and that the public will consequently benefit. However, it is the function of the market, not the government, to make value judgments of lawful private uses of property, and to select among them, particularly when someone's home is involved.

This principle of reasonable use of property is enshrined as one of the great trinity of rights acknowledged in both the Fifth and Fourteenth Amendments, on par with life and liberty. Property and one's home are explicitly protected in the Third, Fourth, Fifth, and Fourteenth Amendments, and impliedly in the penumbra of the First, Second, Ninth, and Tenth Amendments. *See* U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law."); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (right to use property for non-noxious uses is a fundamental "stick" in the property rights bundle).[5]

[5] Highlighting the fundamental nature of private property, even the People's Republic of China is amending its constitution:

> The state has the right to expropriate or collect private property in line with laws in the public interest, but has to compensate owners, under the draft amendment.

(Continued on following page)



An individual's right of property is not different from other fundamental Constitutional and human rights and deserves utmost protection when threatened. *Lynch v. Household Finance Corp.*, 504 U.S. 538, 552 (1972) ("The dichotomy between personal liberties and property rights is a false one."). Property is "sacrosanct," *Hathcock*, 684 N.W.2d at 769, and an individual has a right "to own property and use it as he pleases." *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003).

The Constitutional acknowledgment and protection of property and the home are founded upon Lockean principles that property rights, as a source of individual liberty, cannot be subject to absolute state control. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (the state cannot simply wipe out property rights by prospective legislation); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (the government cannot defeat property rights and permit a taking simply by declaring that

> Tang said the draft amendment set up a critical rule to curb public power and guarantee private owners compensation if they suffer losses in the public interest.
>
> The proposed amendment is hailed not only by the wealthy elite, but also ordinary citizens who feel they have suffered injustices.
>
> "We are not always so confident in representing private clients as sometimes judges lean towards the public party," said Liu Weiping, a Shanghai-based real estate lawyer, who has represented individuals in cases of illegal demolition of homes by local governments and developers.
>
> "With the constitutional guarantee of private property, local governments and real estate developers won't recklessly level private residences as if it is in the nature of things," he said.

*Amendment to Private Property Hailed*, China View (Jan. 1, 2004).

the property never existed at all); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit*" transform private property into public property). *See also Lucas*, 505 U.S. at 1014 (government's ability to redefine the range of interests included in the ownership of property is limited by the Constitution).

## III. TAKINGS ANALYSIS HAS LONG REQUIRED A SUBSTANTIAL NEXUS BETWEEN THE GOVERNMENT'S PROFFERED GOAL AND THE MEANS USED TO ACHIEVE IT

This Court's modern takings jurisprudence since its inception in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), has followed a heightened scrutiny test for actions alleged to be de facto takings of property by inquiring whether an action is "substantially related" to a legitimate public purpose, and even if so, whether the regulation devalues property to such a degree that it is no different than a taking of title by eminent domain. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In *Penn Central*, the Court held that a regulation is an enjoinable taking unless it serves "a substantial public purpose." *Penn Central*, 438 U.S. at 127 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The Court held it is:

> implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if *not reasonably necessary to the effectuation of a substantial public purpose* . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property.



*Penn Central*, 438 U.S. at 127 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring)).

Subsequent decisions of this Court have confirmed the continuing validity of the "substantial public purpose" standard. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."); *Nollan v. California Coastal Comm'n*, 482 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' "); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests' "); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (same); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (same); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (same).[6]

---

[6] In *Chevron USA v. Lingle*, 363 F.3d 846 (9th Cir.), *cert. granted*, 125 S. Ct. 314 (No. 04-163, Oct. 12, 2004), the Court is reviewing the State of Hawaii's challenge to the long-standing "substantially advance" takings standard in a case where the Hawaii Legislature responded to the perceived high price of gasoline by capping the rent oil companies may charge dealers who lease company-owned gas stations. The District Court concluded that the rent control law was a taking because it did not substantially advance the legitimate interest of controlling gas prices since rather than decreasing prices, the legislation would actually have the opposite effect of *raising* them.

Although never explicitly articulated, the two-part regulatory takings standard is plainly based on the text of the Takings Clause, and the "substantially advance" test is a restatement of the public use requirement.[7]

*Nollan* explained when an action advances a legitimate state interest. The coastal commission had conditioned permission to build a beachfront home on the owner's assent to provide public access across his property. The Court held that before the public could be invited to use private property, the government must demonstrate a legitimate interest in doing so, and that an "essential nexus" exists between the interest and the means used to achieve it. *Nollan*, 482 U.S. at 837. The Court accepted the determination that public views of the beach was a legitimate goal of government, and acknowledged that the agency could have prohibited the building of the house if it blocked such views, or could have allowed the building of the house with conditions designed to protect public views. Thus, the agency could have required the property owner "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836-37. The coastal commission had not done so, however, but conditioned its development approval on the exaction of public access that in no way furthered its stated goal of protecting views.

[7] The test of whether a regulation "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, is based upon the Just Compensation Clause – "nor shall private property be taken . . . without just compensation." The "substantially advance" test is a restatement of the Public Use Clause. The remedies available also track the language of the Takings Clause: compensation for denial of all beneficial use, and invalidation for failure to substantially advance a legitimate state interest.



The "constitutional propriety disappears, however, if the condition substituted for the prohibition *utterly fails to further the end advanced as the justification* for the prohibition." *Id.* at 837 (emphasis added). Lacking a substantial nexus to the legitimate goal, the condition was invalidated. In *Dolan*, the Court further explained:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

*Dolan*, 512 U.S. at 390.[8]

Heightened scrutiny is designed to insure that suspect actions requiring the surrender of property for public use are in fact for public use and not "an out-and-out plan of extortion." *Nollan*, 482 U.S. at 837; *Dolan*, 512 U.S. at 387. Eminent domain supported solely by "Field of Dreams" promises of economic development without some showing that the takings will achieve that result presents the same threat – *see Kelo*, 843 A.2d at 581-82, 602 (Zarella, J., concurring in part and dissenting in part) – that the

[8] The nexus test has thus far been limited to cases in which the government effects a *per se* taking by requiring dedication of property to the public, but the instant case presents a much more egregious example of a *per se* taking, as there is the threat of a total takeover by another of title not simply a government invitation to public trespass. Also, unlike the typical exaction situation, in eminent domain the property owner is not presented a "take it or leave it" deal. An owner facing an eminent domain action has no right to refuse compensation and keep her property.

condemning authority, rather than representing the consent of the governed, has been captured by special interests or has an ulterior motive. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 432 (1983). It also is subject to the danger that it may be more efficient for private parties who desire to acquire another's property to "invest" in eminent domain action through the condemning agency than it is to attempt to purchase the property on the open market. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 52 (1998).[9]

[9] *Midkiff*'s rationale is not readily adaptable to economic development takings because its conclusion that pronouncements of public use are coterminous with the police power is dependent upon the expectation that a property owner subject to eminent domain has sufficient political capital to participate meaningfully in the legislative process, and the courts should not interfere in such areas where representative bodies have more institutional competence to balance questions of public policy. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144 (1938). That assumption is severely undermined, however, in economic development takings where the targeted property owners are often in a class of one and unable to organize with others with similar interests to object because there are no others being targeted. The reality is also that the owners of the types of property generally targeted by economic development takings lack the wherewithal to compete in a survival of the wealthiest contest with well-financed special interests bent on acquisition. *See* Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 302 (2000) (citing Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 436 (1983)). In such cases, no judicial deference is due a condemning authority's determination since "the results of a manipulated political process are no more legitimate than those of the unelected judiciary." Jones, *supra* (citing Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 362-63 (1995)).



This Court has also long recognized that physical takings, regulatory takings, and affirmative exercises of the eminent domain power are not different in kind, especially from the position of the property owner who is either dispossessed of his property, or left with little of value:

> It would be a very curious and unsatisfactory result if in construing [the Takings Clause] it shall be held that if the government refrains from absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

*Pumpelly v. Green Bay Co.*, 80 U.S. 166, 176-78 (1871).

Having the same textual foundation, eminent domain and regulatory takings jurisprudence cannot be consistently separated, particularly from the property owner's perspective since it matters little that in one instance the government is affirmatively confiscating his property, while in the other the confiscation is de facto rather than de jure. *See, e.g., Rukab v. City of Jacksonville*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002) ("We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context. In both cases, property owners are asserting their constitutional rights not to have the government take their property without just compensation.").

Maintaining a less rigorous public use standard for affirmative takings would result in the anomalous situation of the individual whose property is taken by regulation

having both invalidation and just compensation remedies available, while the owner whose property is taken by eminent domain would have only the ability to obtain compensation. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (Takings Clause requires *both* invalidation and just compensation remedies for regulatory takings). As the Richards Family is arguing in its case, the government's choice of illegitimate means to accomplish its goals should not be ignored simply because it may be willing to provide compensation.

## IV. TAKINGS SUPPORTED ONLY BY "ECONOMIC DEVELOPMENT" MERIT HEIGHTENED JUDICIAL SCRUTINY

Amici suggest this Court adopt a heightened standard of review for exercises of the eminent domain power supported only by promises of "economic development." Such takings are invalid under the Public Use Clause unless the condemning agency shows the taking substantially advances a legitimate state interest and the requisite proportional nexus. The dissenting Justice in the court below recognized a similar standard. After acknowledging that betterment of the economy is a valid goal, he noted:

> In my view, the development plan as a whole cannot be considered apart from the condemnations because *the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement*. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met.



*Kelo*, 843 A.2d at 597 (Zarella, J., concurring in part and dissenting in part) (emphasis added).

The question of public use has always been a judicial one, *Midkiff*, 467 U.S. at 240, and heightened scrutiny will not result in unwarranted judicial usurpation of a legislative function. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact"). Instead, heightened review will be useful to "smoke out" illegitimate criteria when the condemning authority is using the "suspect tool" of eminent domain supported only by promises of economic development. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Heightened scrutiny will also not disturb established public use doctrine nor will it initiate a deluge of public use challenges to ordinary eminent domain actions. For example, the takings in *Berman* and *Midkiff* would manifestly satisfy this test. In *Berman*, the taking was designed to improve severely blighted property in Washington, D.C. *Berman*, 348 U.S. at 30. In *Midkiff*, the Hawaii Land Reform Act was enacted to remedy the ills perceived to be caused by concentrated land ownership. *Midkiff*, 467 U.S. at 232-33, 241-42. Eliminating blight and the breakup of land oligopolies are legitimate government goals, and using eminent domain was clearly directed in those cases to accomplish those goals. The property taken was the

property causing the problem: taking blighted property and putting in into the hands of a redeveloper alleviates the blight; exercising eminent domain and vesting individual owners with title diversifies ownership.

Improving the economy is a legitimate goal of government. But when the condemning authority need merely set forth tenuous "butterfly effect"[10] connections between that legitimate goal and the means used to achieve it, no substantive limits remain in the public use requirement. To avoid this, the targeted property owner must be allowed the opportunity to challenge the government's assertion that the exercise of eminent domain to take their property will further that goal, and the condemning authority must demonstrate the nexus between the taking and the betterment of the economy before an individual is casually deprived of her property and home.

If all that is required of the government in economic development takings is to invoke grandiose promises of a "better economy," with no examination of whether there is any substance to that assertion, there is no limit to the government's ability to take property and put it into the hands of another, for more economically intensive uses of any property can always be imagined.

And how often do the promises of a "better economy" materialize? If the subsequent history of *Poletown* is any example, not always:

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[10] *See* James Gleick, Chaos: Making a New Science 8 (1987) (discussing the parable of the flapping of a butterfly's wings that creates a minor air current in China, that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean).



> condemnations that transfer property to private businesses usually don't even provide the economic benefits their advocates promise. General Motors and Detroit Mayor Coleman Young promised that the new factory would create more than 6,000 jobs. In reality, the plant employed less than half that many workers; possibly, more jobs were lost from the destruction of Poletown than were created by the factory. This result is typical.

Ilya Somin, *Poletown Decision Did Not Create Desired Benefits; New Ruling Protects Weak from Government Abuses*, The Detroit News (Aug. 8, 2004). Courts are understandably reluctant to examine closely an agency's predictive ability, but property owners should have the opportunity to challenge such pronouncements when their homes and fundamental property rights are threatened.

Cursory judicial review of economic development takings augurs a return to outdated republican norms that presumed that "takings that advanced the interests of one citizen could be regarded as advancing the interests of all." Nathan A. Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L. J. 339, 380 (1999). These notions have been superceded by the more pragmatic realization that all people – even legislators – are subject to acting in their own self-interest. *See* The Federalist No. 10 (J. Madison) <http://www.yale.edu/lawweb/avalon/federal/fed10.htm>. The danger of total judicial deference to public use pronouncements is plain: without it, condemning authorities would have no reason to refrain from taking private property and turning it over to those who claim that they would make "better" use of it. The public use requirement is supposed to insure that takings are in fact for the public good and not for private gain, and Amici suggest the Court should undertake

careful review of bare assertions of public use in economic development takings. When the government has the ability to take private property from one owner and put it into the hands of another, with the only justification necessary that the economy *may* be benefitted by the transfer of property because the new owner *might* make "better" use of it, the public use requirement has lost all meaning.

The lower courts are beginning to pay attention to the abuse of eminent domain and are reviewing economic development takings against the individual right of property, but have not established a consistent standard of review. *See, e.g., 99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (government "appeased" big box retailer by condemning a smaller competitor); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (Costco versus a church); *Bailey v. Superior Court*, 76 P.3d 898 (Ariz. Ct. App. 2003) (attempt to take a non-blighted automobile repair shop and turn over the property to a neighboring hardware store for expansion); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown*, economic development takings do not satisfy public use requirement); *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (economic development taking invalid); *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (same).

While state courts are free to set their own high standards under their state public use requirements, in the absence of definitive guidance from this Court establishing minimum standards, property owners like Petitioners and Amici will continue to live in the crosshairs.



*See Hathcock*, 684 N.W.2d at 786 ("*Poletown*'s economic benefit rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity.") (emphasis original).

The standard for economic development takings adopted by the court below ignores the separate purposes served by the Public Use Clause and the Just Compensation Clause. The purpose of the public use requirement is to insure that the private property owner is not being unfairly forced to contribute his or her property to someone else's private use and that the government's purported use of the property is real before an individual's fundamental rights are interfered with.

The purpose of the Just Compensation requirement is to insure that the cost of public benefits are not concentrated in a few but spread across the beneficiaries, and that an owner whose property is targeted for public use is at least provided fair market value as a result of the forced sale. *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) ("since the acquisition was for public use . . . [t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Both parts of the Takings Clause should be acknowledged.

## CONCLUSION

If the public use requirement is to continue to have significance, then a condemning authority's conclusory assertions that taking private property and vesting it in

another will boost the economy does not satisfy the Takings Clause. The Constitution requires public use, not just "better" use. Affirming the Connecticut Supreme Court's decision in this case would write out of the Constitution the last measure of protection property owners have to keep their homes and defend their "sacrosanct right" of property.

Property owners who bear the burden of these experiments in Darwinian economics may be able to obtain monetary compensation, but the intangible loss of home, neighborhood, and community is never "just." The only check on eminent domain abuse is the public use requirement, an agency's ability to self-police, and meaningful judicial review when it fails to do so. Although compensation may be provided for illegitimate exercises of eminent domain for purely private uses, receiving money is bitter justice if the government is forcibly evicting the owner from the family homestead or a life's work, for the enrichment of another.

In the end this case is reduced to this vital fact: the Constitution contains the *Takings* Clause, not just the Just Compensation Clause.

Respectfully submitted,

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# In The Supreme Court of the United States

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**SUSETTE KELO, ET AL.,**

***Petitioners,***

**v.**

**CITY OF NEW LONDON, CONNECTICUT, ET AL.,**

***Respondents.***

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**On Writ of Certiorari to the Supreme Court of Connecticut**

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## AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenue and improve the local economy?

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## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens—in particular, those dealing with issues affecting the right to own property and to use one's property without unreasonable government interference.

The Rutherford Institute is participating as *amicus* herein because it regards the case as an extraordinary opportunity for the Court to confirm and uphold the

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[1] *Amicus Curiae* The Rutherford Institute files this brief by consent of counsel for all parties. Copies of the letters of consent are on file with the Clerk of the Court. The Rutherford Institute expresses its gratitude for the research assistance provided by J. Charlton Wimberly. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

sacrosanct right to own and use private property without fear of the government usurping that right.

## SUMMARY OF ARGUMENT

In the instant case, this Court has the unique opportunity to affirm once and for all that there is private property beyond the reach of government. Moreover, the Court can put a stop to city officials who use the sledgehammer of eminent domain as an economic tool, rather than for traditional public uses.

Indeed, in this case, the Court is presented "with a clash of two bedrock principles of our legal tradition" – the sovereign's power of eminent domain and "the sacrosanct right of individuals to dominion over their private property." *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004) ("Hathcock").

Each of these principles has a place in our nation's history. The power of eminent domain is an attribute of sovereignty[2] implicitly recognized by the Fifth Amendment. *Kohl v. United States*, 91 U.S. 367, 372 (1875).[3] And securing the property rights of citizens is a "principal function of government." So important is this function that, during

[2] *See, e.g.*, Alfred D. Jahr, Eminent Domain: Valuation and Procedure 3 (1953).

[3] *See also* Steven J. Eagle, *Protecting Property from Unjust Deprivations Beyond Takings: Substantive Due Process, Equal Protection, and State Legislation, in* TAKING SIDES ON TAKINGS ISSUES 510 (2002) (noting that the Fifth Amendment's Takings Clause "implicitly acknowledges that the power of eminent domain devolved from the British Crown to the federal government as well as the states").



colonial times, it was believed that "any government that rendered property rights insecure violated the very purpose of its existence. Such a government would forfeit the allegiance of its citizens and would be open to rebellion."[4]

Courts must balance these two "bedrock principles" in such a way that governments can acquire property only when that property is necessary for a public use and citizens can remain secure in their private property rights. *Hathcock*, 684 N.W.2d at 769. When deciding what constitutes a "public use"[5] and, therefore, when "[t]he despotic power . . . of taking private property" may be exercised, it is vitally important to consider our nation's legacy of protecting private property rights and whether permitting the exercise of eminent domain in the case at hand would violate that legacy. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (Dall.) 304, 311 (C.C.D. Pa. 1795).

To allow the use of eminent domain as it was used by Respondents in the instant case is to cease balancing and to make the power of eminent domain absolute and tyrannical. Because it will always be possible to put land to more productive use, allowing the exercise of eminent domain in such cases will mean that no land will ever be safe from government confiscation, thus ending the sanctity of private property as we have known it.

[4] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 28 (1998).

[5] *See* U.S. Constitution, Amendment V (providing that private property shall not "be taken for public use, without just compensation").

## ARGUMENT

### I. THE SANCTITY OF PRIVATE PROPERTY IS A FUNDAMENTAL PRINCIPLE OF AMERICAN LAW.

The importance of protecting "the sacrosanct right of individuals to dominion over their private property" pervades our nation's history. *Hathcock*, 684 N.W.2d at 769. This principle was recognized prior to the adoption of our Constitution on both sides of the Atlantic. It also was venerated by the Framers and has been applied in the courts.

The Magna Carta provided that "[n]o freeman shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers or by the law of the land."[6] John Locke wrote that "'[t]he great and *chief end* . . . of Men uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.'"[7] And William Blackstone recognized "the right of private property"[8] as one of the three "absolute" rights "which every man is entitled to enjoy."[9] As did Locke, Blackstone asserted that "the first and primary end of human law is to maintain and regulate these *absolute* rights of individuals."[10]

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[6] Bernard H. Siegan, Property Rights: From the Magna Carta to the Fourteenth Amendment 7 (2001) (translating from the Latin Chapter 39 of King John's charter).

[7] John Locke, *Second Treatise* § 124, *in* Two Treatises of Government (1960) (quoted in Siegan, *supra* note 6, at 47).

[8] 1 William Blackstone, Commentaries *129.

[9] *Id.* at *124. The other two absolute rights were "the right of personal security" and "the right of personal liberty." *Id.* at *129.

[10] *Id.* at *124.



The early state constitutions similarly identified the protection of property rights as among the chief purposes of government. The New Hampshire Constitution of 1784 listed "acquiring, possessing and protecting property" as "natural, essential, and inherent rights" possessed by all men.[11] The Pennsylvania Constitution of 1776 also regarded the protection of private property as "among the natural and inherent rights of all persons."[12] Indeed, "[f]ollowing the Revolution and prior to the drafting of the federal Constitution, every state constitution was based on the idea that the purpose of government was to preserve natural rights to 'life, liberty and property.'"[13]

These principles were reiterated by many of the Framers, whose "great focus" was "the security of basic rights"—"property in particular."[14] For instance, James Madison wrote in *The Federalist No. 10* that "the first object of government" is "the protection of [men's] different and unequal faculties of acquiring property."[15] Madison later wrote, in the *National Gazette*, that "[g]overnment is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[16] Alexander Hamilton proclaimed that "[o]ne great

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[11] Ely, *supra* note 4, at 30.

[12] *Id.* at 31-32.

[13] Polly J. Price, Property Rights: Rights and Liberties Under the Law 3 (2003). *Cf.* Ely, *supra* note 4, at 32 ("[T]he constitutional protection of property rights was established in the states well before the adoption of the federal Constitution.").

[14] Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 92 (1990).

[15] The Federalist No. 10, at 55 (James Madison) (2000).

[16] James Madison, *Property*, Nat'l Gazette, Mar. 29, 1792, at 174.

objt. of Govt. is personal protection and the security of Property."[17] And John Adams wrote that "[p]roperty must be secured, or liberty cannot exist."[18] In short, "colonial leaders viewed the security of property as the principal function of government."[19]

This principle of protecting private property—championed by our nation's founders and their predecessors—also has been enforced in the courts. In 1795, in *Vanhorne's Lessee*, a federal circuit court stated:

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact[.]

*Id.*, 2 U.S. (Dall.) at 310. Three years later in *Calder v. Bull*, 3 U.S. 386 (1798), Supreme Court Justice Samuel Chase, writing for this Court, recognized that governments possess the power of eminent domain, noting that private property may be taken "for PUBLIC use." *Id.* at 394. However, Justice Chase also asserted that "[i]t is against all reason and justice, for a people to entrust a Legislature" with the power to

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[17] Ely, *supra* note 4, at 43 (quoting 1 The Records of the Federal Convention of 1787 534 (1937)).

[18] Jean Edward Smith, John Marshall: Definer of a Nation 388 (1996) (quoting 6 The Works of John Adams 280 (1850)).

[19] Ely, *supra* note 4, at 28.



"take[] property from A. and give[] it to B." *Id.* at 388. "The Legislature may enjoin, permit, forbid, and punish . . . *but they cannot . . . violate . . . the right of private property.*" *Id.* (emphasis added). To suggest otherwise "would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." *Id.* at 388-89.

## II. PRIVATE PROPERTY RIGHTS MUST BE BALANCED AGAINST THE POWER OF EMINENT DOMAIN.

Because the two "bedrock principles" of eminent domain and securing private property must coexist, neither can be absolute. *Hathcock*, 684 N.W.2d at 769. Rather, courts must engage in a balancing act: protection of private property must yield in some circumstances when property is needed by the government to fulfill its duties; and the power of eminent domain must be limited only to instances where it is *necessary*, so that the security of private property can endure.

The circuit court in *Vanhorne's Lessee* underscored the role that necessity must play in the exercise of eminent domain. The court noted that "[t]he despotic power, . . ., of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it." *Id.*, 2 U.S. (Dall.) at 311. However, the court also noted that "[t]he presumption is, that they will not call it into exercise *except in urgent cases, or cases of the first necessity.*" *Id.* (emphasis added). Concerning the use of eminent domain to take land from one private party and give it to another, the court went on to say that it would be

> difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. . . . Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?

*Id.* at 311-12.

The necessity of balancing these fundamental principles is not a thing of the past. Only last year, in a case with facts similar to those in the instant case, the South Carolina Supreme Court emphasized the necessity of limiting the power of eminent domain in order to preserve property rights. *See Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003). In that case, a county attempted to use eminent domain to acquire private lands, which were to be leased to a private corporation. *Id.* at 854. The county asserted that the subsequent development by the private corporation would result in economic benefits to the public. *Id.* at 856.

The court, however, refused to allow the exercise of eminent domain for such a purpose because doing so would have been "in derogation of the right to acquire, possess, and defend property." *Id.* at 856. Despite the fact that the project's projected economic benefit to the county was "very attractive," it could not justify the use of eminent domain: "'However attractive the proposed [project], however desirable the project from a [government] planning point of



view, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases.'" *Id.* at 856 (alterations in original) (quoting *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978)).

### A. THE CONNECTICUT COURT'S DECISION ALLOWS LIMITLESS GOVERNMENTAL INTRUSION UPON THE RIGHT OF PERSONS TO RETAIN PRIVATE PROPERTY.

If the power of eminent domain can be exercised as Respondents have in the instant case—taking land from A and giving it to B on the theory that B will use it more productively and therefore provide greater benefits to society—then there remains "absolutely no limit on the right to take private property," and, therefore, a citizen's private property will "never be safe from invasion." *Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979) ("McCormick") (quoting *Chesapeake Stone Co. v. Moreland*, 104 S.W. 762, 765 (Ky. 1907)) ("Moreland"). Numerous courts have recognized this inevitable result.

The Michigan Supreme Court recently attested to this fact in *Hathcock*. In that case, the county sought to acquire land for a development project that would create new jobs and greater tax revenue. *Id.* at 770. This projected contribution to society of more jobs and greater revenue was the "public use" the county hoped would justify its exercise of eminent domain. The court, however, pointed out that "every productive unit in society . . . contributes in some way to the commonwealth." *Id.* at 786. The court warned that "if one's ownership of private property is forever

subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.*

In a similar case, the Illinois Supreme Court noted that "'[i]f private property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.'" *S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002) (quoting 710 N.E.2d 896, 906 (Ill. App. Ct. 1999) (Kuehn, J., concurring)).

In yet another similar case, the Kentucky Supreme Court summarized the problem in this way:

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, *there would be absolutely no limit on the right to take private property.* It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and *under this rule the property of the citizen would never be safe from invasion.*



*McCormick*, 581 S.W.2d at 6 (emphasis added) (quoting *Moreland*, 104 S.W. at 765).

And in *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967), the Arkansas Supreme Court also recognized this principle. The court considered whether a city could use its power of eminent domain "to take private property for use as an industrial park." *Id.* at 488. The court ruled that allowing such use of the power of eminent domain would mean that "the city could condemn the plant of an existing industry to secure another." *Id.* at 492. The court went on to hold, "[w]e do not believe that it was intended that [the constitutional amendment at issue] be the vehicle for overruling all principles of existing law of eminent domain, in view of our recognition that the right of private property is higher than constitutional sanction." *Id.*

### B. Special Consideration Must Be Given When the Taking of People's Homes Is Involved.

Finally, when balancing the sacrosanct right to private property with the power of eminent domain, special consideration must be given to cases where the land sought to be taken includes people's homes. In *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970), this Court stated, "[T]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." While this statement was made in a context very different from eminent domain, it nevertheless demonstrates that the law treats individuals' homes as more important than their other property. *Cf. Payton v. New York*, 445 U.S. 573, 585 (1980) (invasion of the home is the chief evil against which

the prohibition on unreasonable searches and seizures was directed). There is no reason that this principle should not be extended to the present context.

## CONCLUSION

The principle of protecting private property rights is indisputably a fundamental aspect of our nation's history and jurisprudence. If this principle is to continue, then the use of eminent domain in cases like the one at hand must be found unconstitutional. Otherwise, the right to private property will be swallowed up by an eminent domain power that can be exercised whenever a state or local government determines that someone's property could be put to more productive use. As explained by the Kentucky Supreme Court almost a century ago, "under this rule the property of the citizen would never be safe from invasion." *Moreland*, 104 S.W. at 762, 765.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October 2004

SUSETTE KELO, ET AL.,

Appellants,

v.

CITY OF NEW LONDON, ET AL.,

Appellees.

## AMICUS CURIAE BRIEF OF THE TIDEWATER LIBERTARIAN PARTYON THE MERITS IN SUPPORT OF THE APPELLANTS

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IN THE

# SUPREME COURT OF THE UNITED STATES

SUSETTE KELO, ET AL.,

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Tidewater Libertarian Party (TLP) is an independent affiliate of the Libertarian Party of Virginia and the national Libertarian Party. In eastern Virginia, the TLP boasts a large following dedicated to the principles of personal and economic liberty. [1] The TLP's recent electoral success is unmatched in third party races anywhere in the nation. Libertarian Robert Dean, former chairman of the

[1] This counsel was the sole author of this brief. Research help was provided by fellow TLP members. All of the funds related to the writing and filing of this brief were contributed by TLP's general fund.

TLP, polled 43% of the vote in the 2004 mayor's election in the City of Virginia Beach: the largest city in the Commonwealth of Virginia. The TLP is in the forefront of coming change in Virginia, including the greater protection of private property rights from the dead hand of government.

This brief is filed with the consent of all parties as evidenced by the mutual, unconditioned written consent filed with the Court.

As is well known, libertarians favor the return to American constitutional principles of limited government that formed this nation and prevailed until the 20th Century tide of collectivism invented an all-powerful Congress from whole cloth. One of the traditional constitutional principles the TLP advances is the narrow meaning of the "Public Use" exceptions to private property rights as written in the Fifth Amendment and applied to the States by the Fourteenth Amendment.

In Virginia, the use of the doctrine of eminent domain has not advanced in theory to the kind of practice employed



by the City of New London, Connecticut and by many other localities across the country. Virginia law does not countenance the use of eminent domain for economic reasons except in the instance of clearing "blight". Va. Code Sections § 36-2, § 58.1-3245.1, § 36-55.25, Berman v Parker, 348 U.S. 26 (1954).

However, it may be that an open practice of city-mandated economic redevelopment is preferable in some ways to the narrower basis for legally imposed redevelopment sanctioned by the Berman Court and presently in use in Virginia. "Blight" has become whatever the city can say it is even without a straight face. See Redevelopment: The Unknown Government, Chapter 2, Blight Makes Right (Municipal Officials for Redevelopment Reform, August 1998).

As the cities of Virginia compete in their efforts to force their poor and lower middle-class to simply leave along with their primary education and health-care needs, the legitimacy of the law of eminent domain is cast into doubt.

The money for both the acquiring locality and its favored developer is simply too tempting to allow legal technicalities to get in the way. Conveniently, the Virginia legislature has accommodated the cities' lump sum gold rush by all but prohibiting judicial review of a finding of "blight" by a locality. Virginia Code Sections § 36-27, § 25.1-220. For cities like Norfolk and Portsmouth the choice becomes to either export your poor at a good pace or become a net importer of the poor. See The Slaughter of Cities: Urban Renewal as Ethnic Cleansing (South Bend, St. Augustine's Press, 2004), American Journal of Economics and Sociology, Inc., City Without Slums (Gale Group, January 2001.)

This brief is written to make the case for the broader principle to apply: the principle that real property should never be expropriated from one group of citizens by the government for the private use and enjoyment of other citizens. "Public Use" should be returned to its traditional meaning: only for the construction of government-owned



facilities and public utilities and roadways. The disastrous history of urban redevelopment over the past fifty years could not be better proof that government is ill-suited to the task of grand economic planning: something the Constitution wisely excluded from the enumerated powers of government.

**SUMMARY OF ARGUMENT**

Civilized societies going back to the time of ancient Rome and Babylon adopted the principle the King himself may not expropriate land except for a legitimate public use and on the payment of fair compensation. These freedoms passed into law so many times in so many places have only recently been abridged by modern government in a stampede to expropriate land on a wholesale basis for transfer to the legislature's favorites. From a small opening aimed at combating the worst housing conditions imaginable, the tide of eminent domain has swelled nationwide to the point today that long-time neighborhoods are never safe from the envy of the powerful and wealthy. Excessive power corrupts: absolutely over time.

The decision in Berman v. Parker, supra, was a sharp departure from the usual protections inherent in the

ownership of land dating more than two millennia. The case should be overruled. There are many possible solutions to curing blight and predatory practices that may well prove more effective than expropriation of land by government has proven to be. To draw a distinction between clearing blight in Washington, D.C. and economic planning in New London, Connecticut is to perpetuate the error made and to confirm the principle that the United States of America has forever left that league of nations that prohibit the forcible expropriation of land for anything other than a legitimate public use.

**ARGUMENT**

The words of the Fifth Amendment are stark and clear.

> "No person shall be deprived of ... property without due process of law nor shall private property be taken for public use, without just compensation."



At the time the Fifth Amendment was enacted, the reference to eminent domain as part of the provision was a natural one. The reference defines the scope and terms of the one large exception to the absolute rules protecting the private ownership of property. The amendment confirms that real property takings are absolutely necessary at times in order to build large public facilities, to use waterways and to provide for roads. The concept of such a "public use" as a condition of a taking was never conceived to empower the government to expropriate land for purely social-economic reasons, until the Congress of 1945 and the Berman decision.

The traditional American rule limiting the scope of eminent domain could be stated broadly and simply: the government does not have the power to take land from one citizen in order to give the land to another citizen.

There is nothing novel in this, even by the time of the Eighteenth Century.

The Kings of Babylonia (circa 700 B.C.) could not commit a taking of real property even as a dowry for a

Prince. Any taking of real property by the King had to be for a truly public purpose and conditioned on the payment of full compensation. Babylonian and Assyrian Laws, Contracts and Letters, Chapter XVIII, pg. 192 (T. & T Clark, Edinburgh 1904.)

The Roman Emperors after Caesar held dictatorial powers, but there were some limits. Roman law always provided that the power of eminent domain could only be used for public facilities.

According to Suetonius, Emperor Augustus (31 B.C. - 14 A.D.) narrowed his plans to build a forum to avoid the legal impediments with dispossessing the owners of neighboring houses. In the same taking, the Roman Senate sold public lands to pay the sums due to the owners who were forced to sell, rather than refuse prompt payment due to the lack of present funds in the treasury. Questions of Public Law, Vol. 2, Chapter 15, Eminent Domain (At the House of Johannes Van Kerckhem 1737)



The first constitution of sorts arising in Europe following the Dark Ages memorialized the permanency of land ownership. The English Magna Charta, 1215 A.D., provided:

> 52. If anyone has been dispossessed or removed by [the King], without the legal judgment of his peers, from his lands, castles, franchises, or from his right, [the King] will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five and twenty barons of whom mention is made below in the clause for securing the peace....
>
> 56. If [Kings] have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers ...

This Court in its long history has defined "public use" as:

> " … government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, -- as must sometimes be necessary in the case of forts, light-houses, and military posts or roads ….its right to do so may be …. the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or any other authority." Kohl v. United States, 91 U.S. 367, 373 (1876) citing McCullough v. Maryland, 4 Wheat 29 (1819).

In America, all this changed fifty years ago. Berman v Parker, 348 U.S. 26 (1954). In the case, a federal program to eliminate slums in Washington, D.C. sought to take large tracts of residential and commercial property by eminent



domain for later sale or lease to private developers. Congress's plan showed no mercy to local landowners. No matter the condition, usefulness or grace of one's home or business, it was to be expropriated like all of the others, bulldozed and then sold to selected developers.

Speaking for the Court, Justice William O. Douglas swept aside centuries of settled law in the field of eminent domain by finding that land could be forcibly taken from one citizen by the government for the private use and benefit of other citizens. A sign of the times: Justice Douglas declared that "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful …., there is nothing …. that stands in the way."

Out of the blue, Berman declares that the lawful scope of public use in eminent domain law is a matter entirely for the legislature to determine: not for the courts to review. See contra, Shoemaker v. United States, 147 US. 282, 298 (1892), Monogahela v. United States, 148 U.S. 312

(1893), Sears v. Akron, 246 U.S. 242 (1918), Rindge v. Los Angeles, 262 U.S. 700 (1923), United States v. New River Collieries, 262 U.S. 341 (1923), Old Dominion Co. v. United States, 296 U.S. 49, 60 (1925). The historic special protections in eminent domain law were turned on their head. Land ownership suddenly could be abridged by government based solely on the legislature's view of what would be best for all. Such dictatorial powers were extraordinary under American law at the time of Berman and remain so today. The departure from a traditional constitutional limit on the power of government was especially stark.

By far the better view of Washington D.C.'s post-war urban renewal program came from Circuit Judge Prettyman sitting as a member of the Federal District Court of Columbia who, with two district court judges, conducted the trial of the Berman case. Schneider v. District of Columbia, 117 F. Supp. 705 (DC Dist. 1954.) The lower court held that Congress's plan would have to spare property that was not



deteriorated like the commercial building owned by the Bermans.

Judge Prettyman noted:

> " … the Fifth Amendment authorizes the taking of private property for public use. But here is the end of government power—That the Government may do whatever it deems to be for the good of the people is not a principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited. There is no general power in government, in the American concept, to seize private property. Hence, it is universally held that the taking of private property from one person for the private use of another violates the due process clauses of the Fifth and Fourteenth Amendments." Id, at 716 citing Missouri Pacific Ry. Co. v. State of Nebraska ex rel Board of Transportation, 104 U.S. 403, 417 (1896), A Treatise

on Constitutional Limitations, Section 1124, et. seq. (Cooley, Little Brown & Co., 4th Ed. 1927).

In the time since Berman, this Court has not directly reaffirmed the principle that real property can be taken by the government in order to be given to others for private development. The decision sometimes considered similar in content to Berman, Hawaii Hous. Auth. v. Midkoff, 467 U.S. 229 (1984), is best viewed as ultimately involving an entirely different matter in substance.

In Midkoff, a land ownership oligopoly was ended by the Hawaii legislature with the only remedy that could be effective and just: forcing the sale of the land to existing tenants if the tenants so apply. Less intrusive attempts at land reform over several generations had failed.

Ending monopolistic practices is a clearly established, proper exercise of governmental power aimed at creating greater economic freedom for all, unlike the practice sanctioned in Berman. But for Berman, the Hawaii legislature undoubtedly would have remedied the land reform



problem by relying on a police power other than eminent domain, quite legitimately.

What has happened since Berman is an explosion of redevelopment planning by government at all levels using the hugely expanded scope of eminent domain law. The tremendous future benefits always invoked in redevelopment planning have proven quite elusory. The end result in redevelopment has often been disappointing: even perverse. See The Art of Revitalization: Improving Conditions in Distressed Inner-City Neighborhoods, (Garland Pub. Co. 2000). The loss to the taxpayers and to the previous landowners have been colossal and, by now, predictable.

If one would believe today that the government is uniquely positioned to create beauty, that person should review the modern architecture of Moscow. Creating a better future is no more within the direct power of government in our 21st Century than it was in any time past. History demonstrates that only economic and personal freedom has ever led to a measurably better future. The government's

forcible purchase of real property for economic reasons is not a social remedy that has much chance of succeeding in its stated goal. There are many other planning remedies that offer a greater prospect for revitalizing blighted neighborhoods for the long-term. [2]

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[2] Without the blunt force of eminent domain for economic reasons, legislatures would be free to find better solutions for ending blight.

The law of condemnation has long combated dilapidating housing by litigating with the people responsible for the problem and forcibly curing the situation in an extreme case. No one could reasonably suggest that such laws requiring property owners to maintain their buildings and improvements in a reasonable way are unlawful. Strict enforcement of a legitimate building code would be the primary tool to end the kind of conditions that Justice Douglas describes in Washington D.C.'s Section B in 1954.

If the legislative concern is the prospect of profiteering by some landowners thereby blocking large developments that require the assembly of numerous parcels, different remedies could be adopted.

Once the assembly of the development site is sufficiently complete and reviewed for its compliance with zoning laws, the



If the Court were to retain the principles of Berman, but decide to reject New London's practice, the distinctions to be drawn between the two cases will do little more than confirm the radical departure Berman represents. The nationwide money stampede through political power-broking would certainly continue, as it does today in Virginia, and eventually prevail in one way or another no matter the protective formulation the Court might conceive.

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remaining land owners could be limited to a sale prices of no more than twice the fair market value of their property. The practice of profiteering in real property development could itself be made a criminal offense, possibly punishable by the loss of the land at issue.

If the issue is health, safety or morals as enumerated in Berman, then the reasonable remedies are also clear. Laws regulating these areas are already enacted and could be changed in ways to meet present circumstances. A government-imposed real property face-lift is hardly a cure for the kinds of human weaknesses that inevitably lead to the creation of slums and its social pathologies.

## CONCLUSION

It is past time to end the monopolistic land-use planning practices that have corrupted the legitimate use of the power of eminent domain. Berman should be overruled as well as some of the language in Midkoff. The traditional understanding of "public use" should be invoked anew in this case.

The judgment of the Connecticut Supreme Court should be reversed and final judgment entered in favor of the appellant landowners.

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# In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

*Petitioners,*

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## BRIEF OF THE STATES OF VERMONT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MONTANA, NEW YORK, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA AND TENNESSEE, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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## INTEREST OF THE AMICI CURIAE

The amici States have at least two significant interests in opposing the petitioners' call for heightened scrutiny of what are essentially state and local economic and land use planning decisions. First, the power of eminent domain is most commonly exercised by State and local governments and the States thus bear primary responsibility for balancing the public good with the rights of individual property owners. The amici States accordingly share an overarching interest in protecting their ability to make policy decisions that will best serve the economic, social and environmental interests of their citizens without additional, unnecessary judicial review under federal law. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (public use determinations made by state legislatures entitled to same deference afforded Congressional determinations).

Second, heightened scrutiny of public use determinations under federal law will seismically shift takings litigation from the predominant and proper venue, the state courts, into the federal courts, upsetting an appropriate federal-state balance in the process. The amici States have a strong interest in preserving the primary role of the state courts in reviewing state and local land use decisions. State courts have been, and will continue to be, responsive to local economic conditions, to the rights of local landowners, and to the legal traditions of the respective States. But if this Court departs from its established deferential review of public use determinations, state and local governments will face increased costs and delays associated with additional layers of judicial review – including the likelihood of litigation in multiple forums and the unpredictable risk of liability for attorneys' fees.

The change in federal law sought by petitioners would also unnecessarily disrupt the evolution of public use law in the various States. The States, through their constitutional provisions, statutes, and state court decisions, have developed different approaches to takings law and public use determinations that reflect the political, legal, and economic circumstances of each State. Consistent with our federalist system, the amici seek to preserve the ability of the States to experiment in this area free from the burden of heightened judicial review of the purpose of every proposed taking in federal court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The central question posed by this case is whether the Court will adhere to its rulings in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) and *Berman v. Parker*, 348 U.S. 26 (1954), or reverse those decisions and abandon the established practice of deferring to determinations of public use made by federal, state, and local governments in connection with the exercise of eminent domain. Although petitioners do not ask for *Berman* or *Midkiff's* reversal, and assert that those cases are distinguishable, *see* Pet. Br. 24-26, the outcome they seek in this case cannot be reconciled with *Midkiff's* central holding, which is largely drawn from the Court's earlier decision in *Berman*: the "public use" requirement of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers," and the exercise of the eminent domain power will therefore be upheld if it "is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 240-41. As Justice Kennedy observed more recently, writing for the Court in a case that reaffirmed *Midkiff* and *Berman*,



exercises of the condemnation power are constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992).

Amici States urge this Court to reject petitioners' arguments and reaffirm the rule of deference set forth in *Midkiff* for three principal reasons. First, a departure from the rational basis standard is contrary to precedent and unnecessary in the context of eminent domain. The Takings Clause of the Fifth Amendment is unique in the National Constitution for its unequivocal requirement that the government pay "just compensation" to those whose property is taken for a public use. U.S. Const. amend. V. The "weighty demand of just compensation," *Midkiff*, 467 U.S. at 245, serves both as an independent limitation on the use of the eminent domain power and as a guarantee of fair treatment to those affected by a taking. Heightened scrutiny, which is typically employed where the nature of government action suggests a greater risk of improper motive or abuse of power, makes no sense here.

Second, if the Court departs from the rational basis standard and imposes some form of heightened scrutiny as a matter of federal takings law, state and local governments – and the federal courts – would experience an upsurge in federal takings litigation. Plaintiffs have little incentive under current law to seek separate review of the public use issue in federal court, because, as the Sixth Circuit recently noted, plaintiffs in the typical case have "virtually no chance" of success under the deferential *Midkiff* standard. *Montgomery v. Carter County*, 226 F.3d 758, 768 (6th Cir. 2000). But that would change, and change dramatically, if this Court adopted the "reasonable

certainty" standard advocated by petitioners, or any other form of heightened scrutiny. Plaintiffs would then have great incentives to pursue litigation in multiple forums, including challenging the public use issue in federal court while litigating other matters in state proceedings. As a result, state and local governments in particular would face increased litigation costs, more delays attributed to court fights, and the potential for crippling attorneys' fee awards in actions brought under 42 U.S.C. § 1983.

Third, the dramatic change in federal law sought by petitioners would short-circuit the evolution of public use law in the state courts and unnecessarily impose a uniform federal rule in an area that has traditionally been governed by state law. Petitioners' claim that the "sky will not fall," Pet. Br. 48, if this Court rules in their favor is ironic, because the more accurate and relevant point is that the sky is *not* falling under present law. State courts have not hesitated to place limits on the use of the eminent domain power by state and local governments and a number of those courts (guided by a combination of state constitutional provisions, state statutes, and decisional law) impose a more stringent public use standard than federal law requires. Consistent with our federalist system, public use law varies among the States and the state courts have the flexibility to tailor their review to local conditions. But the willingness of state courts to act and the relatively frequent success of plaintiffs who bring public use challenges in state court show that no change in federal law is needed here. Amici States urge this Court to allow our federalist system to work and to refrain from imposing a more stringent federal standard that would prevent the States from adapting public use law to local needs.



## I. Petitioners essentially ask this Court to reverse its public use precedents and apply heightened scrutiny to determinations of public use, a result that is least appropriate where the government must provide full and fair compensation to persons injured by its actions.

In their effort to overturn established takings law, petitioners ignore a basic truth: federal, state, and local governments routinely take actions to promote economic development in the public interest, even though those actions may benefit some persons while imposing costs on others. Except in very limited circumstances, this Court defers to the government's view of the public interest and upholds such actions – including taxes, subsidies, and market regulation and deregulation – so long as they are rationally related to a legitimate government purpose. *See, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978) (upholding state regulation of petroleum industry and emphasizing that courts do not sit as "superlegislatures" to evaluate the wisdom or "ultimate economic efficacy" of such legislation). Here, however, petitioners seek to impose a different, more exacting standard – either that economic development, however that should be defined,[1] cannot be a legitimate government purpose, Pet.

[1] Although petitioners urge the adoption of a rule prohibiting any taking for the purpose of economic development, they offer no definition of the term, but instead refer alternatively to "private business development," Pet. Br. 9, "economic development," *id.* at 10, and "private development," *id.* at 11. The eminent domain power has long been used, however, to aid business development and promote economic growth. Governments have taken land for mills, railroads, roads, and public works and utilities – all of which contribute to economic development. *See, e.g., Hairston v. Danville & Western Ry. Co.,* 208 U.S. 598, 608 (1908) (approving condemnation of land to construct railroad spur designed to meet demands of business); *Head v. Amoskeag Mfr. Co.,* 113

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Br. 11-12, or that courts must second-guess the political branches and decide whether a particular form of economic development is "reasonably certain" to benefit the public, Pet. Br. 27-28. Although petitioners carefully avoid the term "heightened scrutiny," that is unquestionably the standard they wish this Court to apply in all takings cases. But neither precedent nor logic supports this result.

To begin with, the Court squarely rejected this approach in both *Midkiff* and in its earlier decision in *Berman*. Although petitioners try to distinguish the facts of *Midkiff* and *Berman* from this case, they entirely ignore the legal underpinnings of the two decisions. *See Midkiff*, 467 U.S. at 239-43; *Berman*, 348 U.S. at 31-36. In both cases, the Court rejected any special understanding of the term "public use" in the Takings Clause and instead equated the public use requirement with the government's police powers. *See Midkiff*, 467 U.S. at 240 ("'public use' requirement is thus coterminous with the scope of a sovereign's police powers"); *Berman*, 348 U.S. at 33 (where object is within authority of Congress, "the right to realize it through the exercise of eminent domain is clear") Notably, in *Berman*, the Court rejected precisely the kind of

U.S. 9, 16-19 (1885) (describing Mill Acts in numerous States that permitted mill owners to flood land belonging to others for mechanical and manufacturing purposes); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-called "Takings Clause,"* 53 Hastings L.J. 1245, 1254 n.28 (2002) (noting, in nineteenth century, "widespread use of statutes designed to delegate the state's eminent domain power to private interests for the creation of a wide variety of manufacturing projects designed to achieve desirable economic ends"); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 Nat. Resources. J. 59, 71-75 (Winter 1996) (describing early Mill Acts as designed to promote economic benefit derived from mills).



bright-line rule that petitioners seek here, noting that attempting to define the reach of the police power is "fruitless" in part because the "purposes of government" are "neither abstractly nor historically capable of complete definition." *Id.* at 32. The role of the courts in deciding whether a taking serves a public purpose is "extremely narrow," because the legislature, not the courts, must be "the main guardian of the public needs to be served by social legislation." *Id.* As the Court put it, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.*[2]

In short, neither *Midkiff*, *Berman*, nor the Court's more recent decision in *National Railroad* can be reconciled with the result sought by petitioners in this case. In *Berman*, the Court approved condemnations in the District of Columbia that involved the "use of private enterprise for redevelopment," and declined to second-guess the determinations made by "Congress and its authorized agencies." 348 U.S. at 33. In *Midkiff*, the Court upheld the use of eminent domain to break up Hawaii's land oligopoly, not because there was any certainty that Hawaii's approach would accomplish its goals, but because Hawaii's purpose was legitimate and the means chosen were not irrational. *Midkiff*, 467 U.S. at 242-43. In so doing, the Court emphasized that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless

[2] In this case, the Connecticut Legislature determined that economic development was a public use. *See Kelo v. City of New London*, 843 A.2d 500, 519-520 (Conn. 2004) (construing state eminent domain statute and noting Connecticut Legislature's "declared public purpose of promoting economic development").

the use be palpably without reasonable foundation.'" *Id.* at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)). In *National Railroad,* the Court explicitly reaffirmed the rational basis standard and upheld Amtrak's effort to condemn a section of railroad track and convey the track to a different private owner. *See Nat'l R.R.,* 503 U.S. at 422-23. As in *Midkiff*, the Court considered only whether the public purpose was rational and declined to "make a specific factual determination whether the condemnation will accomplish its objectives." *Id.*

Petitioners disregard the core holdings of these cases when they suggest that the courts should closely scrutinize the purposes and likely success of challenged takings. Both of the alternative approaches advocated by petitioners – either prohibiting takings for economic development or requiring a showing of "reasonable certainty" that economic development will succeed – would greatly expand the "extremely narrow" role of the federal courts in reviewing public use determinations. Consistent with *National Railroad, Midkiff,* and *Berman*, the Court should reject petitioners' arguments and adhere to the rational basis standard for evaluating the public purpose of a taking.

Setting aside the Court's controlling precedents, heightened scrutiny is in any event unnecessary and inappropriate in this context because the Constitution already provides a special protection against takings. When the government takes private property for public use, it must provide just compensation to the owner. U.S. Const. amend. V; *see, e.g., Berman,* 348 U.S. at 36 (rights of property owners "are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking"). No such requirement applies in



numerous other contexts. The government may limit tort liability, grant tax breaks, and allocate public spending and resources in ways that benefit some market participants at the expense of others (including competitors, tort victims, and taxpayers) without providing any compensation at all. But the requirement of just compensation places an inherent limit on the use of the takings power.

Not surprisingly, petitioners make no effort to justify the application of heightened scrutiny where the government is already required to pay compensation for its actions.[3] Such a rule makes little sense. This Court consistently and appropriately defers to the government's view of the public interest in numerous contexts in which

[3] Petitioners suggest that courts should apply heightened scrutiny to takings for economic development purposes in part because eminent domain imposes personal costs on property owners that cannot be compensated. Pet. Br. 32-34. Amici in no way minimize the impact that takings may have on ordinary homeowners, some of whom may be unwilling to relinquish their property and move elsewhere. Petitioners' logic is flawed, however, for two reasons. First, the disruption a taking may cause a property owner is entirely unrelated to the purpose of the taking. A highway project may similarly require demolition of occupied homes. The fact that a taking of any kind may sometimes require a family to move out of its home does not support a rule limiting takings for economic development or any other specific purpose. To the contrary, this Court has held that "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Second, the same project may affect homeowners, real estate speculators, owners of vacant land, and owners of unattractive, unproductive property – in other words, property owners with varying degrees of attachment to their property. Nothing in this Court's precedents suggests that the constitutionality of a taking should depend on the property owner's personal interest in keeping his or her property, as opposed to the government's purpose in effecting the taking.

economic regulation results in uncompensated financial burdens. The rule of deference should, if anything, be stronger where the government must pay compensation for any injury it causes.

## II. Any departure from the deferential standard set forth in *Berman* and *Midkiff* would entangle the federal courts in local land use disputes and foster additional and expensive litigation in takings cases.

Overruling *Midkiff* and *Berman*, and establishing heightened scrutiny for public use determinations, would unquestionably both increase the role of federal courts in local land use disputes and result in more time and money being spent on takings litigation. Under current law, takings cases typically begin in state court and most remain there. *See infra* note 5. This Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requires as much. Under *Williamson County*, a plaintiff must seek compensation for a taking through available state channels before seeking recourse in federal court. *Id.* at 194-95. Moreover, where a plaintiff asserts a regulatory taking, the plaintiff must "ripen" the takings claim by obtaining a final decision from the appropriate state or local agency about the potential use of the property at issue. *Id.* at 186, 190-94. Thus, state courts typically determine whether a taking has occurred and, if so, how much compensation is due.

Public use challenges are different, however. Most of the lower federal courts that have addressed the issue have held that a plaintiff may bring a public use challenge in federal court without first pursuing state remedies. These courts reason that a plaintiff challenging a taking



on public use grounds does not seek compensation but rather seeks to prevent the taking as unlawful regardless of compensation. Applying the "no exhaustion" rule of *Patsy v. Board of Regents*, 457 U.S. 496 (1982), several Courts of Appeal have allowed plaintiffs to bring actions in federal court under 42 U.S.C. § 1983 without first pursuing inverse condemnation proceedings or analogous remedies in state court. *See, e.g., Montgomery v. Carter County*, 226 F.3d 758, 766-68 (6th Cir. 2000); *Samaad v. City of Dallas*, 940 F.2d 925, 936-37 (5th Cir. 1991); *Theodorou v. Measel*, 53 Fed. Appx. 640, 643, 2002 WL 3168455, at *3 (3d Cir. Nov. 25, 2002) (unpublished opinion); *see also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 457-58 (7th Cir. 2002) (holding that state's inverse condemnation proceedings were futile where plaintiffs alleged taking for private use).

Although plaintiffs may bring public use challenges in federal court without resort to state remedies, under current law they are unlikely to do so. As the Sixth Circuit recently explained, plaintiffs in the "overwhelming majority of cases" have "virtually no chance . . . to make the extraordinarily difficult showing that a taking had no rational connection to a minimally plausible conception of the public interest." *Montgomery v. Carter County*, 226 F.3d at 768. Thus, plaintiffs are presently more likely to bring public use challenges, together with other related claims, in state courts. If this Court overrules *Midkiff*, however, and holds that federal law requires heightened scrutiny in public use cases, that will change. A heightened standard of review would make federal courts and federal claims more attractive and cause a significant increase in takings litigation, for at least three reasons.

First, litigation over the same land use dispute would likely take place in multiple forums. A plaintiff who challenges a taking on both public use and just compensation grounds may seek to litigate the public use claim in federal court and the compensation claim in an inverse condemnation proceeding in state court. The Fifth Circuit anticipated this precise problem in *Samaad*, where it held that the plaintiff's public use claim was ripe but dismissed the just compensation claim. *Samaad,* 940 F.2d at 936-37; *see also Montgomery v. Carter County*, 226 F.3d at 768 (noting that plaintiff did not appear to be seeking just compensation, but such claim was not ripe for federal review in any event). If the federal court rules against the plaintiff on the public use issue, but the plaintiff is dissatisfied with the compensation received, the plaintiff may be able to return to federal court to litigate the issue of compensation.[4] The likelihood of multiple plaintiffs in takings cases (such as here, where a development plan affects a number of properties) also increases the likelihood of litigation in multiple forums. Nothing would prevent plaintiffs from splitting their cases and intentionally filing separate lawsuits in state and federal courts to make the government's defense more difficult. Even

[4] Even if the doctrines of claim and issue preclusion place some limits on duplicative actions, individual plaintiffs may seek to preserve the right to litigate federal claims in federal court. *Cf. England v. Louisiana State Board of Med. Examiners*, 375 U.S. 411 (1965). This Court recently granted certiorari in a case from the Ninth Circuit that addresses whether the doctrine of issue preclusion bars property owners from relitigating takings claims in federal court where the same issues were necessarily resolved in state court litigation. *San Remo Hotel, L.P. v. San Francisco,* 364 F.3d 1088 (9th Cir. 2004), *cert. granted,* 73 U.S.L.W. 3162, 73 U.S.L.W. 3347, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004) (No. 04-340).



though the government may ultimately prevail, it would be forced to absorb the delays and costs imposed by these additional layers of litigation – costs that would be a hardship for cash-strapped local governments and their taxpayers.

Second, plaintiffs would be likely to forum shop and employ public use litigation to delay government projects. As described in Part III, below, some state courts already review public use determinations under less deferential standards than required by *Midkiff*. Under current law, plaintiffs in those states have no incentive to seek federal court review of a public use claim, because state law is more favorable to their claims. If the Court adopted heightened scrutiny in this area, however, plaintiffs would have a significant incentive to litigate public use issues in both state and federal courts, in the hope that one court at least would rule in their favor. Even if they did not prevail on the merits, they might be able to create enough delay or increased cost to force the government to halt its plans.

Third, because federal claims may be brought under 42 U.S.C. § 1983, plaintiffs who bring federal public use claims would have the added incentive of seeking attorneys' fees – while state and local governments would be exposed to uncertain and potentially crippling liability for those fees. A fee award in protracted litigation can easily equal or exceed the amount in controversy in the litigation. If a federal court finds no public use for a particular project, a government may be obliged to use taxpayers' dollars originally set aside for the condemnation or development project to pay the attorneys' fees of the successful plaintiffs – with no benefit at all to the public. Even appealing an unfavorable district court decision would be risky, because fees would continue to mount. The risk of

liability for attorneys' fees might be manageable if government officials could look to clear, established legal standards for guidance, but any new rule adopted by this Court would lead to a period of uncertainty, possibly a prolonged period, as the lower courts interpret and apply the rule to varied factual circumstances. Thus, a heightened standard for public use determinations under federal law would impose significant new liabilities on state and local governments and inevitably have a chilling effect on the actions of government officials.

## III. Instead of imposing a new public use standard as a matter of federal law, the Court should allow public use law to develop in the state courts, which already provide significant property rights protection and are better suited to respond to local needs and conditions.

There is no compelling reason to replace the longstanding deferential approach to public use determinations with a heightened federal standard. The state appellate courts, which presently handle the vast majority of public use cases,[5] have consistently applied public use law as a measured guard against potentially unconstitutional government encroachment on private property rights without hamstringing permissible state and local governmental efforts to improve society. Throughout their brief, the petitioners suggest that reaffirming this Court's longstanding, deferential public use standard "invites

[5] Authors Merrill and Wilk together identified 544 public use appeals decided between 1953 and 2003, of which 513 were decided by the state appellate courts and only 31 decided by the lower federal courts. *See* Merrill, *infra,* at 95-96; Wilk, *infra,* at 257-58.



abuse by governmental bodies and private parties." Pet. Br. 15; *see also* Pet. Br. 12 (arguing that the "unfettered sweep of the [Connecticut Supreme Court's] opinion places all home and small business owners at risk"). This sky-is-falling rhetoric cannot be squared with the actual situation in the courts.

To the contrary, the state courts have a strong history of responsible judicial review of public use claims under *Midkiff* and *Berman* as well as under more stringent standards imposed by state law. Since *Berman* was decided in 1954, the state courts have not been reluctant to reject the governments' proffered public uses in eminent domain proceedings. Between 1954 and April 2003, these courts have struck the government's proffered public use in over 16% of cases, meaning that more than one in six landowners prevailed. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 93-97 (1986) (surveying federal and state appellate "public use" cases decided between November 22, 1954 and January 1, 1986; finding state courts rejected government's public use claim in 16.2% of 291 cases); Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 Real Prop. Prob. & Trust J. 251, 258 (Summer 2004) (surveying appellate public use cases decided between January 1, 1986 and April 1, 2003; finding state courts rejected government's public use claim in 18% of 222 cases). This trend shows no sign of reversing. Between 2000 and early 2003, the state courts rejected the government's public use claims in roughly 20% of public use cases. *See* Wilk, *supra,* at 258. Recent public use decisions suggest that the state courts continue to effectively root out governmental plans serving no *bona fide* public use.

*See, e.g., In re Robert W. Forrester*, 836 A.2d 102, 105 (Pa. 2003) (opening private road is not public use).

Indeed, the petitioners' own brief is replete with examples of state courts identifying government public use claims that, under the relevant facts and circumstances, did not pass muster. *See, e.g.*, Pet. Br. 13, notes 7-9. The case of *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1 (Ill. 2002), shows that there is no call for the bright line test urged by the petitioners. There, the court first acknowledged that the proper test was whether a proffered public use fell within the government's police power. *Id.* at 7. Then, the court reconfirmed that whether a proffered public use is beyond the state's police power depends on the facts and circumstances of the particular case. *Id.* at 8. The court held that the particular condemnation and subsequent transfer, solely in response to the private transferee's expansion goals and designed to result in transferee's private profits, was not a public use. *Id.* at 10-11. Far from providing support for petitioners' arguments here, *Southwestern* illustrates the willingness and ability of state courts to continue distinguishing public uses from non-public uses on a case-by-case basis.

The role played by state courts in this area is consistent with our federalist system. State courts, no less than federal, are entrusted with protecting the rights established by the federal constitution. State courts are also best suited to applying the varied provisions of state law that govern public use determinations. Indeed, state constitutions, which for many years provided the only protection against non-federal takings, continue to be a source of rights and protections for property owners. As the Connecticut Supreme Court in this case acknowledged, courts in a number of States apply more restrictive public



use standards and have rejected takings for economic development. *See Kelo v. City of New London*, 843 A.2d 500, 532 (Conn. 2004) (noting that "courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow view of their public use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes" and collecting cases). And, as petitioners emphasize, the Supreme Court of Michigan also recently rejected a taking for economic development on state constitutional grounds. *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004) (holding that general economic development is not public use under the Michigan state constitution); *see also Georgia Dep't of Transp. v. Jasper County*, 586 S.E. 2d 853, 857 (S.C. 2003) (proposed marine terminal did not meet "restrictive definition of public use" under South Carolina's constitution).

Neither the willingness of state courts to grapple with these difficult issues, nor the varied approaches that result, should come as a surprise. This Court recognized almost one hundred years ago that the Fourteenth Amendment does not require a uniform approach to public use determinations and that "conditions vary so much in the states and territories of the Union that different results might well be expected." *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 606-07 (1908). As in *Hairston* and this case, federal court review is of course available, and hardly toothless – federal courts have found takings unlawful where no public use has been shown. *See, e.g., Montgomery v. Carter County*, 226 F.3d at 771-72 (suggesting that taking private driveway for public road solely for convenience of one neighbor is private taking); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237

F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (holding that unsupported and "entirely speculative" claim of future blight was not constitutionally sound public purpose). But the "great respect" given by this Court to the "judgments of the state courts upon what should be deemed public uses in that state" in *Hairston*, 208 U.S. at 607, is still warranted. State courts have ably succeeded in balancing the legitimate interests of the government and the public with the rights of property owners.

A departure from the deferential standard of *Midkiff* and *Berman* would undermine the role of state courts and unnecessarily impose new uniform federal rules in an area that calls for flexibility and attention to local needs. *See Hairston*, 208 U.S. at 606 (public use determinations have been "influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the public welfare, and the long-established methods and habits of the people"). This Court's perceptive edict that public use review is an inquiry that "must turn on its own facts," *Berman*, 348 U.S. at 32, has relevance here. Eminent domain undertaken for public uses such as economic development does not lend itself to the one-size-fits-all approach advocated by the petitioners. *See* Julius L. Sackman, 2A Nichols on Eminent Domain § 7.03[2][a], at 7-38 (3d ed.) (meaning of public use cannot be fixed in part because it "is to a great extent a local question"). Instead, it is a question of degree, necessarily turning on the local need for economic development, the locality's unique economic profile, local unemployment rates, industry composition, tax base, and a host of other very local factors better suited to legislative determination followed by deferential, yet individualized judicial review. That is exactly the type of responsible



judicial oversight afforded by the Connecticut Supreme Court in this case and by state courts across the country. *See Kelo*, 843 A.2d at 543 (recognizing importance of "facts and circumstances of the particular case" and noting that "decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster"); *see also Bailey v. Myers*, 76 P.3d 898, 902 (Ariz. App. 2003) (since there is "no mechanical formula" for determining public use, it should be decided on "case-by-case basis."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (casino development authority's attempt to take properties by eminent domain for declared purpose of providing parking, green space and roadway access to casino complex was not public use because, unlike bona fide economic development plan, primary consequence and effect of taking was to benefit casino owner). This case-by-case, and state-by-state, review of public use determinations is working and remains the best way to both protect property owners and promote the public good.

The Court should adhere to its precedents and allow public use law to continue to develop primarily in the state courts. Federal and state law already adequately protect property owners whose property is taken for "economic development" and myriad other public uses that benefit society. Against this backdrop, the Court should preserve the long-standing tradition of allowing the States wide berth in advancing public uses with the historical, limited but effective judicial oversight.

## CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be affirmed.

Respectfully submitted,

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